This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

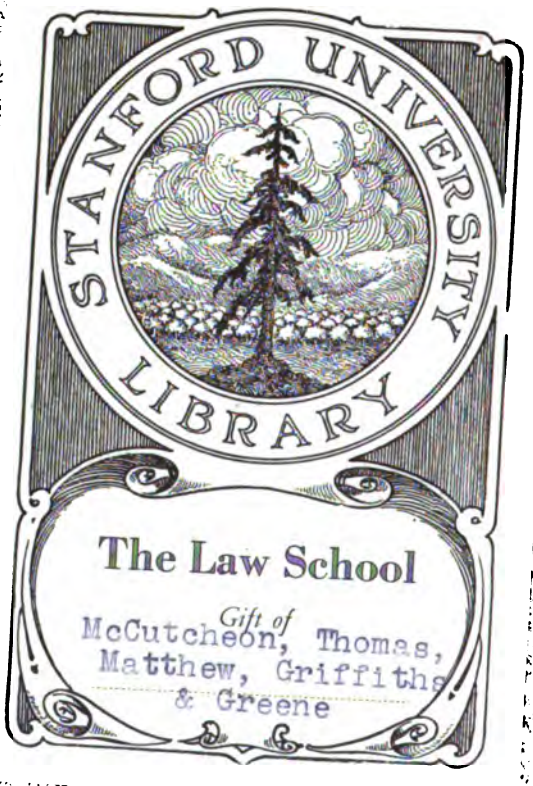
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

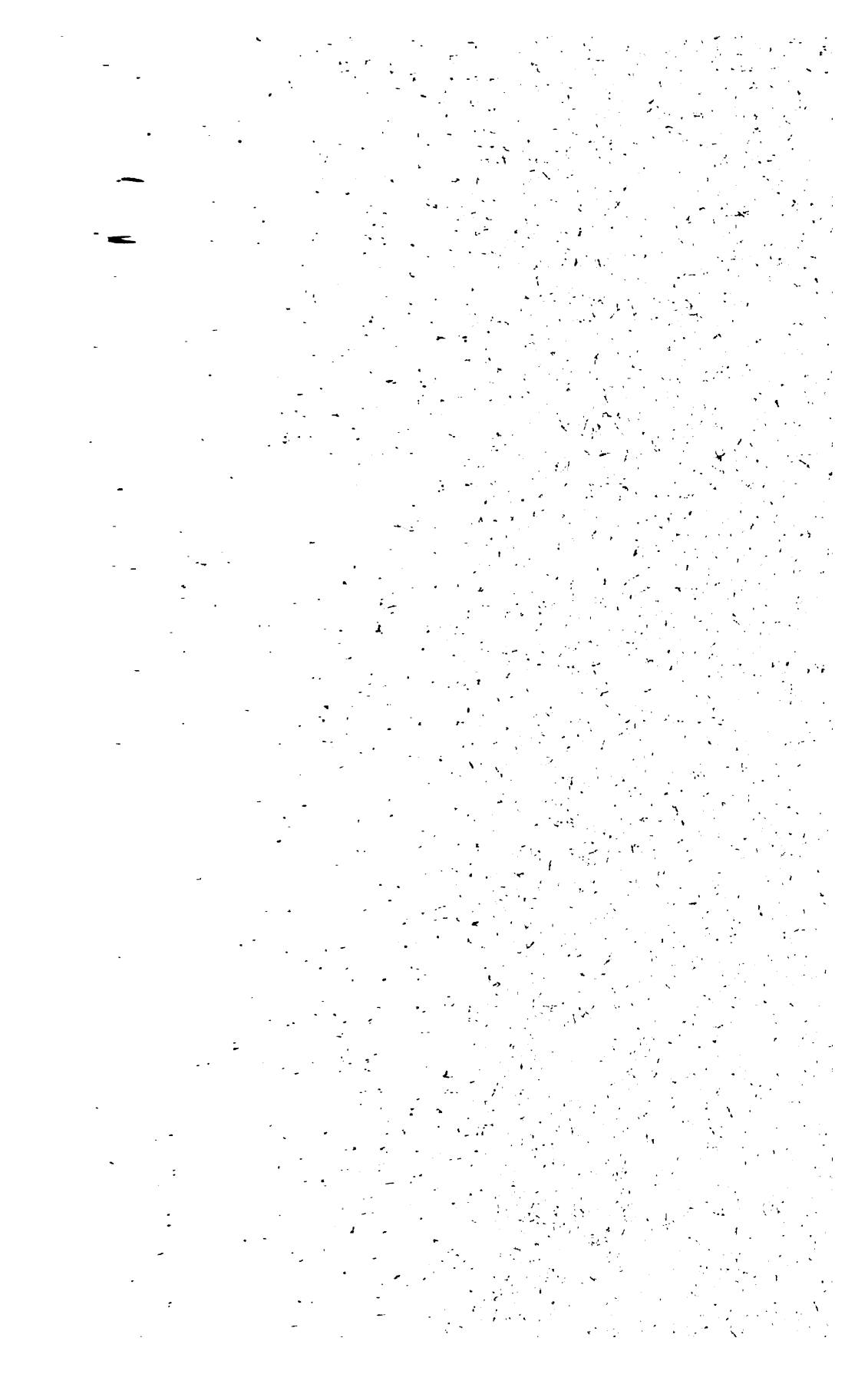
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`


STANFORD UNIVERSITY
LIBRARY
The Law School
Gift of
McCutcheon, Thomas,
Matthew, Griffiths
& Greene



A TREATISE

ON THE LAW OF

LANDLORD AND TENANT

IN CONTINUATION OF

THE AUTHOR'S TREATISE

ON THE

LAW OF REAL PROPERTY

BY

LEONARD A. JONES, A. B., LL. B. [Harv.]

JUDGE OF THE LAND COURT OF MASSACHUSETTS

LIBRARY
McCUTCHEN OLNEY MANNON & GREENE
DEC 20 1941

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
PUBLISHERS
1906

L37807

JUL 12 1951

Copyright 1906
BY LEONARD A. JONES

STANFORD LIBRARY

THE HOLLENBECK PRESS
INDIANAPOLIS

PREFACE.

Many years ago I began upon the execution of a plan to write upon the principal topics of Real Property law. In my treatise upon the general law of Real Property I considered the practical parts of the subject as applied between Vendor and Purchaser in modern conveyancing, or estates in fee and their transfer by deed. I stated in the preface of that work that if I should thereafter write upon other parts of the law of Real Property, such writings would be published under separate and specific titles. Accordingly, when I subsequently took up the consideration of those incorporeal hereditaments, the uses or profits in the land of another, I published a separate volume under the title of Easements. I had already treated the subject of Mortgages of Real Property and the subject of Liens. The subject of Landlord and Tenant still remained for consideration. In writing upon these and other subjects down to the present work, I had never availed myself of any assistance from others except clerical work. But having seven years ago accepted a judicial position I could not go on with the present work without assistance from some scholarly lawyer who could spend his days in the Law Library searching the Reports. I was fortunate to obtain the assistance of Frank N. Morrill, Esq., of the Boston bar, a graduate of Harvard College in 1897, and of the Harvard Law School in 1900. He had already had considerable experience in law writing, and whatever merits the present work may have are largely due to his careful and thorough investigations.

The plan of the present work is to state the law concisely, and to refer to all the American cases worth citing and the leading English cases. It is believed that the law is sufficiently discussed for all ordinary purposes, and that the reports which are essential to a full investigation of the law are all referred to.

January 1, 1906. L. A. J.

TABLE OF CONTENTS.

CHAPTER I.

CREATION OF THE RELATION.

I. Essentials of a Tenancy.

SEC.

1. A tenancy is created by contract express or implied whereby one person permits another to occupy lands actually or constructively.
2. Occupation must not be adverse.
3. The relation of landlord and tenant cannot be inferred as a matter of law from the mere fact of lawful occupancy.
4. An award of arbitrators cannot create the relation of landlord and tenant.
5. It is not necessary to the creation of a tenancy that there should be a formal hiring, letting, or leasing.
6. Reservation of rent by the landlord is not essential to the creation of a tenancy.
7. The validity of a landlord's title is not material.
8. The fiduciary relation of a lessee.

II. Subject Matter.

9. The general rule.
10. Where chattels are let for a term.

III. Proof of Tenancy.

SEC.

11. The existence of a tenancy or of the relation of landlord and tenant with reference to a particular piece of ground is a fact.
12. The payment of rent is a fact going to the establishment of a tenancy.
13. Entry and occupation.
14. Province of judge and jury.

IV. Interesse Termini.

15. Under the old common law a bare lease did not give any estate in the land.
16. Even though there is an outstanding *interesse termini*, the owners of the reversion could maintain an action of trespass against a disseisor.
17. If a lease is so worded as to be a bargain and sale.

V. Similar Contractual Relations.

18. In general.
19. Statutory remedy dependent on technical relation of landlord and tenant.
20. A servant or employe occupying a house of his master does not ordinarily become his tenant.

SEC.
21. There is no inconsistency in the relation of master and servant with that of landlord and tenant.
22. An independent contractor who contracts to do certain acts on land belonging to another.
23. Tenant or lodger.
24. An oral contract by the keeper of a boarding house.
25. Mortgagor in possession.
26. Contracts for mortgage or for letting.
27. A mortgagee in possession is not a tenant of his mortgagor, and the latter cannot recover rent after redeeming.
28. Tenancy between joint owners.

VI. Purchaser in Possession.

29. The occupation of land under a contract for purchase.
30. In the absence of agreement a purchaser's right to possess is not greater than that of a tenant at will.
31. Modifying circumstances.
32. That a vendee in possession is entitled to emblements.
33. Where a vendor of land continues in possession.
34. The character of an occupancy may be determined by a condition subsequent.
35. Proof of change in relationship.

VII. Lease or License.

36. A license in the sense it is used here is an authority to do an act or a series of acts on the land of another.
37. A mere license, while it remains executory, is revocable at the pleasure of the licensor, is indivisible and non-assignable.
38. A parol license to cut and carry away standing timber.

SEC.
39. A conveyance for a limited period of an interest in land subordinate to the grantor's ownership in fee is a lease.
40. A permissive occupation, under a contract, express or implied, conferring a legal possession, is indispensable to the creation of a tenancy.
41. Grant of mining rights.
42. Payment of consideration as a test.
43. Restricted and intermittent use.
44. A theater ticket is only a license.
45. In cases where dams are built and lands flowed.

VIII. Cropping Contracts.

46. The term "cropping contract" is used here to indicate any agreement between a landowner and a laborer in regard to the cultivation of land which does not rise to the dignity of a lease.
47. Whether an agreement for the occupation of farming lands is a lease or a cropping contract depends on the intention of the parties.
48. There has been a tendency in certain cases to impute a fixed intention to the landowner not to create a tenancy.
49. If one be hired to work land, receiving for his compensation part of the produce, he is a cropper and not a tenant.
50. The character of the cropper's occupation is an important factor in determining the nature of the contract.
51. Where the person producing the crop is in exclusive possession and control of the land.

SEC.
52. The relation of landlord and tenant may exist although rent is to be paid in a part of the crop.
53. Tenancy carries with it the idea of legal ownership by the tenant of the products of the soil.
54. Co-tenancy in both land and crops.
55. The doctrine that an agreement for a crop rent takes effect as a reservation.
56. In some jurisdictions the matter of letting on shares has been regulated by statute.

CHAPTER II.

THE INSTRUMENT OF DEMISE.

I. Formal Parts.

SEC.
57. The instrument in writing creating the relation of landlord and tenant is termed a lease.
58. Lease distinguished from other instruments.
59. Technical requirements of form.
60. Date of lease.
61. Lease executed on Sunday.
62. Alteration of lease.
63. Reservations and exceptions.
64. Stipulation for attorney's fee.
65. Consideration.
66. The true construction of written leases is to be declared by the court and not submitted to the finding of the jury.
67. The lease must be construed as a whole.
68. Custom of the country.
69. Inconsistent and contradictory clauses.
69a. By the term "relet," when used in an alternative provision for the purchase of improvements, the parties mean a new letting for a fixed and definite term.
70. Reformation of lease.

II. Execution and Delivery.

SEC.
71. All that is necessary to the execution of a lease is that it should be signed and delivered.
72. On the other hand, a different rule prevails in some states.
73. Rights of third parties.
74. Seal unnecessary.
75. A lease must be signed by the lessor.
76. Errors in signature.
77. Lessee need not sign.
78. Where the parties contemplated the signing of an indenture of lease by both parties.
79. Acceptance of lease.
80. Form of action.
81. An undisclosed principal.
82. Leases by corporations.
83. Delivery is a question of intent and it depends on whether the parties meant it to be a delivery to take effect immediately.

III. Parties to Leases.

84. In general.

SEC.
85. The general doctrine of the law is that a person dispossessed cannot make a valid conveyance.
86. One tenant in common cannot as such make a lease of community land.
87. Leases by and to married women.
88. Right of husband to lease wife's real estate.
89. Guardians.
90. Except in regard to the duration of the terms, there seems to be no restriction as to the mode in which the guardian must proceed.
91. Trustees have a general power of leasing.
92. Infancy of lessee.
93. Executors and administrators.
94. Mortgagor and mortgagee.
95. Infancy of lessor.
96. Although a room may properly be regarded as a necessary.
97. Assignment by infant.

IV. Description of Premises.

98. Where a lessee has not entered into occupation, the lease must with reasonable certainty describe the land demised.
99. The practical location of the boundaries of the leased premises.
100. A defective or totally inadequate description.
101. The question whether a particular place is a part of the demised premises.
102. A lease of a building *eo nomine* is a lease of the land on which the building stands.
103. A description of a house by the street number.
104. Any right of way or other easement.

SEC.
105. The lease of property abutting on a public street carries with it all the easements, incidents and rights of the owner.
106. A tenant could prevent an interruption of his right to an easement for light and air.
107. What constitutes the curtilage.
108. Use of outside walls for signs.
109. Riparian boundaries.
110. The reservation to lessor of a right to select a portion of the leased premises and retain them for his own use has an effect of the condition subsequent.

V. Duration of Term.

111. Leases may at law be for years, for life or of perpetual duration.
112. The term for which a lease for years is to run should be certain.
113. Leases running from an indefinite future time.
114. A contingent limitation of a term is valid and enforceable.
115. Happening of contingency.
116. Lease for life.
117. Errors in calculation.
118. A lease is a single instrument.
119. In determining when a term begins, the word "from" may be either exclusive or inclusive.

VI. Illegal Leases.

120. A colorable lease for an illegal purpose cannot be enforced.
121. Kind of illegality.
122. Use of premises for the use of prostitution.
123. Premises to be used for gambling.
124. Setting up defense of illegality.

VII. Leases Obtained by Fraud.

SEC.
125. The rule that fraud in the making of a written agreement may be shown by parol evidence.
126. Rescission of lease and defense of action for rent.
127. In Missouri.
128. Election of remedies.
129. What constitutes fraud.

VIII. Collateral Parol Agreement.

130. Contracts, if a statute does not intervene, may be expressed partly by parol.
131. Compliance with statute of frauds.
132. Not only must the agreement stand the test of the statute of frauds, but it must be collateral to the lease.
133. On the question what agreements are collateral there is a wide divergence of judicial opinion.
134. In England.
135. A subsequent agreement reducing rent.
136. In accordance with the general law regarding consideration for a contract.
137. The execution of a new lease to the same tenant.

IX. Agreements to Lease.

137a. What constitutes a valid agreement.
138. Specific performance of agreement.
139. Breach of agreement.
140. Measure of damages.
141. Lease or agreement to lease.
142. The test of intention in regard to making a lease or an agreement to lease is whether the agreement leaves anything incomplete.
SEC.
143. Where there is no covenant for executing any further instrument an agreement will take effect as a present lease, even though the term is not to begin until a future time.
144. The words "agree to let" have for a long time been held to be apt words of present demise.
145. Agreements subject to a condition.
146. Effect of possession.

X. Statute of Frauds.

147. The English act.
148. Form of statutes for the prevention of frauds and perjuries in the United States.
149. The requirement of the original English statute as to the value of the rent reserved.
150. In New Mexico.
151. Assignments.
152. Leases for one year from future date.
153. Extent of validity.
154. Duration of term.
155. Whether void only as to excess.
156. Sufficiency of memorandum.
157. Authority of agent.
158. Leases by undisclosed principals.
159. Effect of part performance of a parol lease.
160. In order to amount to part performance, an act must be unequivocally referable to the agreement.
161. In Alabama.
162. There is a very obvious difference between a parol agreement to make a written lease and a parol lease.

XI. Recording.

163. Statutory provisions.

SEC.
164. Validity of unrecorded instruments.
165. Place of record.
166. Record of sublease.
167. Computation of time.

CHAPTER III.

KINDS OF TENANCY.

I. Estates for Years.

SEC.
168. The chattel interest known as a term for years.
169. Term for years or from year to year.
170. A lease, on account of uncertainty of duration, might be inoperative for any other purpose than the creation of an estate at will.
171. A lease for years is a chattel real only.
172. Sale on execution as a chattel.
173. Curtesy and dower.

II. Tenancy at Will.

174. An estate at will, in the primary and technical sense of that expression, is created by grant and contract.
175. Where a tenant occupies the premises without rent and without any time agreed upon to limit the occupation.
176. A parol gift of land creates merely an estate at will in the donee.
177. The necessity for consent by the landowner.
178. A landowner's mere consent to the occupation of his land by another does not necessarily imply consent to such occupation as tenant.
179. The possession of a tenant at will.
180. Entry and occupation under a void parol lease creates a tenancy.

SEC.
181. Unauthorized lease.
182. Determination of tenancies at will.
183. Yet until a termination of the will the possession of a tenant at will is lawful.
184. Death of parties and destruction of subject matter.
185. Notice to tenant at will.
186. An estate at will is uncertain and defeasible, and is destroyed by the alienation of the premises by either party.
187. Purpose and mode of transfer immaterial.
188. Notice of the transfer of the landlord's title.
189. Recovery of rent till time of alienation.
190. The estate of a tenant at will is not an interest capable of bargain and sale.
191. Notice to the landlord is essential.

III. Tenancy from Year to Year.

192. Rests on judicial, not statutory authority.
193. Applicable to conditions in this country.
194. The expression tenant at will from year to year exactly expresses the old common-law idea of periodical tenure.
195. Similarity to estates for term of years.
196. Statutory modifications.

SEC.
197. An estate at will is converted into an estate from year to year by the payment of rent.
198. The receipt of rent by a landlord from which a tenancy from year to year is inferred may be explained on other grounds.
199. Where a tenant enters and occupies under an invalid parol lease, the agreement governs the terms of the holding..
200. The form of action to recover rent when occupation has been under a void agreement is one for use and occupation.
201. Yearly tenancy created by holding over.
202. The terms of a year to year holding are the same as those of the lease which preceded it.
203. Option as to yearly tenancy rests with landlord.
204. The landlord's act of receiving rent implies such assent on his part to the holding over.
205. It is not necessary for the landlord to indicate his assent to a holding over by overt acts.
206. Dissent on part of tenant.
207. Rule in England.
208. Surrender rendered impossible by act of God.
209. Necessary length of tenant's holding over.
209a. If the landlord is in any way responsible for the holding over.
210. Rebutting presumption of year to year tenancy.
211. A covenant to pay rent at the same rate for such further term as the lessees or persons claiming under them shall hold the premises.

SEC.
212. Where there is an express renewal of a lease.
213. Changes in the amount of rent.
214. Where a lease provided for a penalty of double rent.

IV. Tenancy from Month to Month.

215. The reservation and payment of rent at stated periods.
216. A tenancy from month to month may be created by express agreement.
217. Effect of void lease to render time for termination definite.
218. A lessee for a year who holds over after his term expires becomes a tenant from year to year even though the rent is payable in monthly instalments.
219. A tenancy from month to month is not a continuing right of possession.

V. Tenancy by Sufferance.

220. General nature of holding.
221. Arises on holding over.
222. To constitute a tenancy by sufferance there need not have been any prior contract of letting.
223. A mortgagor holding after a sale of the mortgaged property for breach of condition is a tenant at sufferance.
224. Another case in which a tenancy at sufferance arises without any preceding contract of tenancy.
225. Exception to rule.
226. Rights of tenant at sufferance.
227. The common law gave no right of action in any case against a tenant at sufferance to recover for use and occupation.
228. Right of entry on tenant at sufferance.

SEC.
229. The term tenant at sufferance is not always used in the strict sense which it bore in the old law.
230. Use of term in statutes.

VI. Statutory Provisions.

231. California.
232. Connecticut.
233. District of Columbia.
234. In Delaware.
235. Georgia.
236. In Indiana.
237. In Iowa.
238. In Kentucky.
239. In Maine.
240. In Massachusetts.
241. In Michigan.
242. In Missouri.
243. Nevada.
244. In New Hampshire.
245. New York.
246. Oklahoma Territory.
247. In Rhode Island.
248. South Carolina.
249. In Washington.
250. Wyoming.

CHAPTER IV.

NOTICE TO QUIT.

I. Necessity for Notice.

SEC.
251. Notice to quit is necessary to terminate a year to year holding.
252. In the United States the length of notice depends almost entirely on statute.
253. At common law a tenant from month to month must give thirty days' notice of his intention to leave.
254. A written notice to terminate a tenancy strictly at will or by sufferance was not required at common law.
255. When there is a valid lease for a time certain, no notice to quit is necessary.
256. Where a tenant holds premises for the full term provided for by a void agreement.
257. No notice to quit is necessary when the parties do not stand in the relation of landlord and tenant.
258. Where a certain kind of notice is by statute required to terminate a tenancy a proper notice is essential to end the holding.
259. The rights and duties in respect to the giving of notices to quit between landlord and tenant are mutual and reciprocal.

II. Sufficiency of Notice.

260. That the notice must point to the time when the tenants must quit.
261. The time for quitting must be on the day of the year when the tenancy commenced.
262. Defective notice.
263. A notice to quit should be addressed to the lessee or tenant in possession of the demanded premises.

SEC.
264. A formal insufficiency of a notice to quit is waived by the tenant's repudiation.
265. Authority of agent.
266. Who may give notice after assignment.
267. A notice to quit should be absolute rather than in the alternative.
268. Notice by parol to terminate a tenancy from year to year was of course sufficient at common law.
269. Notices to and from joint owners.
270. The requirements for notice to quit may be waived by agreement between the parties.
271. Enforcement of notice.

III. Service of Notice.

272. Personal service of a notice to quit upon a tenant is not necessary.
273. In England a notice to quit left with the servant or wife of the tenant.
274. Service of a notice by mail.
275. Service by posting.
276. Proof of service.

IV. Statutory Provisions.

277. Alaska.
278. Arizona.
279. Arkansas.
280. California.
281. Colorado.
282. Connecticut.
283. Delaware.
284. District of Columbia.
285. Georgia.
286. Idaho.
287. Illinois.
288. Indiana.
289. Iowa.
290. Kansas.
291. Kentucky.
292. Louisiana.
293. Maine.
294. Maryland.
295. Massachusetts.
296. Michigan.
297. Minnesota.
298. Mississippi.
299. Missouri.
300. Montana.
301. Nevada.
302. New Hampshire.
303. New Jersey.
304. New York.
305. North Carolina
306. North Dakota.
307. Ohio.
308. Oregon.
309. Oklahoma Territory.
310. Pennsylvania.
311. Rhode Island.
312. South Carolina.
313. South Dakota.
314. Virginia.
315. Washington.
316. West Virginia.
317. Wisconsin.

CHAPTER V.

COVENANTS IN LEASES.

I. Construction and Effect.

SEC.
318. A covenant is an agreement, convention or promise of two or more parties by deed in writing.
319. No particular form of words is necessary to constitute a covenant.
320. Joint covenantors.

SEC.
321. Covenants have been divided into express and implied covenants.
322. The general rule for interpretation of covenants in a lease is to expound them so as to give effect to the actual intent of the parties as collected from the entire context.
323. Covenants are either dependent, concurrent and mutual, or independent.
324. Covenants in an agreement will be construed as conditions precedent or as independent agreements.
325. Violations of independent covenants by a landlord will not require an injunction.
326. The distinction between a covenant and a condition exists even when the agreement is to surrender the property.
327. The apt words of limitation.
328. Running of covenants.
329. Rule in Spencer's case.
330. A covenant in regard to a personal matter undertaken by one party to a lease and contained in the instrument of demise is not binding upon the assigns of the covenantor.
331. Covenants affecting the mode of occupation and enjoyment of leased premises run with the land.
332. A covenant to buy improvements at the end of the term runs with the reversion.
333. A covenant of guaranty for rent is collateral to the lease it accompanies.
334. Running of covenants after breach.
SEC.
335. A covenant to insure which had for its object the benefit of the lessor only, as where the money paid in the event of the loss would go to him, has been regarded as collateral.

II. For Renewal of Lease.

336. A common form of lease fixes a short term for which the lessee is bound to retain the premises and then gives him a right to occupy them for a further period if he so desires.
337. A distinction between a stipulation to renew a lease and one to extend it for an additional period.
338. On the question whether a general provision to renew a lease calls for a new one.
339. Where lessee is entitled to the renewal of his lease, he must give notice promptly at or before the expiration of the first term or according to the agreement.
340. When there is an option to lessee to have the same term extended no notice of an election to have the term continue is necessary unless it is required by a clause in the lease.
341. However, the lessor has a right to call on the lessee to elect before the end of the term.
342. A requirement for notice of election must, in the absence of waiver, be complied with.
343. Validity of covenants to renew.

SEC.
344. A renewal agreement cannot be made to apply to subdivisions of the premises, but must be claimed in its entirety.
345. Parties bound and parties entitled under renewal agreements.
346. Where there is an arrangement for arbitration to fix the amount of rent in a renewal lease.
347. A conditional covenant to renew upon the termination of the lease is not a present demise.
348. Happening of contingency.

III. For Quiet Enjoyment.

349. When implied.
350. The rule that where an instrument contains an express covenant in regard to any subject, no covenants are to be implied in respect to the same subject.
351. Statutory provisions against implied covenants.
352. The legal implication of the covenant for quiet enjoyment.
352a. On the lease of surplus water in a canal.
353. It is sufficient in many cases that a lease contains an implied covenant which is a good warranty by the landlord against his own acts.
354. The rule as to the breach of a covenant for quiet enjoyment is that there can be no breach without an eviction, actual or constructive.
355. The question of eviction or no eviction depends upon the circumstances, and is in all cases to be decided by the jury.

SEC.
356. An eviction may be actual, as where there is a physical expulsion, or it may be constructive.
357. Physical expulsion.
358. Entry by landlord under claim of privilege.
359. Interference with light and air.
360. Eviction by nuisance on adjoining premises.
361. Under a covenant for quiet enjoyment, the lessor does not covenant against the acts of wrong-doers.
362. A taking of the demised premises by the sovereign under the right of eminent domain is not an eviction.
363. An outstanding title which is paramount to that of his landlord is no defense.
364. Eviction suspends rent.
365. If a tenant is evicted from a material part of the premises, he has a legal right to abandon the whole.
366. If the lessor give to his lessee a complete and perfect right of possession to the demised premises, he has done all that he is required to do by the terms of an ordinary lease.
367. In direct opposition to the law as just stated, it is established in England and in several jurisdictions in the United States that the lessor is bound to put the lessee in possession.
367a. Where the lessor is in possession of the leased premises and refuses to vacate.
368. Tenants remedy by action.
369. Where the lessee has actually been deprived of the possession or use of demised premises, damages resolve themselves into three elements.

SEC.
370. In regard to the second element of damage, the rule for the measure of damages is that the tenant is entitled to recover for such loss as results directly and necessarily from the breach of the contract.
371. Loss of prospective profits.

IV. In Regard to Buildings and Improvements.

372. A general covenant by a lessee to build is satisfied by an erection of the building at any time before the end of the term.
373. In the absence of agreement, a landlord is not liable for the value of improvements made by his tenant upon the demised premises.
374. Authority to build.
375. Rights under alternative options.
376. Improvements as part of realty.
377. Such covenants run with the land.
378. Mechanics' liens for improvements.
379. Proceedings for appraisal.
380. Restraints upon buildings.
381. Tenant's right to light and air against landlord.

V. Restricting Use of Premises.

382. Validity of restrictions.
383. What constitutes a covenant for restrictive use.
384. Equity will restrain an infraction of an agreement in a lease in regard to the use of the premises.
385. A covenant for exclusive personal occupation on the part of the lessee cannot be classed as one of the usual covenants in a lease.

SEC.
386. An agreement by a lessee not to "make or suffer" an unlawful use of the premises should be interpreted as a stipulation that shall be no unlawful use.

VI. As to Sale of Premises.

387. An option in a lease giving the lessee a privilege of purchasing the premises.
388. A clause in a lease reserving to the lessor the right to sell.

VII. For Insurance.

389. So common is the practice of fastening on the lessee the burden of insuring.
390. Measure of damages for failure to insure.

VIII. For Repairs.

391. A covenant by a lessee to repair.
392. It is the established rule of the common law that an express covenant to repair binds the covenantor to make good any injury which human power can remedy.
393. Responsibility for rebuilding rests on contract.
394. The phrase "unavoidable casualty" is in common use in leases in this country and has a well settled and understood meaning.
395. "Damages by the elements" which are ordinarily excepted from a lessee's covenant to keep in repair.
396. The external parts of premises are those which form the inclosure of them and beyond which no part of them extends.

SEC.
397. A general covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate.
398. A lessee who has been compelled to rebuild has no claim on insurance taken out by the lessor for his own benefit.
399. City ordinance forbidding wooden buildings.
400. A duty to maintain machinery in a leased mill, will be created by a covenant of the kind under discussion.
401. Painting, papering and decorating.
402. The point of time at which the then condition of the premises furnishes the standard of repair which a lessee is bound to maintain.
403. When right of action accrues.
404. The obligation of a landlord in any case to repair and rebuild leased premises rests solely on express contract.
405. A tenant has no equity to compel his landlord to expend money received from an insurance company on the demised premises being burned down, in rebuilding the premises.
406. In California.
407. By statute in Dakota.
408. A covenant by a lessor to make all necessary repairs on the outside of a building is not a covenant that the outside shall not give way.
SEC.
409. Requirement of notice to landlord.
410. Where a landlord fails to keep his covenant to make exterior repairs, a tenant has several remedies.
411. A covenant to pay taxes like one to pay rent is an undertaking to do something with respect to the land itself.
412. The general rule in regard to leases for years is that where the lease is silent on the subject, the landlord is bound to pay all state and municipal taxes.
413. In many jurisdictions it has by statute been made the duty of the tenant holding any leasehold estate to pay the taxes levied on the demised premises.
414. The price charged for water by a city is not a tax or assessment chargeable upon the premises.
415. The intention of the parties, as shown by the language of the instrument, determines what taxes, burdens and assessments are to be borne by the lessee.
416. If a lessee of a part of a building covenants with the lessor that he will pay the taxes.
417. Levy distinguished from assessment.
418. Invalid taxes.
419. The destruction of the leased premises does not as a general rule release the tenant from his covenant to pay taxes.
420. What constitutes a breach.

CHAPTER VI.

ASSIGNMENT OF LEASES.

I. By Lessor.

SEC.
421. According to the modern rule the power of a lessor is ample to transfer either the entire reversion or his interest under the lease.
422. In regard to the effect of a transfer of the reversion on the rents.
423. In Illinois the statute of Anne dispensing with attornment was not regarded as in force in 1871.
424. A reversion not being an estate in possession, would lie in grant and the ordinary mode of transfer would be by deed, signed, sealed and delivered.
425. Rent may be excepted in a grant of a reversion by a lessor.
426. Attornment has been defined to be the acknowledgment by a tenant.
427. Covenants in assignment to deliver possession.
428. A conveyance of the reversion in fee to a lessee or his assignee holding an outstanding lease causes the lease to merge in the freehold estate.
429. Effect of sub-tenancy on merger.
430. An assignment of a lessor's interest under a lease without a transfer of any rights in the reversion is equivalent to an assignment of rent.

II. By Lessee.

431. Transfer of lessee's interest.
432. Statutory provisions against assignment and sub-letting have been enacted in some states.
SEC.
433. In Georgia it is provided by statute that an estate for years, if it be in lands, passes as realty.
434. In Texas.
435. Where the whole of the term of a leasehold is assigned, there is no relation of landlord and tenant between the assignor and the assignee.
436. What passes on an assignment.
437. In accordance with the principle that the form of the instrument of assignment is immaterial.
438. The transfer of a lease by assignment may be by indorsement on the back of the lease or by separate instrument.
439. A leasehold estate created by an instrument under seal, may be assigned by an instrument not under seal.
440. That the English statute of frauds extends to agreements for the assignment of a lease.
441. The validity of a parol assignment of a valid parol lease.
442. Where one other than the lessee occupies leased premises during the continuation of the term and pays rent, he is *prima facie* in as assignee of the term.
443. A receiver appointed by a court to take charge of a lessee's property does not thereby become an assignee of the term.
444. Where a sheriff under an execution, sells a term for years, it operates as an assignment at law.

SEC.
445. There is a wide distinction in law between an assignee of a lease and a sub-tenant.
446. An underlease for the whole term is an assignment.

III. Rights and Liabilities of Parties.

447. The express covenants in a lease continue to be binding upon the covenantor notwithstanding his assignment of the lease.
448. The contract of the original lessee continues in force unless the lessor accepts the assignee as sole tenant and absolves the original lessee.
449. Lessee is liable as surety for the assignee.
450. The duration of a term after an assignment does not at all affect the obligation of a lessee upon his express covenant.
451. In case a lessee has been held to his liability for rent after an assignment, he will be entitled to recover the rent from the assignees.
452. When the covenant to pay rent is implied in law, acceptance of rent directly from an assignee will discharge the original lessee.
453. A surety for a lessee is not discharged from liability on the express covenants of the lease by an assignment.
454. Liability of lessor on covenant after assignment.
455. An assignee of a lease is bound by privity of estate to perform the express covenants which run with the land.
456. The liability of an assignee upon the covenants of a lease continues only so long as the privity of estate continues.

SEC.
457. The assignee of a leasehold estate is not bound by the covenants of the lease till the transfer has been completed by his acceptance of the assignment.
458. An actual entry by an assignee upon the demised premises is not necessary in order that he should be bound by the covenant to pay rent.
459. Who are entitled as assignees of the reversion.
460. An assignee of part of leased premises is liable for his pro rata share of the rent reserved in the lease, but he is not liable for the entire rent.
461. Where a lessee makes a general assignment of all his property.
462. The assumption by an assignee of a lease of all the obligations and liabilities of the assignor creates a privity of contract.
463. What constitutes an assumption of covenants by assignee.

IV. Conditions against Assignment and Sub-letting.

464. A covenant in a lease against alienation without license is at least as old as Dumpor's case.
465. That an assignment contrary to a restriction in a lease is not absolutely void, but voidable only.
466. An ordinary covenant against sub-letting and assignment is not broken by a transfer of the leased premises by operation of law.
467. The rule is universally admitted that a covenant not to assign a lease is not broken by an underletting.

SEC.
468. A covenant not to assign or sub-let is not necessarily broken because some one other than the lessee shares in the benefits.
469. Change in business relations as breach of covenant not to sub-let.
470. Rule in Dumpor's case.
471. In the United States the rule in Dumpor's case, while subject to some adverse criticism, has generally been received as settled law.
472. Special license to assign or sub-let.
473. If an assignee is led to act on the assumption that the assignment will not be relied upon as a ground for forfeiture.

CHAPTER VII.

TERMINATION OF LEASES.

I. Disclaimer by Tenant.

SEC.
474. Introductory.
474a. Effect of repudiation of tenancy.
475. The most certain general test of the sufficiency of a disclaimer to create a forfeiture.
476. Generally, attornment or delivery of possession to a stranger or adverse claimant, or any act disavowing the title of the landlord.
477. Conveyance by tenant.
478. By matter of record.
479. By deed recorded.
480. Payment of rent.
481. Mere words can never work a forfeiture of an estate for life or for years.

II. Forfeiture for Breach of Condition.

482. Forfeitures are also incurred by the breach of express or conventional conditions.
483. Necessity for re-entry.
484. How affected by statutes.
485. An option to claim an estate for breach of condition is sufficiently expressed by entry or acts equivalent thereto.
486. That a condition in a lease calling for a forfeiture is to be strictly construed against the lessor.
487. The mere breach of a covenant by the tenant can give the landlord no right of reëntry.
488. A breach of an implied covenant in a lease such as by the commission of waste.
489. Acts of sub-tenant.
490. The general doctrine that equity will never lend its aid in exacting a penalty.
491. Under certain circumstances a court of equity may, without violating any settled rules, relieve against a forfeiture.
492. Only in exceptional cases will equity relieve against a forfeiture caused by a failure to repair or insure.
493. Emblements.

SEC.
494. A possibility, right of entry, thing in action, cause of suit or title for condition broken could not be granted or assigned over at common law.
495. A landlord is not bound to declare a forfeiture for breach of a condition, as he may insist on the tenant fulfilling his obligations under the lease.
496. Waiver of ground for forfeiture.
497. One common mode of effecting a waiver is by the receipt of rent due under the forfeited lease.
498. The mere reception of rent accrued before the time for the termination of the tenancy is not a waiver of the notice to quit nor a renewal of the lease.
499. That lessors are indulgent and accommodating, allowing a default to continue.
500. The doctrine of waiver does not apply when the covenant broken is a continuing one.
501. Liability for rents subsequent to a forfeiture.

III. Effect of Non-payment of Rent.

502. The right to enter for non-payment of rent is not an incident of a lessor's estate at common law.
503. Necessity for demanding rent.
504. An express stipulation in a lease dispensing with the requirement for a demand for rent is valid.
505. Damages from an alleged trespass by a landlord will not constitute such a legal set-off against an unpaid quarter's rent that it will prevent a forfeiture for non-payment of rent.

SEC.
506. Arizona.
507. Arkansas.
508. California.
509. Colorado.
510. Connecticut.
511. Florida.
512. Georgia.
513. Illinois.
514. Indiana.
515. Iowa.
516. Kansas.
517. Massachusetts.
518. Michigan.
519. Minnesota.
520. Mississippi.
521. Missouri.
522. Nebraska.
523. New Hampshire.
524. New Jersey.
525. New York.
526. North Carolina.
527. North Dakota.
528. Oregon.
529. Oklahoma.
530. Pennsylvania.
531. Rhode Island.
532. South Carolina.
533. Vermont.
534. Virginia.
535. West Virginia.
536. Wisconsin.
537. Wyoming.

IV. Surrender.

538. A surrender is a yielding up of an estate for life, or years, to him who hath the immediate estate in reversion or remainder.
539. A surrender may be effected by express words or it may be implied from the conduct of the parties.
540. Executed agreement.
541. Cancellation and destruction of lease.

SEC.
542. A common method of effecting a surrender of a term for years by operation of law is by the substitution of a new lease.
543. The doctrine of *Thomas* v. *Cook*.
544. The foregoing doctrine has been restricted in its application by a subsequent English case.
545. Change in terms.
546. Leases *in futuro*.
547. Where the tenant leaves the land and abandons the possession.
548. The delivery of the key by the tenant and keeping it by the landlord are not sufficient to show a surrender.
549. After an unauthorized abandonment by a tenant the landlord may, by taking proper precautions, relet to another without creating a surrender by operation of law.
550. It is essential that the landlord notify his tenant that his responsibility for the deficiency in rent will continue.
551. Consent of tenant implied.
552. Rights of sub-tenants.
553. The question whether negotiations and circumstances amounted to a surrender.

V. Restoration of Possession to Landlord.

554. Duty of tenant to yield up possession.
555. It often happens that a tenant who intends to quit at the end of his term is not able to complete his arrangements promptly and desires to remain a short time.
SEC.
556. As the law stood before modified by statute, a wide scope of action was allowed to an owner in using force to recover possession of his property.
557. A forcible entry within the meaning of the forcible entry and detainer act is one accompanied with some circumstance of force or violence of the person.
558. Civil liability of landlord regaining possession by force.
559. Trespass for assault and battery against landlord.
560. Where a tenant is legally entitled to possession and the landlord forcibly enters on him.
561. The rule allowing the use of force to recover possession of real estate, which makes the landlord a law unto himself, is not conducive to good business principles.
562. Forcible entry and detainer distinguished from summary process.
563. The action of unlawful detainer can be maintained only where the relation of landlord and tenant subsists between the parties to the action.
564. Statutory penalty for holding over.
565. A bill in equity is not the appropriate remedy to obtain possession of premises from a tenant holding over.
566. Form of judgment in summary process.

VI. Emblements.

567. The term emblements is used to designate not only certain

SEC.
products of the soil, but also the right of a tenant to take and carry away such products after his tenancy has ended.
568. During the continuance of his holding a tenant's right to emblements is undoubted.
569. The doctrine of emblements is founded entirely on the uncertainty of the termination of the tenant's estate.
570. The common-law rule is that every one who has an uncertain estate or interest in land, if his estate determines by act of God before severance of the crop, shall have emblements, or they go to his executor or administrator.
571. An executor or a lessee of a tenant for life is entitled to crops which were planted during his lifetime but did not mature till after his death.
572. Rights of lessee under lease subject to a prior lien.
573. An outgoing tenant in agriculture is not entitled to manure made on the farm, even though it is made by his own cattle and from his own fodder.

CHAPTER VIII.

RIGHTS AND LIABILITIES OF THE PARTIES.

I. Landlord's Responsibility for Good Condition of Premises.

SEC.
574. The well-established general rule is that, upon a demise of premises, there is no implied warranty or implied condition as to fitness.
575. Oral evidence of warranty.
576. Demise of dwelling-houses.
577. Furnished house.
578. Exceptions to rule.
579. Liability of landlord for personal injuries to tenant.
580. Fraud a basis of landlord's liability.
581. When there are concealed defects attended with danger to an occupant, and which a careful examination would not discover, known to the lessor.
582. Landlord's duty to learn defects.
583. Unsanitary condition of leased house.
584. Duty on landlord to warn against infection.
585. Liability to guests of the tenant.
586. Injuries to property of the tenant.
587. By statute in Georgia.

II. Liability Imposed by Lessor's Agreement to Repair.

588. Lessor's obligation to repair.
589. An obligation to repair cannot be placed on the landlord without clear and explicit language.
590. Payment by landlord for repairs made by tenant.
591. Exempting lessee from obligation to repair.

SEC.
592. The landlord's responsibility for damages caused by his failure to perform.
593. Notice to landlord of need of repairs.
594. Another ground on which the landlord's freedom from responsibility can be placed is the doctrine of contributory negligence.
595. Rights conferred on third persons by a covenant to repair.
596. Liability of landlord for unsafe repairs.
597. Repairs effected through agent or independent contractor.
598. Non-performance of landlord's voluntary promise to repair.

III. Liability for Nuisance.

599. The occupier, and not the owner, is bound, as between himself and the public, to keep buildings and other structures abutting on the highway and street in repair.
600. Injuries on abutting sidewalks.
601. Injuries from falling articles.
602. Snow and ice.
603. Landlord and tenant both responsible.
604. Necessity for request to abate nuisance.
605. A lessor is not liable for a nuisance created and maintained on the premises by the tenant.
606. Moreover, a landlord is not liable for injuries resulting from an improper use of the demised premises by the tenant.
607. The landlord is liable for the damage caused when the premises were let with the want of repair or the nuisance complained of already existing.

SEC.
608. Injuries on public wharves.
609. Collapse of building.
610. Statutory nuisances.
611. What constitutes a reletting.

IV. Premises Occupied by More than One Tenant.

612. Obligation to repair roof.
613. Duty as to sidewalks.
614. Duty of landlord as to common passageways.
615. There are other decisions in which the reasoning is directly opposed to the principles just laid down.
616. To make a landlord liable for injuries caused by water flowing from a closet.
617. To whom this duty extends.
618. Duty of landlord to strangers.
619. What constitutes a fulfilment of the landlord's duty.
620. The place where the accident occurs is not material, provided it was on a common platform or passageway.
621. Defective carpeting of passageways.
622. Repairs interfering with enjoyment.
623. Liability of landlord for negligence of janitor.
624. A tenant of a part of a building is bound to exercise due care in the use and control of his part of the premises.

V. Responsibility for Waste.

625. Waste may be defined to be any act or omission of duty by a tenant of land which does a lasting injury to the freehold.
626. With respect to the mode of procedure by which a tenant was made to account for the waste committed by him.

SEC.
627. At common law, a tenant at will was punishable for voluntary waste, but not for permissive waste.
628. Independent of an express agreement on the part of a lessee, the law imposes on him an obligation to treat the premises in such a way that no substantial injury shall be done to the property.
629. A tenant is only bound to make tenantable repairs, and is not liable for the ordinary "wear and tear" of the premises.
630. Where the parties to a lease of real property have expressly covenanted to repair.
631. On a demise of farming lands a covenant is raised by operation of law that they shall be used as such and cultivated in a husbandlike manner.
632. A tenant, whether rightfully in possession or not, cannot, without the consent of the landlord, make material changes or alterations in a building to suit his taste or convenience.
633. The cases in the country relied on to show an amelioration of the strict English rule.
634. The intent or motive with which a tenant acts is immaterial in determining what constitutes waste.
635. A tenant for years who cuts standing timber for the purpose of sale.
636. Where wild timber land is leased for farming.
637. It is the duty of a tenant for life to cause all taxes assessed against his estate during the tenancy to be paid.
638. When waste is threatened, an injunction to prevent it is the proper remedy.

SEC.
639. Forfeiture of the place wasted and treble damages were the punitive measures provided by the Statute of Gloucester.

VI. Actions Relative to Possession.

640. The common-law rule is that actual or constructive possession is necessary to support an action of trespass *quare clausum.*
641. However, a qualification of the foregoing rule permits the landlord, while a tenant is in possession, to maintain trespass on the case.
642. In determining whether the landlord or tenant or both may recover damages for injury to real estate, the general rule applies that wherever a legal right is violated the owner of such right is entitled to action therefor.
643. If a tenant be deprived of his leasehold interest in consequence of the appropriation by the public to public uses of the property upon which his leasehold estate rests, it cannot be doubted that he is deprived of his property.
644. According to common law rules of pleading, not only must the fact that the plaintiff is a reversioner appear, but the extent of the reversion, whether it is for years or for life or in fee.
645. A landlord has no such interest in the growing crops of his tenant as to enable him to maintain an action against a person who injures the crop.
646. Tenants at will and by sufferance.

SEC.
647. An action of trespass by the landlord will not lie against a tenant pending the term, because the wrong which is the gist of the action is an offense against the actual possession and right of possession, and these are in the tenant.

CHAPTER IX.

RENT AND ITS RECOVERY BY ACTION.

I. Nature of Rent.

SEC.
648. Rent has been defined generally to be a return or compensation for the possession of some corporeal inheritance.
649. A fee farm rent arises where the rent is created by deed and the fee is granted.

II. Actions to Recover Rent.

650. Remedies for recovering rent.
651. The statutory action for use and occupation is of the nature of assumpsit at common law on an implied promise, and is not an action *ex delicto*.
652. The statute providing a remedy for the recovery of rent, by action of assumpsit for use and occupation, limits it to cases where the agreement is not by deed.
653. The whole action for trespass for mesne profits is a contrivance for awkward construction.
654. An action for use and occupation cannot be maintained except where the relation of landlord and tenant exists.
655. While the law will imply the relation of landlord and tenant from the fact of the occupancy of the premises with the consent of the owner, this implication may be rebutted.
656. Recovery of crop rents.
657. If there is no actual ouster or eviction of one tenant in common by the other, neither is liable to the other for mere use and occupation.
658. That rent is an incident to the reversion, and that whoever is entitled to the reversion at the time the rent becomes payable is of right entitled to it.
659. A sub-tenant is not answerable to the original lessor for the rental, as there is neither priority of estate nor priority of contract between them.
660. Where the fact of an agency is not disclosed at the time an agent enters into a contract of lease for his principal.
661. A covenant to pay rent creates no debt or legal demand for rent until the time stipulated for payment arrives.
662. An undertaking in writing attached to a lease between landlord and tenant by which a third person, without expressing any consideration, agrees to become surety.
663. Alterations in amount of rent and mode of payment.

SEC.
664. A power of attorney contained in a lease to confess judgment for rent due and interest is valid.
665. The only defenses against an action for rent reserved in a valid lease are eviction, release and surrender of the term.
666. Interest is recoverable as of right upon contracts in writing to pay money upon a day certain.

III. Apportionment.

667. By the general rule of the common law, rent may be apportioned as to estate, but not as to time.
668. When part of a reversion is sold, the law will apportion the rent.
669. Where a lessee assigns a part of his interest, the rent may be apportioned between the parties holding the premises.
670. The rent which follows the reversion as an incident is the rent which falls due subsequent to the transfer.
671. In most states of the United States there are statutes providing for apportionment in case the estate of the lessor is determinable.

IV. Set-Off and Recoupment.

672. The cost of repairs made by a tenant with the consent of the landlord and for which the landlord agreed to pay.
673. The extent of the right of a tenant entering or remaining in possession of the premises after the failure of the landlord to repair is to recoup.

SEC.
674. Furthermore, a lessee sued for rent may recoup in damages for a false allegation of the landlord.

V. Abatement of Rent.

675. The destruction by fire of buildings upon leased premises does not relieve the lessee from his obligation upon an express covenant to pay rent.
676. When premises have burned down and the landlord has collected insurance, a court of equity will not prevent him from collecting the rent.
677. The general rule of the common law, as stated above, is predicated upon the assumption that an interest in the land or soil upon which the burned buildings stood passed under the lease.
678. In Nebraska there has been a vigorous protest against the common-law rule of continued liability on express covenants after the destruction of the premises.
679. A provision that, if premises are destroyed by fire, rent shall be suspended until they shall be put in proper condition for use.
680. A case where a leased building is torn down under power of eminent domain to widen a street.
681. In many jurisdictions the rule of the common law as to continued liability for rent after destruction of the premises has been abolished or modified by statutes.

CHAPTER X.

ESTOPPEL TO DENY LANDLORD'S TITLE.

SEC.
682. Modern rule of estoppel to deny title between landlord and tenant.
683. Where a lessee has had full benefit of his term, he is estopped to deny the capacity or power of the lessor to execute.
684. To allow a tenant to object to the right of joint lessors to maintain a joint action to recover the premises.
685. A tenant at will equally with a tenant for years or from year to year.
686. Occupation under a void or improperly executed lease.
687. A disability to contract of one who enters upon land by permission of another does not relieve him from the obligation of returning the possession.
688. A tenant cannot deny the landlord's title while remaining in possession after the expiration of his term.
689. Purchase of adverse title by tenant.
690. An owner of land or one under obligation to pay taxes thereon, cannot acquire a tax title so as to defeat incumbrances.
691. The rule that denies to a tenant the right to dispute his landlord's title cannot be so extended as to take away from him the right to prove exactly what his relationship to the landlord originally was.
692. The estoppel upon a tenant only extends to the land included in the lease.
693. The operation of the general rule of estoppel.
694. The parties may by their agreement waive the rule of law that a tenant cannot deny his landlord's title.
695. After the expiration of his lease a tenant may disclaim and disavow his tenancy.
696. Some overt act is necessary to make a tenant's holding adverse.
697. The effect of a possession previous to the acceptance of a lease on the right to dispute the title.
698. In California an exception to the general rule is made.
699. The relation of landlord and tenant, once established, attaches to all who may succeed to the possession through or under the tenant.
700. That the estoppel inures both as to its benefit and burden to privies in law, in blood and in estate.
701. The burden is on the tenant, in an action for the rent or to recover possession of the premises, to establish that the case falls within some exception of the general rule stated.
702. Where the tenant has been induced to accept the lease by misrepresentation, fraud or trick practiced upon him by the lessor, he is not estopped.
703. Showing transfer or expiration of landlord's title.
704. A tenant may purchase his landlord's title at an execution sale.

SEC.
705. After a judgment of eviction has been obtained against a tenant, he may proceed to buy in and set up the adverse title of a stranger.
706. An evicted tenant may take a new lease from the party evicting him.
707. Although it is well established that a tenant cannot voluntarily attorn to an adverse claimant.
708. Estoppel does not bar a lessee from exercising a power of eminent domain.
709. The attornment of a tenant to a third person does not have the effect of making the possession of the tenant the constructive possession of the stranger to whom he attorns.

CHAPTER XI.

FIXTURES.

SEC.
710. The general rule of law is that whatever is fixed to the soil becomes a part of the realty.
711. The original doctrine was that fixtures were generally regarded as immovable.
712. Fixtures which would be destroyed in removal.
713. Agreements as to removal.
714. If a grantee of the reversion is injured by an agreement which entitles the tenant to remove buildings or fixtures.
715. The agreement allowing removal must be made before the building is erected.
716. In the absence of a special agreement, a tenant under a lease for a specific term must ordinarily remove his fixtures during the term.
717. Where a right of removal conferred by agreement is conditioned on the performance of all the undertakings in the lease.
718. Effect of renewal on right to remove fixtures.
719. Time for removal under agreement.
720. Moreover, there is good authority for the position that the rights conferred by an agreement for removal are not lost by the acceptance of a new lease.
721. Removal during extension of term.
722. A lessor may by estoppel be precluded from claiming fixtures and improvements.
723. A mortgagee from a tenant stands in no better position than the tenant.
724. The term improvements as used to describe the additions made to leased premises.
725. Fixtures erected by the tenant for the purpose of carrying on his trade.
726. As a rule, a dwelling house or similar structure erected on leasehold land is deemed a part of the realty.
727. The strict rule that a building becomes a part of the realty is relaxed.
728. Fixtures used for agricultural purposes.

TABLE OF CASES.

[*References are to Sections.*]

Abbey Homestead Asso. v. Willard 476
Abbott v. Bosworth 72
v. Jackson 604, 607
v. Land &c. Co. 130, 132
Abby v. Billups 392
Abeel v. Hubbell 221
v. Radcliff 343
Abercrombie v. Redpath 430
Aberdeen Coal &c. Co. v. Evansville 539
Abrahams v. Tappe 482
Abrams v. Sheehan 422, 430
v. Watson 361, 505
Accidental &c. Ins. Co. v. Mackenzie 688
Acker v. Witherell 442
Ackerman v. Lyman 2, 27
Ackland v. Lutley 261
Adair v. Bogle 140, 369, 370
Adam v. Arnold 660
Adams v. Beach 446
v. Bigelow 671
v. Boelger 78
v. Burke 447
v. Cohoes 206, 208, 268, 304
v. Fletcher 600
v. French 658
v. Gibney 349
v. Goddard 376, 429, 659
v. McKesson 48, 49
v. Martin 686
v. Werner 353
Adams Express Co. v. McDonald 201
Adler v. Mendelson 209
Adreon v. Hawkins 462
Agar v. Winslow 358
Agate v. Lowenbein 632
v. Lowenstein 474a
Agnew v. Sexton 664
v. Whitney 724
A. G. Rhodes &c. Co. v. Weeden 161
Ahern v. Steele 604
Aiken v. Blaisdell 121
v. Smith 46, 48
Ainsworth v. Backus 389
Ainsworth v. Moriah Lodge 115
v. Ritt 677
v. Williams 61
Aitkin v. Young 160
Albert v. State 608
Albin v. Riegel 572
Alcorn v. Morgan 59, 255
Alderson v. Marshall 682, 696
v. Miller 702
Aldrich v. Reynolds 572
Alexander v. Archer 2
v. Bishop 140, 369
v. Buffington 89
v. Fisher 635, 636
v. Harris 252
v. Hodges 471, 500
v. Rhodes 596
v. Tolleston Club 104, 114
v. Touhy 376, 495, 496, 497
v. Warrance 649
Alger v. Kennedy 110, 355
Alleghany Oil Co. v. Bradford Oil Co. 483
Allen v. Bartlett 201, 213, 699
v. Bicknell 558
v. Bryan 430, 658
v. Carpenter 230
v. Chatfield 682
v. Culver 331, 333, 392, 673
v. Dent 420, 496
v. Gates 713
v. Hall 705
v. Holkins 5
v. Howe 392
v. Keilly 121, 556
v. Kennedy 711
v. Lambden 57
v. Logan 127
v. Mansfield 175
v. Paul 474a, 699
v. Pell 324
v. Smith 616
v. Wooley 424
Allenspach v. Wagner 388
Allison v. Thompson 555
Almand v. Scott 50
Almy v. Allen 373

[*References are to Sections.*]

Almy v. Greene 121, 453
Alperin v. Earle 620
Alston v. Grant 586
Alsup v. Banks 111
Alton v. Midland R. 595
Alwood v. Ruckman 47, 50, 52, 53
Alworth v. Gordon 264, 272, 274, 297
Ambrose v. Root 561
American &c. Co. v. Peoria &c. Co. 120
v. Turner 421, 422
Ames v. Moir 75
v. Norman 88
v. Schuesler 201, 202
Amick v. Brubaker 175
Ammidown v. Ball 107
Amory v. Kannoffsky 538, 543
v. Melvin 416, 417
Amsden v. Atwood 180, 201, 204, 555, 661
v. Blaisdell 182
Amter v. Conlon 6
Anderson v. Bentley 640
v. Comeau 163
v. Critcher 72, 164, 651
v. Darby 89
v. Gray 699
v. Hammon 638
v. Hapler 635
v. Harris 164
v. Harwood 412
v. Hayes 581
v. Prindle 180, 217
v. Robbins 667
v. Simpson 160
v. Strauss 572
v. Swift 375
v. Winton 354, 365
Andreon v. Hawkins 661
Andrew's Case 321
Andrew v. Carlile 98
Andrews v. Jones 631
v. Kinsel 596
v. Woodcock 694
Angell v. Egger 53
Anonymous 439
Ansell v. Robson 461
Anthony v. Butler 165
v. New York &c. R. Co. 71, 164
Antoni v. Belknap 727
Antrey v. Antrey 171
Appleton v. Buskirk 556
v. Campbell 122
v. O'Donnell 99
Appling v. Odom 46
Archer v. Blalock 587
Arden v. Pullen 404
Ardesco Oil Co. v. Richardson 397
Ards v. Watkin 430
Areline v. Ridenbaugh 38
Arey v. Imson 31
Armington v. Stelle 135
Armour &c. Co. v. Des Moines Pork Co. 550
Arms v. Burt 58
Armstrong v. Clark 650
v. Crilly 102
v. Cummings 648
v. Kattenhorn 160
v. Maybee 392
v. Wheeler 442
Arneson v. Spawn 640, 642, 644
Arnold v. Bright 125
v. Clark 592
v. Lyman 462
v. Nash 254
v. Woodard 689
Arnot v. Alexander 337
Arnsby v. Woodward 464, 497
Arras v. Richardson 121
Arthur v. Vanderplank 447
Ashbrook v. Dale 121, 122, 124
Ashby v. Ashby 391, 712
Ashley v. Ashley 641
v. Warner 170
v. Young 445
Aspdin v. Austin 319
Astor v. Hoyt 332, 459
v. Lent 442
v. Miller 458, 460
Astry v. Ballard 637
Atherstone v. Huddleston 87
Atkins v. Chilson 380, 491
v. Sleeper 119
v. Temple 631
Atkinson v. Cole 267
Atlanta &c. R. Co. v. McHan 190
Atlantic Dock Co. v. Leavitt 77, 318
Attaway v. Hoskinson 165
Attersoll v. Stevens 626
Attorney-General v. Backhouse 91
v. Baliol College 91
v. Life & F. Ins. Co. 443
v. United Kingdom &c. 424
Atwood v. Cobb 38
v. Norton 152
Auer v. Penn 548, 549
Aull Sav. Bank v. Aull 428, 652, 654
Auriol v. Mills 447, 650
Austin v. Ahearne 84
v. Field 675, 677
v. Harris 438
v. Hudson River R. Co. 627
v. Huntsville &c. Co. 641
v. Thomson 190, 446
Autrey v. Autrey 658
Auworth v. Johnson 628
Averill v. Sawyer 132, 133
v. Taylor 144
Avery v. Daugherty 660
v. Doughety 349, 365

[References are to Sections.]

Aydlett v. Pendleton 388
Aylesford, Case of 160
Ayres v. Birtch 559
v. Draper 267

B

Babcock v. Albee 271
v. Kennedy 422
v. Scoville 458, 460, 669
Bachelour v. Gage 447
Backus' Appeal 346
Backus v. Sternberg 215, 217
Bacon v. Bowdoin 5, 102, 141, 143, 146
v. Brown 195, 202, 206, 232, 548
v. Combes 140
v. Howell 34
v. Park 420, 491
v. Waller 119
v. Western Furniture Co. 503, 514
Badcock v. Hunt 414
Bagley v. Columbus &c. R. Co. 567, 715
Bailey v. Campbell 3, 13, 690
v. Ferguson 47, 50
v. Fillebrown 53
v. Kilburn 688
v. Richardson 332, 429, 455, 459
v. Wells 448, 455
v. White 323
Bain v. McDonald 152
Baird v. Evans 673
Baker v. Allen 605
v. Hale 682
v. Jeffers 667
v. Jordan 568
v. McClurg 712
v. Pratt 682
Baldwin v. Kerlin 98
v. Morgan 108
v. Munn 140, 369
v. Skeels 371
v. Temple 698
v. Van Vorst 491
v. Walker 71, 164, 421
Baley v. Deakins, 1, 5
Ball v. Cullimore 186
v. Dunsterville 320
v. Lively 2
v. Wyeth 69
Ballance v. Peoria 99, 100, 109
Ballard v. Walker 74
Ballentine v. Poyner 632, 636
Balls v. Westwood 655
Bally v. Wells 330
Balmain v. Shore 86
Baltimore &c. R. Co. v. Pumphrey 592
v. Rose 608
v. West 180, 199
Banbury v. Sherim 201, 204
Bancroft v. Wardwell 3, 654, 655
Bandlow v. Thieme 625
Bangor v. Rowe 610
Bank v. Getchell 6
v. Mersereau 84
Bank &c. v. Wise 658, 670
Banks v. Haskie 339, 343
v. White 675
Bannon v. Mitchell 642
Barber v. Harris 88
Barclay v. Steamship Co. 330
v. Wainwright 378
Bard v. Elston 159
Barge v. Schiek 344
Barghman v. Portman 356
Barhydt v. Burgess 446, 447
Barker v. Troy &c. R. Co. 136
Barlow v. Bell 255
v. Dahm 682
v. Wainwright 148, 180, 192, 199, 261
Barlum v. Berger 241
Barnard v. Godscull 447
v. Pope 657
Barnes v. Barnes 96
v. Hogate 322
v. Ludington 137a
v. Northern Trust Co. 423, 438, 439
v. Shinholster 29, 34, 654
Barnett v. Barnes 136, 496
v. Feary 341
Barney v. Cain 507
v. Keith 58, 321, 349
v. Patterson 444
Barneycastle v. Walker 368
Barnhart v. Boyce 392
Barnum v. Landon 164
Barr v. Doe 172
v. Kimball 126, 128
Barret v. Blagrave 638
Barrett v. Bell 101
v. Boddie 354, 355, 356, 588
v. Cox 175, 197
v. Jefferson 12
v. Johnson 59, 67
v. Trainor 439
Barrie v. Smith 496
Barrington &c. Asso. v. Watson 464
Barron v. Marsh 654
v. Richard 331
Barry v. Briggs 125
v. Page 158
Bartlett v. Greenleaf 502
v. Haviland 710
v. Perkins 626, 640
v. Robinson 701
Bascom v. Dempsey 640
Baskin v. Seechrist 702
Bass v. Rollins 408

[*References are to Sections.*]

Bass v. West 433
Batchelder v. Dean 112, 113
Bateman, Ex parte 389
Bates v. Dunham 89
Batterman v. Pierce 368, 673
Bauer v. Knoble 487, 488
Bauernschmidt &c. Co. v. McColgan 716, 718, 721
Baugher v. Wilkins 349, 361
Baughman v. Reed 50, 54
Baxter v. Browne 74
v. Bush 92
v. Lansing 491
v. Mattox 118
v. Smith 87
v. Taylor 640
Bay State Bank v. Kiley 263
Bayly v. Lawrence 678
Beach v. Crain 392
v. Farish 676
v. Gray 661
v. Morgan 164
v. Nixon 115
Beal v. Bass 502
v. Boston &c. Co. 422, 425
Beale v. Knowles 88
Beale & Taylor's Case 592
Beall v. White 543
Bean v. Edge 10
v. Fitzpatrick 355
Beardman v. Wilson 446
Beardsley v. Morrison 410
Bears v. Ambler 600
Beattie v. Parrott Silver &c. Co. 456
Beaty v. Gibbons 573
v. Jones 682
Beavers v. Trimmer 604, 644
Becar v. Flues 143, 152, 153, 539
Bechtel v. Cone 496
Beck v. Phillips 74
Becker v. De Forest 365
v. Werner 496, 502
Beckwith v. Howard 57, 322, 382, 428
Beddoe v. Wadsworth 332
Bedford v. Kelly 81
v. McElherron 310
v. Terhune 442, 446, 455, 543
Bedingfield v. Onslow 645
Beecher v. Duffield 356, 652
Beecher v. Parmell 558
Beers v. St. John 727
Bees v. Williams 543
Beham v. Ghio 677
Beidler v. Fish 366, 546
Beiler v. Devoll 152, 272
Belden v. Union Warehouse Co. 332
Belding v. Texas Produce Co. 201, 202
Belfour v. Weston 324, 404, 405, 676
Belinski v. Brand 494, 504
Bell v. American Protective League 443
v. Baker 126
v. Golding 101
v. Norris 661
Beller v. Robinson 342
Bellows v. McSinnis 631
Beman v. Rufford 9
Bemis v. Becker 432
v. Wilder 465, 466
Benavides v. Hunt 482
Benedict v. Everard 458
v. Morse 186, 428
Beneteau v. Stubler 586
Benfey v. Congdon 203, 296
Benjamin v. Benjamin 19, 115, 563
Bennecke v. Insurance Co. 497
Bennet v. Bittle 364
v. Pixley 323
Bennett v. Herring 471, 494
v. Robinson 220, 222, 229, 230, 296
v. Scutt 38
Bennock v. Whipple 192, 239, 478
Benson v. Suarez 596
Bentley v. Adams 18
v. Atlanta 643
v. Sill 365
Benton v. Schulte 151
Benzein v. Robinett 666
Bergland v. Frawley 326
Bergman v. Roberts 697, 700
Berkeley v. Hardy 660
Berkowsky v. Cahill 201, 206
Bernal v. Hovious 54
Berner v. Gebhardt 299
Berrey v. Lindley 199, 255
Berrington v. Casey 349, 367a
Berry v. Van Winkle 374, 379
Bertie v. Flagg 584
Bertles v. Nunan 87, 88
Bertram v. Cook 688, 689
Best v. Jenks 87
Bettison v. Budd 412, 690, 703, 704
Betts v. Dick 465
Betz v. Maxwell 258, 270, 290
Bevans v. Briscoe 570, 571
Beverly v. Lincoln &c. Co. 652
Biddle v. Hussman 658, 668
v. Ramsey 346
v. Vandeventer 117
Bigelow v. Collamore 392
v. Jones 654
v. Willson 119
Biggs v. Brown 569
v. Ferrell 606
v. Stueler 210, 212, 549
Billings v. Canney 146
v. Tucker 10
Billingslea v. Ward 160
Bingham v. Honeyman 98

[*References are to Sections.*]

Binney v. Chapman 682, 703
Birch v. Wright 3, 25, 183, 422
Birckhead v. Cummins 149
Bird v. Earle 28
v. Greville 578
Birmingham v. Rogers 47
Bishop v. American &c. Co. 120
v. Babcock 701
v. Blair 88
v. Clark 29
v. Doty 48
v. Howard 203
Bishop of Bath's Case 112
Bissell v. Lloyd 404, 410, 612
Bittenger v. Baker 570, 572
Blachford v. Frenzer 455
Black v. Delaware &c. Canal Co. 9
v. Maitland 599
Blackenship v. Blackwell 701, 702
Blackman v. Kessler 128
Blackmore v. Boardman 330, 343
Blackwood v. Tanner 555
Blain v. Everitt 638
Blair v. Hardin 350
v. Rankin 352, 435
Blake v. Baker 415
v. Clark 102, 677
v. Coats 52
v. Concannon 92
v. Dick 126, 410, 548, 576
v. Fash 59
v. Howe 690
v. Preston 654, 655
v. Ranons 126, 576, 584
v. Sanderson 438, 447, 456
Blanchard v. Bowers 180, 261
v. Raines 34
Blaney v. Hoke 138
Blantire v. Whitaker 424, 700
Blasdell v. Souther 136
Bleecker v. Ballou 415
v. Smith 471, 498
Bless v. Jenkins 157, 269, 274, 554
Blight v. Rochester 699, 700
Bliss v. Bange 561
v. Collins 668
Blish v. Harlow 272
Blitch v. Edwards 31
Block v. Smith 34
Blood v. Spaulding 607
Bloom v. Richards 307
Bloomer v. Merrill 681
Blue v. Sayre 476
Blue Stone Coal Co. v. Bell 488
Blum v. Robertson 29, 183, 254
Blumenberg v. Myres 215, 446
Blumenthal v. Bloomingdale 197
Blundell v. Brettargh 346
Bly v. Edison &c. Co. 642
Blythe v. Gately 417
Board &c. v. Grant 726
Board &c. v. Herrington 703
v. Streeter 420
Board of Directors v. Chicago &c. Co. 204
Board of Supervisors v. Cowgill 20
Boardman v. Mostym 464
Bobb v. Syenite Granite Co. 641
Bodkin v. Arnold 697, 702
Bodman v. Murphy 389
Bodwell Granite Co. v. Lane 257
Boefer v. Sheridan 627
Bogert v. Dean 538
Boggs v. Black 310
Bohannons v. Lewis 392
Boisseau v. Fuller 137a, 143
Bold v. O'Brien 598, 628
Boley v. Barutio 28
Bollenbacker v. Fritts 215, 639
Bolling v. Stokes 415
Bolton v. Landers 257
v. Tomlin 147, 148
Bonaparte v. Thayer 78, 672, 673
Bonetti v. Treat 455, 456, 462
Bonnell v. Allen 573
Bonner v. Welborn 604
Bonnewell v. Jenkins 137a, 138
Bonney v. Foss 555, 726
Bonsall v. McKay 369
Boom Co. v. Patterson 708
Boone v. Chatfield 378
v. Eyre 323
v. Stover 41, 59
Boot v. Wilson 447
Booth v. Clark 443
v. Cleveland &c. Co. 375
v. Gaither 108
v. Merriam 576, 579
Boraston v. Green 569
Borcherling v. Katz 660
Bordereaux v. Walker 424, 439
Borderre v. Den 157
Bordman v. Osborn 661
Boreel v. Lawton 351, 354
Borland's Appeal 444, 456
Borman v. Sandgren 219
Born v. Stafford 703
Boston v. Binney 2, 3, 652, 654
v. Worthington 380
Boston &c. R. Co. v. Ripley 355, 667
v. Boston &c. R. Co. 446
Boston Block Co. v. Buffington 681
Boston, C. & M. R. Co. v. Boston &c. R. Co. 468
Boston Clothing Co. v. Solberg 137a, 138
Bostwick v. Losey 410
Boteler v. Espen 378
Botsford v. Morehouse 541
Botting v. Martin 441
Boudette v. Pierce 185, 251
Bourdereaux v. Walker 549

[References are to Sections.]

Bowdish v. Dubuque 697
Bowe v. Hunking 574, 576, 579, 581, 585
Bowen v. Clarke 549
v. Haskell 543
Bowers v. Cherokee Bob 63
Bowes v. East London &c. Co. 91
Bowman v. Bradley 20
v. Foot 483, 495, 498
Bowser v. Colby 491
Bowyer v. Seymour 535
Boyce v. Bakewell 461
v. Graham 640
v. Guggenheim 359
Boyd v. Douglass 726
v. Fraternity Hall Asso. 464, 468, 469
v. McCombs 661
v. Pico 336
v. Talbert 171, 513
Boyer v. Commercial Bldg Inv. Co. 360
v. Smith 688
Bracket v. Norcross 657
Brackett v. Goddard 573
v. Wait 87
Bradbury v. Wright 415
Bradford Oil Co. v. Blair 328
v. Patten 342
Bradish v. Schenck 48
Bradley v. Bailey 571
v. Brigham 368
v. Chicago, M. & St. P. R. Co. 371
v. Covel 251
v. Goicouria 576
v. McDaniel 653
v. Slater 201, 202, 206, 210
v. Walker 453
Brady v. Flint 169
Braley v. Henry 575
Branch v. Doane 18, 42, 59
Brand v. Frumveller 346
Brande v. Grace 353
Brandenburg v. Reitman 255, 256
Brandon v. Aston 466
Brandt v. Phillippi 367
Branger v. Manciet 319, 361
Brant v. Vincent 197
Branton v. O'Briant 216
Brashear v. Chandler 397
Bratt v. Woolston 345
Brattle Square Church v. Grant 446
Braythwagto v. Hitchcock 197
Bream v. Dickerson 328, 332, 377
Breckenridge v. Parrott 328, 458
Brecknock Co. v. Pritchard 392
Breeding v. Taylor 427
Breese v. McCann 673
Breher v. Breese 136
Brenner v. Bigelow 692
Bresler v. Darmstaetter 555
Brett v. Cumberland 447
Breuckmann v. Twibill 549
Brewer v. Craig 29, 654
v. Dyer 439, 462
v. Keeler 689
v. Knapp 554
v. M'Gowen 23
v. National &c. Asso. 541
v. Stevens 16
v. Winchester 139
Brewster v. De Fremery 404, 576, 588, 612
v. Gracey 494
v. Hill 171
v. Kidgill 415
v. Kitchin 415
v. McNab 25
Breyfogle v. Wood 547
Briar v. Robertson 152
Bridgers v. Dill 645
Bridgham v. Tileston 439, 658
Bridgman v. Wells 199
Brierley v. Palmer 271
Briggs v. Austin 568
v. Hall 365
v. Hervey 274
v. Partridge 660
v. Roth 561
v. Thompson 357, 364
Brigham v. Rogers 132
Bright v. McOuat 215, 228
Briles v. Pace 151, 440
Brinckerhoff v. Phelps 369
Brinkley v. Hambleton 451
Bristor v. Burr 559
Brittin v. Wilder 87
Brohawn v. Van Ness 72
Bromley v. Aday 279
Bronson v. Coffin 331
Brock v. Berry 228
v. Dole 632, 638
Brockway v. Rowley 322
v. Thomas 159, 160, 375
Brooke v. O'Boyle 558
Brookhaven v. Baggett 42
Brooks v. Reynolds 381
v. Rogers 497, 635, 647
Brosman v. Kamer 447, 448
Broughton v. Conway 67
Brouwer v. Jones 382, 431
Brown v. Adams 656
v. Beatty 558
v. Bragg 168
v. Bridges 641
v. Burtinshaw 540
v. Butler 659
v. Carkeek 109, 373
v. Cavins 495, 549
v. Collins 624
v. Crump 628
v. Engel 29

[*References are to Sections.*]

Brown v. Holyoke &c. Co. 355
v. Kayser 174, 251, 261, 317
v. Keller 689
v. Lincoln 55
v. Parsons 569
v. Schiappacasse 66, 358
v. Smith 220, 225
v. Thurston 570
v. Toronto Gen. Hospital 592
v. Vanhorn 251
v. Woodworth 45
Browne v. Haseltine 701
v. Raban 464
v. Tighe 343
Brownell v. Welch 152, 159, 217
Browning v. Browning 149
v. Haskell 83
v. Wright 319, 350
Brozier v. Ansley 46
Bruce v. Fulton Nat. Bank 375
Bruckman v. Dry Goods Co. 18
Brugman v. Noyes 382, 383
Brummell v. Macpherson 470
Brunswick &c. R. Co. v. Hardey 642
Brunswick &c. Co. v. Spencer 587
Brunswick-Balke-Collender Co. v. Rees 613
Brush v. Beecher 116
Bryan v. Atwater 85
v. Whistler 44
v. Winburn 709
Bryant v. Pugh 50, 56
v. Sparrow 647
v. Wells 660
Bryden v. Northrup 383, 384
Buchanan v. Whitman 119
Buck v. Lewis 548
v. Morrow 140
v. Rodgers 410
Bucklen v. Cushman 382
Buckley v. Cunningham 616
Bucknam v. Bucknam 684
Buckner v. Warren 502
Buel v. Buel 563
Buell v. Cook 141, 142, 145
Buerger v. Boyd 675, 677
Buesching v. St. Louis &c. Co. 603
Buffalo, In re 725
Buffalo Co. Nat. Bank v. Hansen 540
Buffum v. Deane 668
Buhl v. Kenyon 151
Bulkley v. Devine 99
Bull v. Follett 319
Bullard v. Johnson 422
Bullen v. Denning 63
Bullock v. Dommitt 392
v. Grinstead 375
Bunker v. Pines 319
Bunton v. Richardson 227
Burbank v. Dyer 236
Burden v. Knight 159
v. Thayer 421, 422, 667, 670
Burdick v. Cheadle 579, 595
Burgess v. Rice 682
Burhans v. Van Zandt 413, 690
Burk v. Hollis 716
Burke v. Tindale 121
Burkhard v. Mitchell 201, 202
Burkhardt v. Yates 78
Burkhart v. Tucker 29
Burkitt v. Harper 378
Burks v. Bragg 588
Burnes v. Fuchs 404
v. McCubbin 487
Burnett v. Lynch 80, 318, 319, 411, 449, 451
v. Rich 682
v. Thompson 163
Burnham v. Hubbard 448
v. Roberts 652
Burns v. McDonald 597
v. Nash 562
Burr v. Spencer 166
v. Stenton 349, 350, 351
Burris v. Jackson 118
Burt v. French 513
v. Merchants' Ins. Co. 680
Burton v. Barclay 458
v. Scherpf 44
Bush v. Cole 369
v. Rawlins 135
Buschman v. Codd 129
v. Wilson 679
Bussman v. Ganster 59, 675, 676
Buswell v. Marshall 73
Butler v. Baker 656
v. Cowles 651
v. Manny 323, 324
v. Page 715
v. Powis 77, 160
v. Rice 21
Butterfield v. Baker 53
Butts v. Fox 256
Buxbaum v. Dunham 423
Byrane v. Rogers 420, 503, 504
Byrne v. Beeson 691
Byington v. Simpson 158
Byrd v. Chase 650
Byrne v. Van Hoesen 90

C

Cade v. Brownlee 171
Cadwallader v. Lovece 33
Cage v. Paxlins 67
Cain v. Ginun 702
Cairns v. Chabert 413, 690
Cairo &c. R. Co. v. Wiggins Ferry Co. 203, 205
Calderwood v. Brooks 254, 499
v. Pyser 707

[*References are to Sections.*]

Caldwell v. Center 11
v. Custard 567
v. Harris 682
v. Moore 413
v. Slade 599
v. Smith 682
Caley v. Portland 464
v. Rogers 519
California &c. Co. v. Armstrong 630
California Ann. Conf. v. Seitz 377, 379
Callaghan v. Hawks 322
Callahan v. Loughran 588, 596
Callan v. McDaniel 331
Calvert v. Rice 635
Camarillo v. Fenlon 702
Cameron v. Little 661, 667
Camley v. Stanfield 704
Camp v. Camp 79, 696
v. Scott 486, 497
Campau v. Lafferty 75, 126
v. Mitchell 209, 554
v. Shaw 90
Campbell v. Campbell 688
v. Davis 709
v. Fetterman 682
v. Hampton 682
v. Nixon 501
v. Procter 190, 474a, 475
v. Shipley 484, 696
v. Shrum 319, 463
v. Stetson 659
Canale v. Copello 438, 442
Candler v. Mitchell 5, 7, 267, 274
Cannan v. Hartley 548
Canning v. Fibush 177, 255
Cannon v. Barry 632, 636, 637, 638
v. Copeland 726
v. Hatcher 641
v. Ryan 267
v. Wilbur 368, 369, 485
Caperton v. Stege 555, 719
Capital Brewing Co. v. Crosbie 367
Cardigan v. Armitage 63
Carey v. Richards 155
Cargar v. Fee 229, 288
Cargil v. Thompson 459
Carhart v. French 63
v. Ryder 128
Carleton v. Redington 37, 604
Carley v. Lewis 328, 331, 447
Carlin v. Ritter 628, 716, 718, 721
Carling v. Purcell 154
Carlton v. Williams 87
Carman v. Mosier 116
Carnegie v. Morrison 462
Carnes v. Hersey 418
Carney v. Mosher 154
Carpenter v. Colins 191
v. Griffin 10
v. Jones 547, 567
Carpenter v. Parker 707
v. Pocasset Manuf. Co. 454
v. Providence &c. Ins. Co. 398
v. Thompson 688
v. United States 29
Carr v. Dodge 55, 131
v. Ellison 343
Carraher v. Bell 498
Carroll v. Ballance 428
v. Rigney 640, 641
v. St. John's &c. Soc. 78
Carson v. Arvantes 540
v. Baker 32
v. Blazer 569
v. Broady 682
v. Crigler 703
v. Godley 576, 613
Carstairs v. Taylor 612
Carter v. Burr 669
v. Carter 413
v. Cummings 675
v. George 630
v. Hammett 440, 458, 461
v. Harlan 37, 45
v. Lacy 369
v. Scargill 324
v. Tippins 685
v. Youngs 413, 637
Carver v. Gough 726
Carey-Lombard Lumber Co. v. Jones 378
Cary v. Daniels 644
v. Thompson 101
Cary Hardware Co. v. McCarty 18, 36, 42
Casey v. Gregory 163, 703, 704
v. Haurick 682, 689
v. King 168, 227
Cassilly v. Rhodes 572
Castleman v. DuVal 661
Castro v. Gaffey 79
Caswell v. Districh 48, 50
Cate v. Blodgett 580
Catlin v. Hayden 640
v. Washburn 257
v. Wright 499
Cavanaugh v. Clinch 235, 555
Cavis v. McClary 421
Cayuga R. Co. v. Niles 39
Center v. Davis 605
v. McQuesten 462
Central Mills v. Hart 1, 2, 3, 40
Central Railroad v. English 604
v. English 642
Cesar v. Karutz 584
Chadbourn v. Rahilly 65
Chadbourne v. Straw 640
Chadwick v. Marsden 63
v. Parker 503, 513
Chalfin v. Malone 3
Chalker v. Chalker 485

[*References are to Sections.*]

Chalmers v. Smith 627, 628
Chamberlain v. Collinson 164
v. Godfrey 675, 677
Chamberlin v. Brown 494
v. Donahue 3, 5, 257, 474a, 654, 655
v. Godfrey 365
Chambers v. Pleak 689
v. Ross 654
Chandler v. Kent 71
v. McGinning 340, 341, 503
v. Pittsburgh Glass Co. 422
Chapel v. Hull 631
Chapin v. Billings 125
v. Dobson 130, 131
v. Foss 28
Chapman v. Bluck 143, 144
v. Cawrey 561
v. Dunwell 70
v. Eames 50
v. Gray 167, 171
v. Harney 503
v. Hart 171
v. Kirby 502, 503, 513
v. McGrew 423, 430, 496
v. Tiffany 258
v. Towner 146, 251
Charleston &c. R. Co. v. Hughes 711
Charsley v. Jones 578
Charter Oak L. Ins. Co. v. Cummings 2
Chase v. Barrett 50
v. Hazleton 625, 626, 636
v. McDonnell 49
Chatard v. O'Donovan 20
Chateau v. Singla 122
Chatterton v. Fox 364, 369, 370
Chauntler v. Robinson 612
Cheairs v. Coats 365, 667, 668
Cheatham v. Plinke 719
Cheek v. Waldrum 88
Cheetham v. Hampson 600
Cheever v. Pearson 6, 36, 42, 112
Cheney v. Bonnell 483
v. Newberry 146
Cherokee Strip &c. Asso. v. Cass &c. Co. 7
Cherry v. Stein 381
Chesebrough v. Pingree 58, 102
Cheshire v. Barrett 92
Chesley v. Frost 62
Chessman v. Whittemore 541
Chestu v. Powell 578
Chestnut v. Tyson 350, 361
Cheuvront v. Bee 410
Chew v. Lucas 369
Chicago v. Peck 206
Chicago &c. Co v. Browne 381
Chicago &c. R. Co. v. Linard 640
v. Perkins 205, 255
Chicago Attachment Co. v. Davis &c. Co. 440, 441, 456, 465
Chicago Warehouse Co. v. Illinois &c. Co. 360
Chighizola v. Le Baron 93
Childers v. Lee 150
v. Talbott 149, 150, 153
Childs v. Clark 430
v. Hurd 716, 721
v. Kansas City &c. R. Co. 625
Chilton v. Niblett 29, 30
Chipman v. Emeric 372, 471, 502
Chowning v. Stanfield 93
Chretien v. Doney 154, 337
Christensen v. Pacific Coast &c. Co. 36
Christine v. Whitehill 350
Christopher v. Austin 324, 365
v. National &c. Co. 157
Christy v. Tancred 227
Chung Yon v. Hop Chong 17, 276, 308
Church v. Brown 431, 464
Church Wardens v. Smith 332, 334, 462
Churchill v. Gronewig 539
v. Lammers 540, 553
City Council v. Moorhead 588
City of London v. Mitford 339
City of Providence v. St. John's Lodge 346
City Power Co. v. Fergus Falls &c. Co. 361
Claflin v. Carpenter 36, 38
Clancy v. Byrne 595
Clapham v. Moyle 319
Clapp v. Noble 267
v. Paine 255
v. Stoughton 88
Claremont v. Carleton 109
Clark v. Babcock 574, 588
v. Banks 566, 569
v. Barlow 666
v. Barnes 111
v. Butt 367, 367a
v. Clark 87, 138, 385, 654, 655
v. Coolidge 418
v. Everly 530
v. Ford 673
v. Harvey 570
v. Herring 433
v. Holden 634, 635
v. Hume 461
v. Jones 495
v. Keliher 263, 272
v. Middlesworth 637
v. Midland &c. Co. 675
v. Rhoads 114, 115, 169
v. Vannort 20
Clarke v. Brookfield 485

[*References are to Sections.*]

Clarke v. Byne 703
v. Cobb 52, 53, 422
v. Camnings 489, 635
v. Merrill 337, 340
v. Samson 321
v. Spaulding 673
v. Thatcher 219, 642
Clason v. Bailey 387
Clator v. Otto 504
Clayton v. Blakey 148, 180, 217
Clemence v. Steere 631, 632, 635
Clemens v. Broomfield 75, 543
v. Murphy 717
Clemenston v. Gleason 386
Clement v. Durgin 45
v. Gould 361
Clemm v. Wilcox 682, 688
Clemson v. Trammell 393
Clenighan v. McFarland 133
Cleveland v. Bryant 140
Cleveland &c. R. Co. v. Mitchell 331, 371, 438
v. Wood 448
Cleves v. Willoughby 577, 578
Clifford v. Atlantic Cotton Mills 601, 602
v. Gressinger 34
Clift v. Stockton 163
Clifton v. Montague 404, 574, 591
Cline v. Black 392
Clinton &c. Co. v. Gardner 201, 205, 206, 209
Clinton Wire Cloth Co. v. Gardner 206
Cluett v. Sheppard 104
Clun's Case 661, 667
Clyne v. Helmes 574, 576, 585
Coale v. Hannibal &c. R. Co. 627
Coan v. Mole 180, 197
Coats v. Chaplin 156
Coatsworth v. Schoellkopf 375
Cobb v. Arnold 1, 686
v. Lavalle 109
v. Stokes 255, 564
Coburn v. Goodall 332, 461
v. Palmer 685
Cochran v. Ocean Dry Dock Co. 105
v. Pew 495
Cochrane v. Justice Min. Co. 137a, 138
v. McCleary 63
v. Tuttle 24
Cocker v. Cowper 44, 45
Cocking v. Ward 200
Cockson v. Cock 331
Codman v. Hall 75, 121, 416
v. Jenkins 652
v. Johnson 415
Cody v. Quarterman 149
Coe v. Clay 367
v. Hobby 543
Coe v. Wilson 53
Coffin v. City of Brooklyn 351
v. Lunt 215
v. Talman 332
Cofran v. Shepard 189
Coggs v. Bernard 596
Cohen v. Barrett 562
v. Dupont 360
v. Habenicht 410
v. Kyler 654, 715
Cohn v. Hill 391
v. Norton 367a, 369, 370
Cohoon v. Kineon 651
Coke v. Gutkese 582
Colburn v. Morrill 365
Colclough v. Carpeles 113, 141, 142, 143
Cole v. McKey 585
v. Maxfield 694
v. Potts 160
v. Wright 152
Colegrave v. Dias Santos 716
Coleman v. Mabberly 542
Coles v. Celluloid Mfg. Co. 675, 681
v. Coles 86
v. Peck 346
Colhoun v. Wilson 133
Collamer v. Kelley 446
Collamore v. Gillis 712
Collier v. Carlisle 709
v. Cunningham 493
v. Hyatt 112, 587, 600
v. Pierce 359
v. Sharpe 34
Collins v. Canty 271
v. Hall 665
v. Hasbrouck 496, 497
v. Karatopsky 355, 365, 669
v. Lewis 357, 361
v. Moore 427
v. Whigham 34
Collins Mfg. Co. v. Marcy 42, 382
Collyer v. Collyer 3
Colton v. Gorham 448
Columbian Oil Co. v. Blake 87
Combes v. Cadmus 637
Combs v. Midland Trans. Co. 58
Commagere v. Brown 123
Commercial Bank v. Pritchard 163
Commonwealth v. Chesapeake &c. R. Co. 163
v. Cortner 119, 648
v. Dudley 557
v. Franklin Ins. Co. 461
v. Harrington 122
v. Haley 556, 559
v. Locke 120
v. Shattuck 557
v. Smith 9
v. Switzer 610
v. Weatherhead 9

[*References are to Sections.*]

Commonwealth v. Welcome 479
v. Wentworth 120
Comstock v. Cavanaugh 421
v. Hitt 463
Conant v. Brackett 378
Condon v. Barr 227
v. Brockway 203, 205
v. Sprigg 604
Cone v. Corse 91
Cones v. Barnes 447
v. Carter 358
v. Parker 329
Coney v. Brunswick &c. Co. 644
Congdon v. Brown 262
v. Cook 558
Conger v. Duryee 471, 497
v. Transportation Co. 495
v. Weaver 369
Congregational Soc. v. Fleming 635
v. Walker 682
Conkling v. Tuttle 296, 404, 652
Conley v. Johnson 136
Connell v. Female &c. Asylum 412
v. Richmond 48, 54
Connelly v. Doe 541
Conner v. Coffin 573
v. Jones 474a, 480
v. Shepherd 635
Connor v. Bradley 484, 503
Conrad v. Morehead 349, 488, 631
v. Saginaw &c. Co. 725
Conrad Seipp &c. Co. v. Hart 360
Consolidated Coal Co. v. Peers 36, 322, 455, 456, 463
v. Savitz 625
v. Schaefer 275, 486
v. Schmisseur 384
Constantine v. Wake 328, 445, 648
Consumers' Ice Co. v. Bixler 447, 462
Conway v. Starkweather 206, 207, 209
Conwell v. Mann 5, 699
Coogan v. Parker 675, 678
Cook v. Anderson 675, 677
v. Basom 703, 706
v. Champlain Transp. Co. 627
v. Cook 182, 190, 705
v. Creswell 262, 272, 682
v. Harris 458
v. Humber 23
v. Jones 344, 446
v. Norton 220
v. Sanitary Dist. &c. 718
v. Soule 410, 594, 673
v. South Park Comm'rs 7
v. Stearns 36, 37
Cook County &c. Co. v. Labahn Brick Co. 69
Cooke v. Brice 482, 504
v. England 400, 410
Cooke v. Norris 215
v. Wise 666
Coomber v. Howard 661
Coombs v. Jordan 711
Coomler v. Hefner 221, 236, 288
Coon v. Brickett 497, 498, 503, 523
Cooney v. Murray 133
Cooper v. Adams 190
v. Blandy 697
v. Bramel 654
v. Cooper 87
v. Joy 340, 342
v. McGrew 54
v. Smith 689
v. Sunderland 562
Coor v. Smith 572
Copeland v. Goldsmith 663
v. Stephens 461
v. Parker 467
Corbett v. Cochrane 232, 233
Corby v. Brill &c. Co. 299
v. McSpadden 112, 170
Cordes v. Miller 399
Cordeviolle v. Redon 465
Corey v. Bishop 573
v. Mann 588
v. Smalley 164
Corle v. Monkhouse 569, 570, 571
Cornell v. Dean 50
Cornfoot v. Fowke 580
Cornish v. Searell 697
Corrigan v. Chicago 362, 680, 703, 706
Corson v. Berson 219
v. Mulvany 387
Couch v. Ingersoll 323
v. McKellar 655
Coudert v. Cohn 199, 256
Coughanour v. Bloodgood 707
Coulson v. Whiting 580, 584
Coulter v. Norton 352
Coupe v. Platt 614, 617
Coupland v. Hardingham 604
Courcier v. Graham 72
Courne v. Hewes 34
Cowan v. Henika 195, 514
v. Radford Iron Co. 174
Cowell v. Lumley 675, 676
v. Springs Co. 382
Cowen v. Sunderland 574, 576, 581
Cowles v. Kidder 37
Coy v. Downie 675
Coyne v. Feiner 141
Cozens v. Stevenson 366
Crabtree v. Hagenbaugh 322
Craig v. Dale 569
v. Summers 417, 436, 446, 494
Cram v. Thompson 152
Cramer v. Groseclose 641
Crandall v. Sorg 378, 513
Crane v. Andrews 254

[*References are to Sections.*]

Crane v. Batten 334
v. Brigham 725
v. Hardman 666
v. Patton 38
Crawford v. Armstrong 663
v. Chapman 658
v. Jones 5, 363
v. Longstreet 74
v. Morris 98, 192
Creech v. Crockett 221
Creekmur v. Creekmur 695
Creel v. Kirkham 51
Creigh v. Heuson 682
Creighton v. Sanders 152, 159
Crentz v. Heil 637
Crescent City &c. Co. v. Simpson 74
Cressler v. Williams 12, 288, 701
Creveling v. West End Iron Co. 495
Crews v. Pendleton 572
Cripps v. Blank 227
Critchfield v. Remaley 201, 204, 251, 261
Croade v. Ingraham 333
Crocker v. Cunningham 54
Crockett v. Althouse 687, 702
v. Crockett 636, 638
Croft v. Lumley 497
Cromie v. Hoover 716
Crommelin v. Thiess 201, 202, 210, 356, 365, 431, 551
Cronin v. Watkins 329, 377
Crooke v. Andrews 565
Crookston Co. v. Marshall 70
Crosby v. Horne & Danz Co. 3
v. Loop 658, 668
Crosdale v. Lanigan 37
Cross v. Campbell 182
v. Freeman 84
v. McClenahan 564
v. Upson 442
Crossley v. Maycock 138
Crossthwaite v. Caldwell 365
Croswell v. Crane 152, 661
Crouch v. Fowle 321, 349, 350
v. Wabash &c. R. Co. 497
Crow v. Cann 566
v. Hildreth 141
Crowe v. Riley 331, 431
v. Wilson 638, 639
Cruger v. McLaury 525
Crusoe v. Bugby 431, 446, 467
Culbreth v. Smith 168, 171
Culton v. Gilchrist 146
Culver v. Hill 672
v. Kingsley 620
Culverhouse v. Worts 422
Cummings v. Perry 104
Cunning v. Tittabawassee Boom Co. 683
Cunningham v. Baxley 171
v. Cambridge Sav. Bank 14
Cunningham v. Holton 12, 190
v. Horton 293, 558, 647
v. Hurter 599
v. Pattee 86, 330, 343
Curl v. Lowell 182
Currey v. Davis 47, 53
Currier v. Barker 260
v. Earl 185, 474a
v. Perley 192, 193, 195, 244, 251, 259, 302
Curry v. Schmidt 715
Curtis v. Aspinwall 139
v. Cash 50
v. Galvin 186, 228, 558, 559
v. La Grande &c. Water Co. 37
v. Pierce 415
v. Smith 690
v. Spitty 460
v. Treat 2
v. Wheeler 446
Curtiss v. Hoyt 646
Curtner v. Lyndon 48
Cushing v. Kenfield 644
Cutter v. Hamlen 583, 584
v. Powell 667

D

Dahm v. Barlow 474a, 475, 476, 497
Dakin v. Allen 30, 655
v. Goddard 654
v. Williams 471
Dalay v. Savage 600, 604, 607
Dale v. Southern R. Co. 642
Daley v. Quick 579
Dalton v. Laudahn 2, 651, 652, 661
Daly v. Wise 126
Damainville v. Mann 458, 669
Damb v. Hoffman 453
Dame v. Dame 713
Danforth v. Sargent 226
v. Stratton 566
Daniels v. Brown 54
v. Cushman 40
v. Edwards 565
v. Pond 488, 573, 627
v. Richardson 669
Dann v. Spurrier 340
Darby v. Anderson 682
Darcey v. Steger 414
Darcy v. Askwith 625, 631
D'Arcy v. Martyn 267, 271
Dare v. Boylston 502
Darling v. Hoban 339
v. Kelly 51, 53
Darmstaetter v. Hoffman 328, 451, 455
D'Arras v. Keyser 387
Dart v. Hercules 726
Dartmouth College v. Clough 445, 446, 458, 650, 659

[*References are to Sections.*]

Dartual v. Morgan 650
Dasher v. Ellis 695
Dassance v. Cold 663
Dater v. Earl 121
Dausch v. Crane 709
Davenant v. Bishop 415
Davenish v. Moffatt 256
Davenport's Case 429
Davenport v. Magoon 632
v. United States 629
David v. Ryan 392, 399
David Stevenson &c. Co. v. Cubertson 83
Davidson v. Crump Mfg. Co. 719
v. Ellmaker 83
v. Wallingford 427
Davies v. Baldwin 242
v. Davies 625
v. Evans 474a
Daviess v. Myers 689
Davis v. Brocklebank 570
v. Burrell 420
v. Cincinnati 411
v. Clancy 640
v. Eyton 466
v. George 577, 675, 676
v. Gillian 635, 636
v. Hemenway 19, 26
v. Jewett 644
v. Lyman 319
v. McGrew 698
v. Morris 456
v. Moss 716, 725
v. Murphy 270
v. Nash 626, 641
v. Pollock 153
v. Schweikert 388
v. Smith 626
v. Taylors Co. 343
v. Thompson 137a, 148, 185, 192, 239, 254, 570
v. Townsend 36
v. Watts 8
v. Wiley 324
v. Williams 20, 682
Davison v. Gent 543
Dawson v. Linton 413
Day v. Essex Co. Bank 323
v. Greenebaum 442
v. McAllister 61
v. Swackhamer 334
Dayton v. Craik 538, 539
v. Van Doozer 493
Dean v. Fall 114
v. Roesler 369
v. Walker 463, 660
Dean &c. v. Pierce 654
Deane v. Caldwell 448
v. Hutchinson 726
Dearlove v. Herrington 561
Deaver v. Randall 214, 564
Deaver v. Rice 53
DeBow v. Colfax 570
Decker v. Adams 303
v. McManus 254
DeClercq v. Barber &c. Co. 415
DeCoursey v. Guarantee Trust &c. Co. 668
Deegan v. Neville 647
De Forest v. Byrne 331, 382, 383, 384
De Givesville v. Legg 417
v. Stolle 273
Deglow v. Meyer 464, 465
Deishler v. Golbaugh 374
De Jarnette v. McDaniel 695
De Lancey v. Ganong 481, 482, 486
Delaney v. Flanagan 242
v. Root 51
Delano v. Montague 207, 227
Delashman v. Berry 339, 340
Deller v. Hofferberth 599
Demarest v. Willard 331, 424, 425, 430, 658
Demartini v. Anderson 122
De Medina v. Polson 200
Demi v. Bossler 569
De Mott v. Hagerman 48
Den v. Alexander 446, 699, 700
v. Ashmore 703
v. Blair 251, 257
v. Craig 502
v. Davis 696
v. Drake 174, 251, 303
v. Hardenbergh 87
v. McKnight 482
v. Murray 700
v. Post 467, 487
v. Snowhill 251, 303
v. Westbrook 29
Dendy v. Nicholl 497
Dengler v. Michelssen 367, 456
Denison v. Wertz 540
Denn v. Barnard 111
v. Rawlins 183
Dennett v. Penobscot &c. Co. 655
Dennis v. Dennis 91
Dennison v. Grove 126, 128, 674
v. Lee 666
v. Read 326
Denny v. Marksbury 371
Denton v. Strickland 9, 51
De Pere Co. v. Reynen 437, 654
De Peyster v. Michael 649
Dermott v. Jones 319, 392
De Ronde v. Olmsted 83
Derrick v. Luddy 699, 701
De Rutte v. Muldrow 387
Desloge v. Pearce 37, 41
Des Moines R. Co. v. Wabash R. Co. 384
Despard v. Walbridge 202, 267, 555, 703

[*References are to Sections.*]

De Taslet v. Crousellat 389
Detroit Savings Bank v. Bellamy 261
Deutsch v. Abeles 607
Devacht v. Newsam 703
Devine v. Lord 221
De Vore v. Kemp 53
Dewey v. Payne 151, 441
De Witt v. Berry 575
v. Harvey 86
v. Pierson 360
De Wolf v. Martin 700
Dexter v. Manley 63, 353, 369
v. Phillips 189, 667
Deyo v. Bleakley 119
Deyve v. Jamison 496
De Young v. Buchanan 227
Diamond v. Harris 675
Dickey v. McCullough 471
Dickinson v. Goodspeed 647
Dickinson Co. v. Fitterling 442
Dickson v. Moffat 5, 11
Diehl v. Lee 548
Dieters v. St. Paul Gaslight Co. 624
Dietz v. Schmidt 453
Diffenderfer v. St. Louis Pub. Schools 343
Digby v. Atkinson 202, 203
Diggle v. Boulden 29
Dike v. Greene 346
Diller v. Roberts 202
Dillon v. Crook 37
Dills v. Stobie 540, 545
Dimock v. Van Bergen 554
Dingley v. Buffum 190, 641, 716
Dircks v. Brant 569
Disbrow v. Jones 164
v. Wilkins 137a
Disdale v. Iles 186
Ditch v. Vollhardt 666
Diver v. Diver 87
Dix v. Atkins 5
v. Marcy 159
Dixon v. Haley 227
v. Niccolls 50, 52, 53, 658, 670
v. Smith 227
Dobbin v. McDonald 553
Dobbins v. Duquid 369, 370
Dobson v. Culpepper 682
Dockham v. Parker 52, 53
Dockrill v. Schenk 271, 420
Dod v. Monger 336
Dodd v. Acklom 538
v. Jones 389
Dodge v. Lambert 382, 384
Dodson v. Hall 118
Doe v. Alexander 484
v. Amey 180, 199
v. Austin 700
v. Bancks 495
v. Barton 689, 697
Doe v. Bateman 446
v. Bell 148, 199, 217
v. Benjamin 144, 146
v. Bevan 446
v. Biggs 340
v. Birch 495
v. Bliss 470, 473, 500
v. Bond 486
v. Brawn 444
v. Brown 421, 697
v. Bucknell 25
v. Burt 101, 110
v. Carter 466
v. Chamberlaine 30
v. Chaplin 269
v. Clarke 466
v. Cooper 480
v. Crago 198
v. David 466
v. Day 15
v. Derry 20
v. Dixon 340
v. Dobell 199
v. Dunbar 272
v. Edwards 703
v. Evans 85
v. Flynn 476
v. Francis 697
v. Fuchan 484
v. Geekie 213
v. Gladwin 500
v. Godwin 486
v. Goldwin 265
v. Gray 272
v. Gregory 225
v. Hawke 466
v. Hazell 253
v. Hogg 486
v. Hull 257
v. Jackson 183
v. Jones 444, 471, 632
v. Lachenour 699
v. Laming 24
v. Lawder 224
v. Lewis 484
v. Lucas 273
v. McInnis 85
v. McKaeg 254
v. Masters 504
v. Matthews 261
v. Miller 30
v. Mills 688
v. Morse 340
v. Murless 2, 442
v. Ongley 272, 273
v. Parker 480
v. Pasquali 480
v. Peck 329
v. Pittman 476
v. Pyke 429
v. Raffan 253

[*References are to Sections.*]

Doe v. Rees 496
v. Reynolds 479, 705
v. Richards 112, 174
v. Ries 142
v. Roberts 95
v. Sandham 404, 675
v. Shewin 471
v. Smith 142
v. Smythe 688
v. Stanion 257
v. Stennett 177, 203, 212
v. Stevens 486
v. Stratton 256
v. Summersett 269
v. Thomas 186, 188, 254
v. Thompson 98
v. Ulph 471
v. Walker 688
v. Walters 265
v. Wandlass 484, 503, 534
v. Watts 496
v. Weller 261
v. Wells 481
v. Whitcomb 653
v. Wiggins 697
v. Williams 2, 257
v. Wood 197
v. Woodbridge 500
v. Worsley 467
Doggett v. Emerson 580
Doherty v. Doe 131, 135
Doidge v. Bowers 197
Dolan v. Scott 180, 182
Dole v. Thurlow 164
Dolittle v. Eddy 19, 563
Dollar v. Roddenberg 570, 572
Dolph v. White 328
Donahoe v. Rich 540
Donaldson v. Wilson 585, 595
Donelson v. Polk 320, 455, 456
Donkersley v. Levy 543
Donnelly v. Thieben 721
Donner v. Ogilvie 620
Donohue v. Chic. &c. Co. 199, 253
v. Kendall 614
Doolan v. McCauley 93
Dooly v. Stringham 632, 638
Dorrance v. Jones 461
v. Scott 87
Dorrell v. Johnson 228
Dorrill v. Stephens 202, 666
Dorsett v. Gray 571, 657
Dorsey v. Moore 635
Doss v. Craig 257
Dossee v. East India Co. 176
Dostal v. McCaddon 716
Doty v. Burdick 474a
v. Gillett 659
v. Gorham 725
v. Heth 52, 53
Dougal v. McCarthy 202
Dougherty v. Chestnutt 98
v. Matthews 329, 471
v. Seymour 122, 360
Douglas v. Fulda 707
v. Herms 499
v. Wilbur 139
Douglass v. Anderson 262, 474a
v. Branch Bank 82, 367
v. Cross 463
v. Geiler 2
v. Murphy 389
v. Parker 516
v. Wiggins 632, 638
Doughty v. Bowman 329
Doupe v. Genin 612
Dove v. Dove 412
Dow v. Bancks 495
Dowd v. Gilchrist 682
Dowling v. Nuebling 598
Downard v. Groff 572
Downing v. Palmateer 666
Doyle v. Dixon 382
v. Gibbs 20, 170
v. Lord 106, 107, 359
v. Union Pac. R. Co. 22, 579
Drake v. Chicago &c. R. Co. 645
v. Wells 37, 38
v. Wilhelm 555
Dresser v. Transportation Co. 436
Drew v. Buck 65
Drey v. Doyle 264
Dreyfus v. Hirt 668, 670
Driggs v. Dwight 140, 369
Drohan v. Drohan 91
Drown v. Smith 636
Drubaker v. Poage 5
Drum v. Harrison 34
Drury v. Drury 92, 95
v. Tremont Imp. Co. 463
Dryden v. Kellogg 717
Dubois v. Kelley 713
Dubuque v. Miller 210, 212
Ducey Lumber Co. v. Lane 12
Dudley v. Folliott 361
v. Sumner 58
Duffit v. Tuhan 690
Duinneen v. Rich 39
Duke v. Harper 5, 180, 474a, 682
Dumn v. Rothermel 156, 180, 197
Dumpor's Case 470
Dunbar v. Bonesteel 65
Duncan v. Beard 14
v. Blake 68
v. Potts 179, 197
Duncklee v. Webber 5, 363
Dunham v. Townsend 29, 30, 224
Dunlap v. Bullard 446
Dunn v. Bagby 373
v. Barton 331, 455
v. Jaffray 86, 320
v. Tillery 34

[*References are to Sections.*]

Dunne v. School Trustees 178
Dunning v. Finson 226
v. Mauzy 538, 540
Dunphy v. Goodlander 169
Dunshee v. Grundy 700
Dupas v. Wassell 121
Durand v. Curtis, 440, 456
Durr v. Chase 66, 98
Duryee v. Turner 661
Dustin v. Cowdry 228, 561
Dutton v. Gerrish 404, 574, 576, 578
Dutton v. Warschauer 459
Dutro v. Wilson 644
Duval v. McLoskey 29
Dwight v. Cutler 30
v. Mudge 448
Dwyer v. Carroll 560
v. Newmann 9
Dyer v. Curtis 121, 124
v. Haley 566
v. Wightman 362, 675, 680
Dyett v. Pendleton 354, 360, 365
Dykers v. Townsend 158, 437

E

Eames v. Prentice 228, 559
Earl v. Hart 127
Earle v. Fiske 164
v. Hale 699
v. Reed 96
East End Imp. Co. v. Sipp 600, 611
East Norway Lake Church v. Froislie 20
East Tennessee &c. R. Co. v. Mayor &c. 412
Eastern R. Co. v. Benedict 158
Eastham v. Anderson 9
v. Crowder 431
Eastman v. Amoskeag Mfg. Co. 604
v. Howard 654
v. Perkins 5, 59
v. Vetter 260, 297
Easton v. Mitchell 112
Eaton v. Jaques 458
v. Lyon 339
v. Whitaker 159, 160, 679
Eberlein v. Abel 60
Ebersol v. Trainor 560
Eberts v. Fisher 389
Eberwine v. Cook 257
Eblin v. Miller 404, 590
Ecke v. Fetzer 329, 377
Ecker v. Chicago &c. R. Co. 442
Eckhart v. Irens 464
Eddy, In re 671
Edelmuth v. McGarren 123
Edgar v. Jewell 51
v. Walker 605
Edge v. Strafford 24, 147
Edgerton v. Page 354, 356, 359, 360, 381
Edmison v. Aslesen 407
v. Lowry 105
Edmonds v. Mounsey 328, 455, 458, 495, 540
Edmonson v. Kite 651, 652, 654
Edmunds v. Electric Light &c. Co. 40
v. Missouri &c. Co. 652
Edmundson v. Preville 216, 281
Edwards v. Clemons 661
v. Davis 87
v. Hale 1, 207, 211, 221, 555
v. New York &c. R. Co. 576, 577, 579, 608, 609
v. Perkins 568
v. Spalding 447, 462
v. Wickwar 421
Egan v. Gordon 122
Eggleston v. New York &c. R. Co. 37
Egler v. Marsden 650
Ehrman v. Mayer 669
Eichart v. Bargas 504
Eichengreen v. Appel 222, 558
Eighmie v. Taylor 131
Eisenhart v. Ordean 392
Ela v. Card 87
v. French 389
Eldred v. Leahy 349
v. Sherman 229
Eldredge v. Bell 465
Elevator Co. v. Brown 348
Elgutter v. Drishaus 548
Elkin v. Moore 666
Elliott v. Aiken 354, 540, 588, 600
v. Gantt 411, 417
v. Lawless 682
v. Round Mountain Coal & Iron Co. 555
v. Smith 704
v. Stone 270
v. Stone City Bank 288
Ellis v. Boston &c. R. Co. 443
v. Bradbury 328, 411, 420
v. Brisacher 496
v. Lord Primate 63
v. Paige 148, 185, 192, 240, 254, 570
v. Welch 321, 361, 362, 393
Ellsworth v. Hale 175
Elmer v. Sand Creek Tp. 661
Elmira v. Dunn 413
Elms v. Randall 476
Elwell v. Shaw 660
Elwes v. Maw 725
Ely v. Ely 392, 398, 588
Emerick v. Tavener 201, 203, 254, 257, 477, 693, 699
Emerson v. Goodwin 85
v. Slater 136
v. Spicer 90

[*References are to Sections.*]

Emerson v. Thompson 653
v. Weeks 1, 3, 13
Emery & Barnett, In re 706
v. Boston Terminal Co. 156, 343
v. Emery 655
v. Fugina 568
v. Hill 464, 468, 469, 473
v. Owings 66
Emmes v. Feeley 189, 362, 667, 680
Emmons v. Scudder 1, 177, 207, 227, 555
Emrich v. Union &c. Co. 71
Engel v. Fitch 369
Engels v. Mitchell 270
England v. Slade 703
English v. Key 421, 658, 670
Engstrom v. Merriam 369
Enyeart v. Carpenter 542
Epps v. Cole 650
Epstein v. Greer 262, 272, 288
Equitable Trust Co. v. Fisher 125
Ernst v. Crosby 121, 122
Erskine v. Adeane 130, 134
v. Plummer 38
Espen v. Hinchliffe 504
Espy v. Fenton 651, 654
Estabrook v. Hughes 486, 718
v. Stevenson 377
Estel v. St. Louis &c. R. Co. 496
Estep v. Estep 373, 404, 588, 600
Esty v. Baker 186, 228, 254, 293, 437, 438
Eten v. Leyster 659
v. Luyster 429, 552
Etheridge v. Osborn 324
Eubank v. May &c. Co. 161
Evans v. Conklin 76
v. Elliot 94
v. Enloe 474a
v. Hastings 255, 310
v. Kingsberry 88
v. McKanna 137, 540
v. Murphy 596
v. Winona Lumber Co. 199
Evers v. Shumaker 136
Evertsen v. Sawyer 703
v. Sutton 563
Evill v. Conwell 557
Exchange Bank v. Rice 158
Eyre v. Jordan 579, 585

F

Fabri v. Bryan 561
Fahnestock v. Faustenauer 310
Failing v. Schenck 6
Fairchild v. Chastelleux 88
Faler v. McRae 171
Falkner v. Beers 688
Fall v. Hazelrigg 29, 152
v. Moore 212
Falley v. Giles 336
Falls v. Carpenter 35
Fanning v. Stimson 447, 452
Farley v. Craig 430, 658
v. McKeegan 197
v. Thompson 421, 670
Farmer v. Pickens 682, 697
v. Rogers 74
Farmers' Bank v. Mutual Asso. Soc. 458, 462
Farmers' &c. Bank v. Kercheval 662
Farnam v. Hokman 262, 263
Farnham v. Monroe 453
Farnum v. Hefner 466
Farr v. Kenyon 471
Farrant v. Thompson 10, 474a, 635
Farrar v. Heinrich 709
Farrer v. Nightingal 435
Farrington v. Kimball 447, 451
Farris v. Houston 702
Farrow v. Bragg 93
v. Edmundson 18, 474a
Farson v. Goodale 270
Farwell v. Easton 383, 471
Faw v. Whittington 35
Faxon, Ex parte 461
Faxon v. Ridge 165
Fay v. Holloran 648
v. Muzzey 573
Faylor v. Brice 486, 504
Feary v. Hamilton 592
Feder v. Van Winkle 712
Felch v. Harriman 568
v. Taylor 79
Felker v. Richardson 544
Fellows v. Gilhuber 479
Felthouse v. Bindley 157
Felton v. Millard 265
Fenly v. Stewart 660
Fenn v. Smart 494
Fennell v. Guffey 328
Fenner v. Duplock 198
Fentiman v. Smith 36
Fenton v. Montgomery 631
Fera v. Child 616
Feret v. Hill 129
Ferguson v. Cornish 340
v. Hoshi 315
v. Jackson 338
Ferris v. American Brewing Co. 382, 384
v. Hoglan 47, 49
Fesmire v. Brock 86
Feyreisen v. Sanchez 60
Field v. Herrick 89, 92, 199, 349, 364, 543
v. Mills 467
v. Schieffelin 90
Fields v. Brown 75, 122, 124, 664
Fifty Associates v. Grace 448
v. Howland 327, 504, 556

[References are to Sections.]

Files v. Magoon 627
Fillebrown v. Hoar 365, 505, 669
Finch v. Moore 207, 270, 297
Findlay v. Smith 632
Finkelstein v. Herson 261, 303
Finley v. Simpson 80
Finney v. Cist 337, 554
v. St. Louis 201
First Cong. &c. Soc. v. Rochester 77, 80, 396
First Nat. Bank v. Security Bank 328
First Nat. Bank, &c. v. Adam 67
Firth v. Rowe 727
Fischer v. Johnson 237
Fish v. Folley 332
Fish v. Thompson 546
Fisher v. Deering 423, 430
v. Goebel 410
v. Lewis 331
v. Milliken 447
v. Provin 87
v. Prowse 604
v. Smith 513
v. Thirkell 588, 595, 600
Fiske v. Framingham Mfg Co. 5, 22
v. Steele 368
Fitch v. Gosser 641
v. Windram 30
v. Woodruff, &c. Works 497
Fitchburg, &c. Co. v. Melven 364, 365, 422, 669
Fitzgerald v. Anderson 714, 716
v. Beebe 650
Fitzherbert v. Shaw 718
Fitts v. Whitney 268
Flagg v. Badger 116
Flanagan v. Pearson 695
Flannery v. Rohrmayer 171, 173
Fleischner v. Citizens' Inv. Co. 337, 603, 605, 611
Fleming v. King 675
Fletcher v. Kelly 726
v. McFarlane 77
Flint v. Sweeney 206
Flood v. Flood 227
v. Yandes 320
Florsheim v. Dullaghan 679
Floyd v. Floyd 6, 251
Fludier v. Lombe 23
Flureau v. Thornhill 140
Flynn v. Hatton 592, 620
v. Trask 392
Fogle v. Chaney 257
Folden v. State 59
Foley v. Addenbrooke 713
v. Southwestern Land Co. 47, 52
v. Wyeth 30, 178
Folkingham v. Croft 464
Folsom v. Cook 66, 79
v. Moore 185
v. Perrin 157
Folts v. Huntley 58, 111, 114, 362
Fontaine v. Schulenburg &c. Co. 420
Foote v. Cincinnati 362
v. Colvin 48, 51
v. Overman 422
Forbes v. Williams 717
Forbush v. Lombard 102, 677
Force v. Callahan 334
Ford v. Campfield 74
v. Cobb 573
Fordyce v. Cole 700
Forest v. Byrne 431
Forrest v. Durnell 434, 445, 446
Forsythe v. Price 569
Fort v. Brown 63
Fort Dearborn Lodge v. Klein 557, 558
Fortier v. Ballance 476
Fortune v. Watkins 35
Foss v. Marr 572
v. Van Driele 706
Foster v. Atwater 462
v. Browning 37
v. Fleishaus 540
v. Kelsey 557
v. Penry 6, 656
v. Peyser 574, 576, 583
Fougera v. Cohn 217
Fowle v. Freeman 138
Fowler v. Black 100
v. Bott 393, 404, 675
v. Fay 463
v. Payne 392, 673, 675
v. Simpson 700
Fox v. Corey 654
v. Harding 497
v. McKee 64, 361
v. McKinney 55
v. Nathans 119, 169, 261
v. Swann 467
Frame v. Badger 50
Francis v. Cockrell 609
v. Sayles 378
Frank v. Brunnemann 384
v. Conradi 593
v. Maguire 462
v. New York &c. R. Co. 442
v. Thomas 664
Franklin v. Brown 574, 577
v. Merida 698
v. Palmer 703
Franklin Land &c. Co. v. Card 239
Fratcher v. Smith 151
Fratt v. Hunt 403
Frauerman v. Lippincott 473
Frazer v. Robinson 682
Frazier v. Caruthers 464, 558
v. Hanlon 557
Frederick v. Callahan 332, 377
Fredericksen v. Singer Mfg. Co. 559
Free v. Stuart 716, 723

[*References are to Sections.*]

Freeland v. Ritz 139, 151
Freeman v. Heath 705
v. Underwood 9
v. Wilson 558
Freer v. Stotenbur 383
Freidenburg v. Jones 605
French v. Fuller 627, 646
v. Gray 164
v. Mayor, &c. 724
Friedhoff v. Smith 155, 180
Friedlander v. Ryder 427, 715, 716, 723, 726
Friedman v. McAdory 139
v. Schwabacher 574, 576
Frisbie v. Price 183
Frischberg v. Hurter 599, 600, 607
Frost v. Earnest 362
v. Kellogg 48
v. Raymond 350
Frout v. Hardin 53
Fry v. Day 126, 129
v. Ford 547
v. Jones 22, 49
v. Patridge 543
Fuhr v. Dean 558
Fuller v. Ruby 358, 365
v. Sweet 474a, 688, 698
v. Swett 189, 667
Fulton v. Stuart 446, 460
Funk v. Kincaid 421, 700
Furlong v. Leary 188, 227, 428
Fusselman v. Worthington 474a

G

Gable v. Wetherholt 688, 689
Gaffield v. Hapgood 725
Gage v. Bates 503
v. Campbell 682
v. Smith 489
Gaines v. Green Pond &c. Co. 637
v. McAdam 549
Gaither v. Hascall-Richards &c. Co. 574, 580
v. Stockbridge 443
Gale v. Nixon 80
v. Oil Run &c. Co. 480, 481
Gallagher v. Bennett 702
v. Button 576, 588, 614
v. Herbert 464
v. Shipley 573
Galloway v. Kerby 267
v. Ogle 688
Galveston City R. Co. v. Gulf Land Co. 675
Gandy v. Jubber 219, 599, 604, 611
Ganley v. Hall 617
Gannett v. Albree 330, 331, 384, 471
Gano v. Vanderveer 148, 349
Ganson v. Baldwin 296
Ganter v. Atkinson 41, 201
Garber v. Gianella 163, 166
Garcia v. Gunn 110
Gardiner v. Corson 324
Gardner v. Board of Commissioners 201, 202, 204
v. Hazleton 132
v. Head 56
v. Keteltas 361, 366, 367
v. Rhodes 587
Gardt v. Brown 69
Garland v. Hilborn 53
Garner v. Byard 447
v. Hannah 411, 414, 420, 491, 503
v. Ullman 152
Garnhart v. Finney 496, 497
Garrett v. Clark 180, 251
Garroutte v. White 445
Garsed v. Turner 140
Garth v. Caldwell 568
v. Cotton 632
Gartside v. Outley 25
Garvin v. Jennerson 29
Gasles v. Johnson 455
Gatch v. Garretson 319
Gates v. Caldwell 350
v. Green 679
v. Hendrick 372
Gault v. Stormont 174
Gay, Ex parte 171
Gay v. Davey 681
v. Ihm 74
Gaylord v. Soragen 121
Gazzolo v. Chambers 361, 366, 367
Geary v. Parker 507
Gedge v. Shoenberger 411
Gee v. Moss 129
v. Young 571
Geer v. Fleming 640
Gelston v. Sigmund 563
Genau v. District of Columbia 628, 629
Genet v. Tallmadge 90
Genin v. Ingersoll 699
George v. Fisk 642
v. Patney 707, 709
Gerber v. Grabel 381
German State Bank v. Herron 237
Gerzebek v. Lord 334
Gett v. McManus 373, 726
Gibbins v. Board &c. 138
Gibbons v. Dayton 59, 253
v. Dillingham 640, 641
Gibbs v. Estey 715
Gibson v. Courthope 461
v. Kirk 650
v. Mullican 445
v. Needham 146
v. Pearsall 121, 123
v. Wells 625
Giddings v. Felker 445, 659

[*References are to Sections.*]

Gifford v. King 289
Gilbert v. Bulkley 541
v. Port 387
Gilchrist v. Gilchrist 393
Giles v. Austin 491
v. Comstock 364
v. Hooper 415
v. O'Toole 140
v. Simonds 37, 38
Gill v. Middleton 596
v. Patton 666
Gillespie v. Beecher 559
Gillett v. Mathews 700
Gilliam v. Moore 706
Gilliland v. Chicago &c. R. Co. 606
Gilloon v. Reilly 614, 619, 621
Gilman v. Hoare 84
v. Milwaukee 201
v. Wills 572
Gilmore v. Wilbur 38
Gilpin v. Adams 65
Gilson v. Boston 157
Gindrat v. Western &c. 477
Gist v. Smith 496
Givens v. Mullinax 702
Gladwell v. Holcomb 195, 218, 252, 307
Glascock v. Robards 29
Glass v. Coleman 607, 718
Glazebrook v. Woodrow 324
Gleason v. Boehm 614, 617, 619
Gleaton v. Gleaton 702
Gleim v. Rise 702
Glen v. Gibson 688
Glenn v. Thompson 269
Glickauf v. Maurer 596, 597
Glover v. Pipe 625
Gluck v. Elkan 499, 500
v. Mayor &c. of Baltimore 362, 588, 676, 680
Gocio v. Day 373
Godard v. South Carolina R. Co. 248, 251, 312
Goddard v. Hall 2
v. South Carolina R. Co. 192
Godfrey v. Black 465
v. Bryan 88
Godley v. Hagerty 613
Goebel v. Hough 358
Goldberg v. Lavinski 152
Goldman v. New York Adv. Co. 40
Goldsberry v. Bishop 33
Goldsboro Storage & Warehouse Co. v. Duke 526
Goldsborough v. Gable 136, 201, 204, 206, 545
Goldsmith v. Wilson 84, 431, 464
Gomber v. Hackett 497
Gomez v. Gomez 111
Goode v. Ruehle 420
v. Webb 119
Goodell v. Lassen 647
Goodenow v. Allen 170
v. Kilby 682
Gooding v. Shea 640
Goodman v. Hannibal &c. R. Co. 713
v. Jones 693
v. Malcolm 474a
Goodrich v. Jones 573
v. Tenney 664
Goodright v. Cator 504
v. Davids 473, 496, 497
v. Straphan 87
Goodsell v. Lawson 682
Goodtitle v. Herbert 183
v. Way 74, 141, 142
v. Woodward 265
Goodwin v. Gilbert 77, 79, 80
v. Goodwin 173
Gordon v. George 455
v. Haywood 87
v. Peltzer 599, 600
Gorton v. Gregory 332
Goshen v. People 561
Goshorn v. Steward 13
Goss &c. Co. v. Oviatt 397, 401
Gossett v. Drydale 569
Gott v. Gandy 588, 600
Gottsberger v. Radway 404
Gould v. Kerr 654
v. Stanton 653
v. Sub-District No. 3 431
v. Thompson 29, 227, 655
Gourlay v. Duke of Somerset 346
Gore v. Stevens 705
Gowen v. Shaw 657
Grabenhorst v. Nicodemus 355
Grace v. Michand 260, 297
Gradle v. Warner 496, 513
Grady v. Iback 655
v. Warrell 93, 181, 296
v. Wolsner 603
Graffam v. Pierce 130, 131, 133
Graham v. Anderson 268, 270
v. Chatoque Bank 89
v. Dempsey 206
v. Moore 688
v. Wade 412
Grand Canal Co. v. Fitzsimons 365
Grand Rapids &c. Co. v. Jarvis 642
v. South Grand Rapids &c. Co. 9
Granger v. Collins 349
v. Parker 682
Grannis v. Clark 321
Grant v. Johnson 324
v. Ramsey 159, 160
v. White 212, 254
Grauel v. Soeller 110
Gravenor v. Woodhouse 198
Graves v. Berdan 102, 474, 570, 677
v. Porter 455
v. Weld 570

[*References are to Sections.*]

Gray v. Blanchard 485
v. Chamberlain 661
v. Clement 455
v. Finch 557
v. Kaufman &c. Co. 550
v. Murray 389
v. Rawson 445
v. Reynolds 48
Graysons v. Richards 541
Greason v. Keteltas 91, 346
Great Northern R. Co. v. Eastern &c. R. Co. 9
Great Pond &c. Co. v. Buzzell 66
Greaves v. Ashlin 412
Greeley v. Stilson 38
Green v. Bell 410
v. Biddle 653
v. Collins 121
v. Dietrich 34, 682
v. Eales 392, 396, 593
v. Hammock 560
v. Kroeger 214, 564
v. Missouri &c. R. Co. 682
v. Morrison 462
v, Robinson 60, 694
Green Bay &c. Co. v. Hewitt 70
Greenaway v. Adams 467
Greene v. Cole 626
v. Hague 616, 623
v. Tallman 369
Greenleaf v. Birth 63
Greenlee v. Greenlee 160
Greeno v. Munson 699
Greenslade v. Tapscott 24
Greenup v. Vernor 654
Greenwood v. Moore 695
v. Strother 152
v. Tyler 87
Greer v. Wilbur 563
Gregor v. Cady 596
Gregory v. Ford 88
v. Lee 96
v. Wilson 492
Greider's Appeal 538
Greiner v. Cota 341
Grescot v. Green 334, 462
Greton v. Smith 180
Grey v. Cuthbertson 329
Griffin v. Colver 140
v. Knisely 139, 141, 267
v. Ransdell 716, 726
Griffith's Case 625
Griffith v. Brackman 25
v. Collins 29, 34
v. Hodges 548
v. Lewis 603, 607, 611
v. Schwenderman 92
Griffiths v. Henderson 322
Grigsby v. Western &c. Tel Co. 141, 162
Grimman v. Legge 538, 540, 667
Griswold v. Cook 47, 53
Grizzard v. Roberts 688
Grizzle v. Pennington 432
Groff v. Levan 572
Grogan v. Broadway &c. Co. 605
Grommes v. St. Paul Trust Co. 447, 501
Groome v. Ogden City Corporation 350
Gross v. Hays 185
Grosvenor v. Henry 170, 289
Groustra v. Bourges 187
Grout v. Townsend 85, 477
Grove v. Youell 357
v. Fox 151
Grubb v. Grubb 474a
Grundin v. Carter 328, 455, 456
Grundy v. Martin 86
Gruner Lumber Co. v. Nelson 378
Grunewald v. Schaales 299
Grute v. Locroft 88
Guay v. Kehoe 373
Gudger v. Barnes 29
Guest v. Opdyke 48, 51
v. Reynolds 381
Guetzkow Bros. Co. v. Andrews 371
Guffey v. Clever 128, 580
Guffy v. Hukill 482, 483
Guild v. Leonard 79
Guinzburg v. Claude 442
Guion v. Anderson 88
Gulf &c. R. Co. v. Cusenberry 646
v. Settegust 434, 644
Gulliver v. Fowler 589
Gunn v. Scovil 200
v. Sinclair 299, 428
Gunsolus v. Lormer 647
Guthrie v. Jones 710
Gutherie v. Stockton 666
Guthman v. Castleberry 587
Guthmann v. Vallery 670
Gutteridge v. Munyard 397
Guvernator v. Kenin 254
Guy v. Barnes 98
Guyon v. Lewis 81
Gwinnell v. Eamer 599
Gwyn v. Wellborn 538
Gwynn v. Jones 555

H

Hackney v. State 46
Hadley v. Berners 328, 329, 330
v. Havens 562
Haeussler v. Holman &c. Co. 459, 555
Haezlip v. Rosenberg 616
Haflick v. Stober 716
Hagar v. Buck 491
Hager v. Wikoff 682
Haines v. Beach 216, 219
v. Downey 126

[*References are to Sections.*]

Halbut v. Forrest City 393
Haley v. Bennett 29
v. Boston Belting Co. 81
v. Hickman 260, 268
Hall v. Beston 404
v. Burgess 199, 540, 543, 667
v. Butler 697
v. Center 387, 454
v. Chaffee 45
v. Dewey 696
v. Durham 569
v. Gould 501
v. Holmes 325
v. Horton 140, 145
v. Marston 462
v. Myers 201, 251
v. Parker 378
v. Ryder 128
v. Spaulding 337, 338
v. Wadsworth 251, 259
Hall &c. Co. v. Wilbur 683
Hallberg v. Brosseau 665
Haller v. Squire 547
Hallett v. Wylie 141, 143, 392, 393, 675
Hallifax v. Chambers 631
Halligan v. Wade 669
Ham v. Hill 420
Hamblett v. Bennett 36, 43
Hamberton v. Stead 146
Hamill v. Jalonick 682
Hamilton v. Ames 98
v. Graham 63
v. Pittock 697
v. Thrall 323
v. Wright 349
Hammers v. Haurick 702
v. Johnson 463
Hammock v. Creekmore 49
Hammon v. Douglas 180, 192, 242
v. Sexton 413
Hammond v. Barton 12, 113
v. Blue 703
v. Dean 5
v. Thompson 186, 189
v. Winchester 41
Hammons v. McClure 702
Hanaw v. Bailey 487
Hanchet v. Whitney 251, 260
Hanchett v. Whitney 268
Hancock v. Boggus 50
v. Yunker 82
Hand v. Osgood 152, 154
v. Suravitz 414
Handrahan v. O'Regan 129
Hanham v. Sherman 540
Hanks v. Price 1
Hanley v. Banks 349, 612
Hanlon v. Thompson 14
Hanrahan v. O'Reilly 725
Hansen v. Dennison 52, 53
Hansen v. Meyer 329, 377
v. Prince 422
v. Ruckman 47
Hanslip v. Padwick 140
Hanson v. Allen 682
v. Barnes 444
v. Cruse 576, 588, 592
v. Johnson 221, 225
v. Stevenson 461
Harbeck v. Sylvester 333
Harcourt v. Wyman 88
Hardin v. Forsythe 699, 703
v. Pulley 3
Harding v. Crethorn 203, 554
v. Seeley 337
Hardison v. Mann 447
Hardware Co. v. McCarty 465
Hardy v. Williams 651
Hare v. Celey 48
v. Groves 405
Hargrave v. King 431, 464, 467, 469
Hargrove v. Miller 63, 110
Harkey v. Cain 725
Harlan v. Harlan 635
v. Lehigh &c. Co. 574
Harloe v. Lambie 135
Harlow v. Lake Superior Iron Co. 67
Harmony Co. v. Rauch 356
Harms v. McCormick 349, 369, 660
Harnett v. Maitland 627
Harpel v. Fall 579
Harper v. Charlesworth 647
Harrington v. Hall 473
v. Watson 102, 675, 677
Harris v. Booker 655
v. Carson 569
v. Corlies 395
v. Coulborn 329
v. Dub 101
v. Frank 431, 460
v. Frink 32
v. Goslin 391, 397, 635
v. Halverson 261, 315
v. Heackman 447, 448, 675
v. Howes 340
v. Knowles 92
v. McDonald 123
v. Ohio Oil Co. 41
v. Taylor 87
Harrisburg School Dist. v. Long 697
Harrison v. Blackburn 15, 458
v. Colton 61
v. Middleton 174, 185, 314
v. Parmer 142
v. Ricks 49, 50, 53
v. Steele 658
Harry v. Harry 555
Hart v. Evans 644
v. Gray 268
v. Hart 111, 637
v. Pratt 553

[*References are to Sections.*]

Hart v. Windsor 574, 576, 578, 588
Harter v. Cristoph 70
Hartford &c. Min. Co. v. Cambria Min. Co. 109
v. Mayor &c. 404
Hartshorn v. Earley 95
Hartung v. Witte 331
Hartzog v. Hubbard 697
Harty v. Harris 201, 210
Harvey v. Briggs 221
v. Brydges 558
v. Gunzberg 201, 202
v. Harvey 629
v. McGrew 445
Harwood v. Hopkins 468
Hastings v. Cruncleton 632, 636
v. Livermore 644
v. Lovejoy 135, 136
v. Wilson 461
Hasty v. Wheeler 632
Hatch v. Bullock 689
v. Hart 52, 54, 55
v. Hatch 541
v. Stamper 588, 681
Hatchell v. Kimbrough 50, 53
Hately v. Myers 201, 204
Hatfield v. Fullerton 669
Hauser v. Romer 180, 192
Hauxhurst v. Lobree 221, 226, 254
Haverstick v. Sipe 106, 381
Hawes v. Favor 486
v. Shaw 705
Hawkins v. Coulthurst 389
v. James 14
v. Sherman 334
Haworth v. Taylor 164
Hawralty v. Warren 387
Hay v. Connelly 19
v. Cumberland 98
v. Palmer 667
Hayden v. Bradley 409
v. Lucas 139
Hayes v. Bickerstaff 361
v. Ferguson 354, 363, 390
v. Lawyer 426
Hayner v. Smith 349, 354, 355, 365
Haynes v. Aldrich 206, 209
v. Union Im. Co. 503
Hays v. Goree 5
Hayward v. Ramge 354, 358, 549
v. Collins 562
Haywood v. Miller 19, 20, 563
v. O'Brien 430
v. Ramge 382
Hazeltine v. Colburn 244, 272, 275, 302
Hazen v. Hoyt 388
Hazlehurst v. Kendrick 329
Hazlett v. Powell 359, 681
Head v. Head 257, 474a
Heal v. Niagara Oil Co. 87
Healy v. Trant 120, 489
Hearn v. Gray 11, 180
Hearne v. Lewis 427, 670
Heath v. Williams 682, 688
Hearilon v. Farmers' Bank 570, 572
Hebron Church v. Adams 566
Hecht v. Dettman 422
v. Ferris 424
v. Heerwagen 667
Heckart v. McKee 703
Hedderich v. Smith 590, 718
Heflin v. Burns 427
Hefling v. Van Zandt 423
Hegeman v. McArthur 669
Heilbron v. King's River &c. Co. 642
v. Last Chance &c. Co. 644
Heims Brew. Co. v. Flannery 501
Heineck v. Grosse 121
Heintze v. Bentley 588, 600
Heiple v. Reinhart 487
Helburn v. Mofford 675, 677
Helena v. Turner 683
Hellams v. Patton 153
Helwig v. Jordan 603
Hemingway v. Preston 125
v. Scales 87
Hemphill v. Flynn 201, 206
Henderson v. Connelly 378
v. Hay 464
v. Virden Coal Co. 77, 111
Hendrick v. Cannon 255
Hendrickson v. Beeson 421, 522
v. Hendrickson 557
Hendrix v. Dickson 328, 411
Henkel v. Murr 621
Henly v. Neal 353
Hennessey v. Hoag 654
Henry v. Chrisinger 417
v. Tupper 491
Henson v. Beckwith 599
Herne v. Benebow 625
Herrell v. Sizeland 251, 257
Herrin v. Libbey 126, 128
Herrington v. Wood 65
Herrmann v. Curiel 661
Hersey v. Chapin 640, 641
Herskell v. Bushnell 51
Herter v. Mullen 208, 209
Hertzberg v. Beisenbach 367, 367a
Hess v. Newcomer 574, 629
v. Weingartner 404
Hessel v. Johnson 659
Hesseltine v. Seavey 540, 543
Hetfield v. Central R. Co. 37
Hetzel v. Barber 703
Hentiz v. Pipher 699
Hewlins v. Shippam 36, 44
Hexter v. Knox 410
Heyer v. Beatty 682
Heywood v. Fulmer 41
Hibbard v. Hurlburt 98, 101, 110

[*References are to Sections.*]

Hicks v. Downing 446
v. Martin 445, 446
v. Parham 675
Higgins v. California &c. Co. 84, 668
v. Halligan 267
v. Turner 428, 689, 690, 702, 704
Hilbourn v. Fogg 647, 685, 700
Hildreth v. Conant 187
Hill v. Barclay 491
v. Bishop 324
v. Boutell 12
v. Coal Valley Min. Co. 1
v. Cutting 38
v. De Rochement 573
v. Dobie 461
v. Gill 378
v. Hill 29, 38
v. Hooper 382
v. Jamieson 382
v. Reno 428, 668
v. Rudd 465
v. Saunders 349
v. Spear 121
v. Taylor 637
v. Wand 473, 496
v. Wilson 136, 676
v. Woodman 65, 74, 404
Hill Trustees 91
Hillhouse v. Jennings 152
Hilliard v. Gas Coal Co. 381
v. New York &c. Co. 681
Hilsenbeck v. Guhring 614, 617
Hilsendegen v. Scheich 270
Hinckley v. Guyon 5
Hines v. Wilcox 582
Hingham v. Sprague 59
Hinsdale v. Humphrey 80, 318
Hintze v. Thomas 334, 456
Hirsch v. Oliver 543
Hisey v. Troutman 568
Hislop v. Moldenhauer 216
Hitchcock v. Bacon 680
Hitner v. Ege 628, 629
Hoag v. Carpenter 542
Hoagland v. Crum 116, 670
v. New York &c. R. Co. 349, 352, 352a, 365
Hobart v. Murray 41
Hobbs v. Batory 76, 201, 202
Hockenbury v. Snyder 702
Hodge v. Giese 163
Hodgeden v. Hubbard 558
Hodgen v. Guttery 34, 689
Hodges v. Fries 369, 370
v. Howard 160
v. Shields 689
Hodgkin v. McVeigh 699
Hodgkins v. Price 272, 502, 517, 562
v. Robson 365
Hodson v. Sharpe 363
Hoerdt v. Hahne 543
Hoffar v. Dement 29, 655
Hoffman v. Clark 33, 563
v. McCollum 169, 210
v. Stigers 87
Hogg v. Reynolds 328, 460
Hogsett v. Ellis 2, 13, 30, 696
Holbrook v. Chamberlin 402
v. Tirrell 541
v. Young 363
Holden v. Purefoy 35
Holden &c. Asso. v. Wann 709
Holder v. Taylor 319
Holdsworth v. Tucker 139
Holford v. Dunnett 628
v. Hatch 445, 467
Holladay v. Chicago Arc Light &c. Co. 36, 37, 40
Holland v. Cole 466
Holley v. Metcalf 202
v. Young 144, 340
Holliday v. Aehle 432
v. Marshall 379, 439
v. Noland 447
Hollingsworth v. Stennett 555
Hollis v. Burns 216
v. Edwards 147
v. Pool 170, 192, 221, 254, 256
Holloway v. Galliac 698
Holly v. Brown 483
v. Holly 422
Holman v. Bonner 695
v. Delin 465
Holmead v. Maddox 123, 124
Holmes v. Blogg 92
v. Seely 90
v. Shepard 346
Holt v. Martin 81, 703
Holton v. Noble 129
Holtzapffel v. Baker 405
Holwin v. De Lin 659
Holzderber v. Forrestal 154
Home &c. Ins. Co. v. Sherman 360
Home L. Ins. Co. v. Pierce 496
Honore v. Murray 666
Honzik v. Delaglise 726
Hood v. Mathis 655
Hook v. Garfield Coal Co. 637
Hooker v. Banner 397
Hooper v. Broderick 384
v. Clark 331
v. Cummings 109, 446
v. Farnsworth 104
Hoopes v. Meyer 361
Hooton v. Holt 6, 254
Hoots v. Graham 558
Hoover &c. Co. v. Pacific Oil Co. 157
Hopkins v. Gilman 346
v. Holland 12
v. McClelland 530
v. Ratliff 18, 373, 590

[References are to Sections.]

Hopping v. Burnam 71
Hopwood v. Barefoot 415
Horgan v. Krumwiede 136
Horner v. Leeds 59
Horsefall v. Mather 628
Horsey v. Horsey 221
Horton v. Miller 673
Horwitz v. Davis 461
Hosford v. Ballard 525
Hosher v. Hestermann 103
Hoskins v. Rhodes 52
Hoslie v. Yokel 155, 568
Hough v. Birge 3, 655
v. Brown 486, 488, 539
Houghton v. Moore 103
House v. Burr 154, 337
v. Jackson 98
v. Metcalf 607
Houston v. Farris 563, 682
v. Laffee 37
Houts v. Showalter 572
Hovenden v. Annesley 474a
Hovey v. Walker 672
How v. Broom 365
v. Norton 650
Howard v. Britton 435
v. Carpenter 14, 83
v. Ellis 431
v. Fessenden 713, 716
v. Hill 34
v. Merriam 428
v. Shaw 29, 30
Howcott v. Collins 666
Howe v. Gregory 12
Howell v. Behler 13, 345
v. Foster 53
v. Howell 182, 190
v. Schenck 569, 570
Howeth v. Anderson 393
Howland v. Coffin 650
v. Leach 324
v. White 423, 431, 513
Hoy v. Gronable 140
v. Holt 392
Hoyle v. Bush 99
Hoyleman v. Kanawha &c. R. Co. 629, 631
Hoyt v. Wilkinson 451
H. R. E. &c. Assn. v. Cochran 216
Hubbard v. Ensign 462
v. Quisenberry 28
v. Russell 604
v. Shaw 635
v. Town 381
Hubble v. Cole 368, 631, 633
Hubner v. Feige 487
Huddell, In re 411, 455
Hudgins v. Wood 50
Hudson v. Jones 95
v. Porter 569
v. Stewart 433
Hudson v. Wheeler 696
Hudson Canal Co. v. Pennsylvania Coal Co. 375
Huff v. Markham 324, 325, 512, 565
v. Nickerson 318
v. Walker 89
v. Watkins 49
Huffman v. McDaniel 60
v. Pollard 28
v. Starks 152, 153
Hug v. Van Burkleo 346
Huggall v. McKean 592, 593
Hughes, Appeal of 89
v. Chatham 20
v. Hood 367
v. Mason 34
v. Robotham 428, 429
v. Vanstone 404, 629
v. Watt 689
v. Windpfennig 341, 343
v. Young 412, 413, 690
Hukill v. Guffey 492
Hulett v. Inlow 87
v. Nugent 77
v. Stockwell 445
Huling v. Roll 553
Hull v. Stogdell 656
v. Vaughan 33, 354
Humble v. Langston 449, 451
Hume Bros. v. Taylor 496
Humiston &c. Co. v. Wheeler 102, 103, 358, 549
Humphreston's Case 95
Humphreville v. Billinger 356
Humphrey v. Wait 576
Humphries v. Humphries 254
v. Smith 234
Hundley v. Moore 465
Hunnewell v. Bangs 388, 486
Hunstock v. Palmer 122
Hunt v. Bailey 202, 267
v. Brown 368
v. Coe 159, 440
v. Comstock 6
v. Cope 354
v. Danforth 329, 332, 377
v. D'Orval 140
v. Dowman 16
v. Gardner 447, 453
v. Hazelton 74
v. Matthews 49
v. Morton 197
v. Thompson 430, 658
Hunter v. Frost 196, 252, 297
v. Giddings 158, 437
v. Jones 570
v. Karcher 262
v. Reiley 364, 674
v. Silvers 337
Huntington v. Knox 158, 660
v. Parkhurst 194, 197

[*References are to Sections.*]

Hurd v. Darling 53
v. Whitsett 215, 219
Hurley v. Lamoreau 651
Huron v. Kerr 160
Hurtt v. Woodland 545
Huston v. Field 662
Hutcheson v. Hodnett 91
v. Jones 538
Hutchings v. Commercial Bank 547
Hutchins v. Dresser 89
v. Hodges 665
v. Weldin 120
Hutchinson v. Bramhall 163
v. Cummings 589, 593
v. Potter 310
v. Ulrich 464
Hutton v. Powers 657
v. Warren 203, 631
Huyser v. Chase 180, 296
Hyatt v. Third Baptist Church 75
v. Wood 33, 558, 647
Hyde v. Skinner 343
Hyman v. Jockey Club &c. Co. 354, 365
Hynes v. Ecker 465

I

Ibbs v. Richardson 207, 227, 554
Iddings v. Nagle 68, 569
Iggulden v. May 67, 343, 462
Illingworth v. Mittenberger 502
Illinois &c. R. Co. v. Baltimore &c. R. Co 565
Inches v. Dickinson 448
Indian &c. Co. v. Sikes 382
Indianapolis v. Kingsbury 87
Indianapolis &c. Union Co. v. Cleveland &c. R. Co. 446, 469, 473
Indianapolis &c. R. Co. v. First Nat. Bank 195, 197, 514, 661
Indianapolis Nat. Gas Co. v. Spaugh 99
Ingalls v. Hobbs 578
Ingraham v. Baldwin 697
Ingwersen v. Rankin 604
Inhabitants &c. v. Jones 713
Inman v. Morris 654
v. Stamp 24, 147
Insurance &c. Co. v. National Bank &c. 338, 339, 340
Insurance Co. of Penn. v. O'Connell 5
International &c. R. Co. v. Ragsdale 646
International Trust Co. v. Schumann 356
v. Shumann 358
Intfen v. Foster 555
Ireland v. Nichols 496
Ireton v. Ireton 694
Irvine v. Scott 238
v. Wood 603
Irving v. Thomas 126, 661
Irwin v. Covode 632
v. Cox 251
Isaacs v. Holland 88
Island Coal Co. v. Combs 483, 488, 496, 503
Ittner v. Robinson 415
Ivay v. Hedges 620
Ives v. Ives 558
v. Van Epps 368
v. Williams 202

J

Jack v. Carneal 19
Jackson v. Aldrich 33, 186
v. Allen 498
v. Anderson 541
v. Andrew 632, 636, 639
v. Ayers 696, 697
v. Babcock 475
v. Barringer 98
v. Bradt 197
v. Brownson 98, 625, 636
v. Bryan 175
v. Bull 84
v. Cairns 88
v. Collins 504
v. Corliss 466
v. Crysler 496
v. Davis 703
v. Delacroix 141, 143, 146
v. Eddy 360
v. Farmer 338, 558, 559
v. Groat 454
v. Harper 479, 688
v. Harrison 420, 467, 503
v. Harsen 225, 479
v. Hughes 251, 431
v. Kingsley 29
v. Kisselbrack 142, 146, 481
v. Livingston 254
v. McConnell 88
v. McLeod 203
v. Mancius 477, 479
v. Mowry 2
v. Murray 84
v. Odell 580
v. Page 541
v. Patterson 136
v. Perrine 99
v. Pesked 626, 641
v. Robinson 422
v. Rogers 176
v. Rowland 703
v. Salmon 203, 251
v. Schoonmaker 60
v. Silvernail 466, 467
v. Spear 688, 702

[*References are to Sections.*]

Jackson v. Stiles 688
v. Stone 653
v. Thomas 474a
v. Tibbets 633
v. Titus 438
v. Van Hoesen 142
v. Vincent 474a, 478
v. Vosburgh 11
v. Wheeler 474a
v. Wilkinson 98
v. Wilsey 197
Jackson &c. Co. v. Philadelphia &c. R. Co. 37
Jacksonville &c. R. Co. v. Hooper 389
Jacques v. Short 456
Jaffe v. Harteau 576, 579, 585
Jaffray v. Greenbaum 135
Jamaica v. Hart 533, 683
James v. Belding 682
v. Cochrane 319
v. Dean 184
v. Kibler 17, 337
v. Landon 688
v. Patterson 30
v. Russell 682
Jamesin v. Thomen 414
Janes v. Jenkins 381
Janney v. Goehringer 379
January v. Stephenson 8
Jaques v. Gould 111, 393
Jarboe v. Mulry 100
J. B. Alfree Mfg. Co. v. Henry 1
Jefcoat v. Gunter 369
Jeffers v. Easton 435
Jefferson v. Jameson &c. Co. 597
v. Jefferson 626
Jeffryes v. Evans 134
Jellett v. Rhode 152
Jemison v. McDaniel 675
Jenkins v. Eldredge 142, 143, 146
v. Green 63
v. Jenkins 268, 503, 514
v. Jenkins Univ. 70
Jenks v. Edwards 367
Jenner v. Morgan 667
Jennings v. Bond 358, 363
v. McComb 152
v. Sparkman 165
v. Van Schaick 618
Jersey City &c. Co. v. United Gas Imp. Co. 415
Jessen v. Sweigert 601, 607
Jewell v. Harding 655
v. Woodman 568
Jewett v. Berry 503
Jochen v. Tibbells 348, 694
John Morris Co. v. Southworth 628, 679
Johns v. McDaniel 257, 298
v. Whitley 569
Johnson v. Albertson 217
Johnson v. Branch 159, 160
v. Carter 220
v. Chely 126
v. Church Wardens 334
v. Collins 587, 594, 596
v. Dixon 598, 628
v. Donaldson 222, 223, 225, 230, 311
v. Doss 422
v. Douglass 496
v. Foreman 210, 212
v. Gurley 482, 487, 495
v. Hannahan 558
v. Hauser 31, 563
v. Hoffman 47, 54, 645
v. Johnson 197, 247, 428
v. Kellogg 98
v. King 322
v. Knapp 462
v. Lewis 604
v. May 650
v. Muzzy 80, 670
v. Oppenheim 681
v. Phœnix &c. Ins. Co. 71, 141
v. Reading 440
v. Shank 289
v. Sherman 456, 459
v. Stewart 295
v. Tacoma &c. Co. 579
v. Wilkinson 43
v. Wilson 128
Johnston v. Bates 456
v. Glancy 160
v. Haines 72
v. Hargrove 491, 503, 534
v. Jones 87
v. Smith 422
Johnstone v. Huddlestone 251
Jolly v. Single 22, 497
Jonas v. Noel 369
Jones v. Adams 656
v. Barnes 447
v. Brewer 89
v. Carter 495, 501
v. Dore 699
v. Durrer 53, 500
v. Freidenberg 605
v. Hill 572
v. Hoard 129, 373
v. Jones 31, 32, 464
v. Kroll 336
v. Leeman 640
v. Marsh 272, 273
v. Millsaps 612
v. Neale 541
v. O'Farrel 378
v. Parker 328, 447, 454
v. Reed 503, 523
v. Reynolds 146
v. Richardson 494
v. Rigby 421

[*References are to Sections.*]

Jones v. Roberts 138
v. Rushmore 539
v. Shay 179
v. Shears 207, 208
v. Shufflin 726
v. Smith 658
v. Springfield &c. Co. 675
v. Temple 178, 183, 314
v. Thomas 572
v. Willis 216, 253
Jordan v. Davis 83
v. Katz 3, 693
v. Lindsay 56
v. Pollock 541
v. Staples 63
v. Woodward 642
Joslin v. Ervein 444
Josslyn v. McCabe 716
Jouitt v. Lewis 451
Jourdain v. Wilson 331
Jourgensen v. Fraitel 142
Journeay v. Brackley 455, 461
Joy v. McKay 186, 280
Joyce v. Martin 603, 604, 608
Judd v. Arnold 157
v. Fairs 197
Judik v. Crane 542
Junction R. Co. v. Harris 87
Juneman v. Franklin 688
Jungerman v. Bovee 718
Justice v. Lowe 490, 491

K

Kabley v. Worcester Gas L. Co. 5, 77, 79, 141, 143, 144
Kabus v. Frost 592
Kahn v. Love 404, 601
Kalis v. Shattuck 606, 607
Kamerick v. Castleman 47, 52, 54
Kamphouse v. Gaffner 37
Kampinsky v. Halls 594
Kane v. Mink 363
Kankakee &c. R. Co. v. Horan 197
Kansas Inv. Co. v. Carter 357
Kash v. Huncheon 375
Kaufman v. Clark 404
v. Cook 176, 229
Kean v. Kolkschneider 367
Keates v. Cadogan 579, 580, 612
Keating v. Springer 354, 355, 356, 381
Keaton v. Thomasson 3
Keats v. Hugo 106, 381
Keay v. Goodwin 227, 228, 422, 668
Keech v. Hall 254
Keefe v. Furlong 713
Keegan v. Kinnaire 132, 201, 205
Keeler v. Davis 497
v. Eastman 636
v. Green 383
Keeley Brewing Co. v. Mason 438, 439
Keeling v. Kuhn 42
Kehr v. Hall 683
Keiper v. Klein 381
Kellam v. Janson 228, 559
Kellenberger v. Foresman 588, 628, 629, 679
Keller v. Klopfer 87
Kelley v. Weston 53
Kellogg v. Groves 289, 555
v. Kellogg 29
v. King 63, 642
v. Robinson 331
Kellum v. Berkshire L. Ins. Co. 195, 421, 427
Kelly v. Bowerman 430
v. Chicago &c. R. Co. 132, 375
v. Clancy 563
v. Davis 370, 371
v. Dutch Church 361, 369
v. Waite 148, 187, 192
Kelsey v. Ward 673
Kelso v. Crilly 205
Kemp v. Bird 382
v. Derrett 261
Kempner v. Heidenheimer 140
Kenada v. Gardner 29
Kendall v. Carland 81, 430, 658, 661
v. Hill 391
v. Moore 555, 662
Kendall &c. Co. v. Bain 73
Kennedy v. Lee 138
Kenney v. Doe 703
v. Parks 438
v. Sweeney 221, 225
v. Wentworth 116
Kenny v. Barns 616
v. Collier 369, 371
Kent v. Kent 154
v. Waite 104
Kentucky &c. Co. v. Commonwealth 486
Kentucky &c. R. Co. v. Higgins 645
Kepley v. Scully 699, 705
Kerley v. Mayer 383
Kern v. Myle 579, 584
Kernochen v. Wilkens 180, 199
Kerr v. Clark 197
v. Day 387, 454
v. Kingsbury 720
v. Merchants' Exch. Co. 102, 474, 677
v. Simmons 554
Kerrains v. People 20
Kershaw v. Kershaw 77
Kerwhacker v. Cleveland &c. R. Co. 307
Ketsy's Case 92
Kew v. Trainor 326, 431, 464, 472, 487

[*References are to Sections.*]

Keyes v. Dearborn 60
Keys v. Forrest 703
Keyse v. Powell 110
Kidd v. Dennison 632, 635, 636
Kidder v. Hunt 159
Kiernan v. Germain 540, 673
v. Linnehan 30
v. Sanders 682
v. Terry 126, 682, 688, 702
Kiersted v. Orange &c. R. Co. 81, 652, 658, 660
Kiester v. Miller 538
Kieth v. Paulk 651
Kile v. Giebner 725
Kilpatrick v. Harper 55
Kimball v. Cross 5, 340
v. Doggett 672, 673
v. Grand Lodge &c. 361
v. Hilton 640
v. Pike 422
v. Rowland 473, 517
v. Sumner 626
Kimpton v. Walker 321, 447
King v. Anderson 670
v. Bird 363
v. Connolly 280
v. Crocheron 541
v. Davies 501
v. Edwards 319
v. Foscue 570
v. Housatonic R. Co. 421, 422
v. Lawson 190
v. Miller 636
v. Reynolds 367, 367a
v. Stock 19
v. Whittle 571
v. Wilson 343
v. Woodruff 199, 200
Kingdon v. Nottle 332
Kingsbury v. Powers 416
v. Westfall 676
Kingsley v. Siebrecht 151, 156, 158, 437, 440
Kingston v. Preston 324
Kinlyside v. Thornton 626
Kinnersley v. Orpe 467
Kinney v. Harrett 89
v. Watts 351
Kinsey v. Minnick 549
Kinsley v. Ames 223, 230, 293
Kinsman v. Greene 85
Kirby v. Boylston &c. Asso. 601, 602, 618
Kirchgassner v. Rodick 1, 40
Kirk v. Mattier 41
Kirkpatrick v. Peshine 384
Kirtland v. Pounsett 29
Kirton v. Elliott 92
Kising v. Stannard 228
Kistler v. Wilson 354, 356, 359
Kitchen v. Cape Girardeau &c. R. Co. 127
Kitchen v. Smith 412, 413
Kittle v. St. John 71, 164, 538
Kleespies v. McKenzie 201, 215
Klie v. Von Broock 632, 633, 638
Kline v. Jacobs 373
v. Johnston 682
v. McLain 404, 591, 613
Kling v. Dress 391
Klingle v. Ritter 564
Knapp v. Anderson 673
Knecken v. Voltz 319
Knefel v. Daly 682
Knerr v. Bradley 34
Knight v. Cox 697
v. Indiana Coal Co. 41, 174
v. Old 659
v. Orchard 486
Knipe v. Palmer 75
Knoeppel v. Kings County F. Ins. Co. 108
Knorr v. Raymond 426
Knotsford v. Gardiner 171
Knowles v. Hull 1, 348
v. Maynard 671
v. Murphy 563, 702
v. Steele 140, 369
Knox v. Marshall 54
Koeber v. Somers 351
Koehler v. Scheider 261
Koeleg v. Phelps 486
Koenig v. Miller Bros. &c. Co. 543
Kohne v. White 410
Kolasky v. Michels 345
Kollock v. Scribner 337, 338, 343
Koplitz v. Gustavus 148, 180
Kornegay v. Collier 422
Kortjohn v. Seimers 127
Kraft v. Welch 380, 384
Kramer v. Cook 154, 337, 340, 405
Krapp v. Crawford 319
Krause v. Kraus 435
Kreiss v. Seligman 121
Krider v. Ramsay 429, 431, 445, 446, 659
Krueger v. Ferrant 576, 612
Krug v. Davis 2
Kugel v. Painter 114
Kuhn v. Kuhn 262
v. Smith 177, 255
Kunzie v. Wixom 257
Kurrus v. Seibert 561
Kutter v. Smith 375, 376, 716
Kyle v. Proctor 554
v. Stocks 476
Kyte v. Keller 289, 568

L

Lacey v. Newcomb 9
Lachman v. Deisch 641

[*References are to Sections.*]

Ladd v. Brown 153
v. Hawkes 373
v. Riggle 11, 257, 474a
v. Robinson 55
v. Shattock 635
v. Smith 548
Ladner v. Balsley 129
Lady Anne Fry's Case 327
La Farge v. Halsey 364
Laffan v. Naglee 454
Laguerenne v. Dougherty 202
Laird v. Boyle 343
v. Mantonya 447, 448
Lake v. Campbell 71, 74, 157, 171
Lake Erie & W. R. Co. v. Kennedy 37, 42
Lakin v. Roberts 2
Lamar v. McNamee 540, 543
Lamb v. Brewster 413
Lambert v. Borden 201
Lamberton v. Stouffer 656
Lambeth v. Warner 636
Lametti v. Anderson 332, 377
Lamme v. Dodson 696
Lamparter v. Wallbaum 596
Lampman v. Milks 381
Lamson v. Clarkson 703
Lancashire v. Mason 422, 703
Land v. Fitzgerald 579
Landon v. Townshend 190
Lane v. King 572
v. Nelson 175
v. Ruhl 270
v. State 56
Lang v. Young 474
Langan v. Schlief 268
Langford v. Selmes 446
Langley v. Ross 487
Lankford v. Green 650, 651
Lanpher v. Glenn 102, 675, 681
Lansing v. Pine 428
v. Van Alstyne 460
Lantman v. Miller 555
Lanyon v. Woodward 53
Lapham v. Norton 29, 655
La Point v. Scott 631
Larkin v. Avery 15, 197, 199, 232, 251, 282, 561
Larned v. Clarke 30
v. Hudson 175
Larue v. Farren Hotel Co. 600
Lask v. Ames 186
Lassell v. Reed 573
Lathrop v. Standard Oil Co. 2
Latta v. Weiss 448, 449
Lattimore v. Harsen 135, 136
Laughran v. Smith 75, 199, 217
Laurence v. Fox 462
Lausman v. Drahos 689
Law v. Haley 108
Lawrence v. Davey 136
Lawrence v. Dole 323
v. French 669
v. Hasbrouck 75, 217
v. Lawrence 541
Lawrenson v. Butler 387
Lawry v. Lawry 626, 641
Lawton v. Salmon 710
Lay v. Bennett 360
Layman v. Throp 255
Lea v. Hernandez 112, 170
Leach v. Goode 412
Leadbetter v. Roth 360
Leader v. Homewood 716
Leadlay v. McRoberts 157
League v. Snyder 695
Leahy v. Lubman 261
Learoyd v. Godfrey 599
Leary v. Meier 288, 514
Leavitt v. Fletcher 392, 396, 405, 408, 593, 600
v. Leavitt 197
Ledoux v. Jones 549
Ledsinger v. Burke 550
Leduke v. Barnett 468
Lee v. Lee 15, 62
v. McLaughlin 599, 602
v. Payne 445, 446, 682
v. Risdon 710, 716
Leebrick v. Stahle 164
Leeds v. Cheetham 405, 676
L'Hussier v. Zallee 367, 563
Legh v. Heald 63
Le Gierse v. Green 447, 455
Lehman v. Nolting 157
Lehow v. Simonton 462
Leiby v. Wilson 378
Leick v. Tritz 369
Leiferman v. Osten 102
Leigh v. Shaw 63
Leighton v. Ricker 414
Leishman v. White 364, 365
Leitch v. Boyington 28, 426, 668
Leiter v. Pike 79
Leland v. Sprague 48, 53
Leman v. Best 718
Lemar v. Miles 725
Lembeck &c. Co. v. Kelly 163
Lemington v. Stevens 71, 713
Lenderking v. Rosenthal 138
Leonard v. Armstrong 576
v. Burgess 430
v. Kingman 2
v. Storer 599, 602
v. White 107
Leopold v. Judson 363
Leppla v. Mackey 330
Lerch v. Sioux City Times Co. 132
Lerned v. Johns 158, 437
Lesley v. Randolph 261, 310
Leslie v. Pounds 596
v. Smith 373

[*References are to Sections.*]

Levering v. Langley 540
Levett v. Bickford 495, 496
Levey v. Dyess 393
Levitzky v. Canning 354, 357, 370
Lewes v. Ridge 462
Lewis v. Campau 125
v. Chisholm 323, 324, 410
v. Clark 129
v. Effinger 375
v. Fish 539
v. Havens 13
v. Hughes 504, 679
v. Jones 573
v. Lyman 53, 573
v. McNatt 566
v. Ocean Nav. &c. Co. 718
v. Payn 62, 129, 365
v. Perry 202
v. Ringo 257
v. St. Louis 521
v. Sheldon 431
Leydecker v. Brintnall 618
Libbey v. Staples 78, 318
v. Tolford 404, 588, 590
Liebe v. Nicolai 661
Lieber v. Blanc 593
Lieberthal v. Montgomery 675, 677
Liebeschutz v. Moore 428
Lieferman v. Osten 356
Lienow v. Ritchie 627, 641
Liford's Case 653
Lightbody v. Truelsen 22
Lightfoot v. West 402
Linahan v. Barr 713, 727
Lincoln Trust Co. v. Nathan 392, 405
Linden v. Hepburn 490
v. Hooper 654
Lindenbower v. Bentley 640
Lindon v. Hooper 651
Lindley v. Dakin 421, 426, 427
v. Miller 381
Lindsey v. Leighton 84, 496, 597, 614
Lindsley v. Schnaider Brew. Co. 462
Line v. Stephenson 350
Linn v. Ross 675
Linton v. Hart 668
Lipsett v. Perdue 95
Lister v. Lane 397
Lithgow v. Moody 255
Little v. Dyer 128
v. Libby 2
v. McAdaras 596
v. Palister 190, 640
v. Pearson 29
Little Rock &c. Co. v. Shall 490, 491
Little Valeria &c. Co. v. Lambert 715
Littleton v. Clayton 688
Littleton v. Wynn 1, 2
Livermore v. Eddy 548
Livingston v. L'Engle 364, 673
v. Reynolds 635
v. Stickles 464, 467
v. Sulzer 725
v. Tanner 29, 225, 227, 229
v. Tompkins 490, 491
Lloyd v. Cozens 112, 310, 446
v. Rosbee 564
Loach v. Farnum 135
Lobdell v. Keene 559
v. Mason 563
Lober v. Bangs 324
Lock v. Furze 15, 369
Locke v. Coleman 163
v. Frasher 693, 702
v. Homer 463
Lockett v. Fort Worth &c. R. Co. 642
Lockwood v. Lockwood 180, 195
v. Lunsford 41
v. Thunder Bay &c. Co. 2
Lodge v. White 447, 452
Loeser v. Liebmann 724
Lofland v. Emory 234, 661
Loft v. Dennis 676
Loftus' Case 88
Logan v. Anderson 543
v. Herron 251, 310
Loker v. Damon 410
Lombard v. Kinzie 109
London v. Warfield 625
London &c. Bank v. Curtis 218, 249
London &c. R. Co. v. South Eastern R. Co. 9
Long v. Bolen Coal Co. 269
v. Bonner 650, 651
v. Fitzsimmons 404, 628, 629
v. Gieriet 673
v. Seavers 656
v. Stafford 340, 342
Longfellow v. Longfellow 11, 555, 682, 688
Longshore v. Jack 129
Longworth v. Wolfinger 689
Loomis v. Wilbur 635
Looney v. McLean 576, 614, 620
Lord v. Brookfield 674
v. Walker 114
Loring v. Melendy 171
v. Taylor 11
Lorman v. Benson 9
Lorring v. Willis 563
Losee v. Buchanan 624
Lothrop v. Thayer 625, 627
Loudan v. Warfield 635, 638
Louer v. Hummel 700
Loughran v. Ross 716, 718, 721
Lounsbery v. Snyder 180, 354
Love v. Edmonston 32, 182, 682

[*References are to Sections.*]

Love v. Howard 415
v. Law 555, 705
Lovering v. Lovering 321, 349
Lovett v. United States 398
Low v. Elwell 228, 558, 559
v. Settle 63, 110
Lowe v. Brown 346
v. Miller 54
v. Ross 17
Lowell v. Spaulding 595, 600
v. Strahan 108, 468
Lowenberg v. Bernd 713
Lowman v. Sheets 131, 152, 153
Lowrey v. Reef 670
Lowry v. Tew 32
L. St. L. & T. R. Co. v. Barrett 645
Lucas v. Brooks 693, 696
v. Comerford 458
v. Coulter 373
v. McCann 418
Lucier v. Marsales 227
Lucy v. Wilkins 548
Lufkin v. Preston 430
v. Zane 604, 605, 607
Lundin v. Schoeffel 491, 492
Lunn v. Gage 324, 673
Lunsford v. LaMotte Lead Co. 41
v. Turner 706
Lush v. Druse 98, 99, 666
Luttrell v. Caruthers 4
v. Knox County 412
Lyde v. Russell 716, 718
Lydiard v. Chute 71
Lyebrook v. Hall 221
Lyles v. Murphy 689
Lynch v. Baldwin 354, 355, 381
v. Ortleib 574, 575, 576
v. Sauer 126
Lynde v. Hough 467, 471
Lynn's Appeal 636, 637
Lyon v. Cunningham 30
v. King 382
v. McMaster 476
v. Reed 539, 544
v. Washburn 697
Lyons v. Osborn 340

M

Mabry v. Harp 431, 432, 465, 567
McAdoo v. Callum 343, 347
McAlester v. Landers 354, 673
McAlpin v. Powell 588, 589
McAnany v. Tickell 413
McBee v. Sampson 431
McBurney v. McIntyre 107, 433
M'Callough v. Irvine 632
McCann v. Rathbone 190
McCanna v. Johnston 203
McCardell v. Miller 362
v. Williams 164, 410, 421, 426
McCarger v. Rood 159, 160
McCarthy v. Fagin 580, 581, 614
v. Trumacher 720
v. Yale 280
v. York Co. Sav. Bank 604, 616
McCartney v. Alderson 563
v. Auer 476, 705
McCarty v. Ely 128
v. Humphrey 414
McClain v. Abshire 112, 113
Maclary v. Turner 547
Maclean v. Dunn 157
McClelan v. Gaston 561
McCleland v. Rush 342
v. Wiggins 289
McClenahan v. Gwynn 435
McClintock v. Joyner 431
McCloskey v. Doherty 640, 641
v. Miller 654
McCloud v. Jaggers 530
McCloury v. Croghan 140
McClung v. Echols 254, 316
v. Ross 657
McClure v. McClure 255
McCombs v. Wallace 29, 30, 33
McConnell v. Bowdry 697
v. East Point Land Co. 433
v. Lemley 579
McCorkle v. Yarrell 563
McCormick v. Cheevers 131
v. Herndon 29
v. Milburn & Stoddard Co. 358
v. Stephany 383
v. Stowell 471
McCoull v. Herzberg 128, 576, 674
McCoy v. Bateman 705
v. Oldham 83, 410
McCracken v. Hall 711, 716
McCraw v. Old North State Ins. Co. 496
McCrea v. Marsh 44
McCreery v. Day 135
McCroy v. Toney 152
McCue v. Whitwell 378
M'Cullough v. Irvine 636
McCurdy v. Canning 87
McDaniel v. Callan 638
McDevitt v. Sullivan 126
McDill v. McDill 320
McDonald v. Hanlon 563
v. May 659
v. Tree 123
McDonough v. Gilman 603, 604
v. Starbird 219, 718
McDougald v. Graham 35
McDowell v. Hendrix 455
v. Hyman 11, 23, 349, 622
v. Simpson 251
v. Sutlive 705
McDuff v. Beauchamp 87
McFadden v. McCann 347

[*References are to Sections.*]

McFadin v. Rippey 354, 669
McFarlan v. Watson 445
McFarland v. Heim 457
McFarlane v. Pierson 410
v. Williams 77, 137a, 661
McGee v. Gibson 21
McGinley v. Alliance Trust Co. 614
McGinn v. French 594
McGinnis v. Genss 315
McGlauflin v. Holman 70, 71
McGlynn v. Brock 553
v. Moore 119, 372, 497, 500
McGrath v. Boston 5, 146
McGregor v. Brown 635
v. Rawle 168, 336
McGuffie v. Carter 703
McGuire v. Wright 436
Machen v. Hooper 629
McHenry v. Marr 392
McIntosh v. Hodges 197
v. Rector &c. 374
McIntyre v. Kingston 65
Mack v. Patchin 349, 365, 368, 369
Mackay v. Bloodgood 320
McKee v. Angelrodt 458
MacKellar v. Sigler 548
McKenzie v. Cheetham 585, 617
v. Harrison 135
v. Hatton 641
v. Lexington 84, 552
McKeon v. Cutter 574, 576, 589, 614
McKesson v. Jones 705
Mackey v. Mackey 138
v. Potter 152
McKie v. Anderson 694
McKildoe v. Darracott 471, 497, 500
Mackin v. Haven 688, 701
McKinley v. Chicago &c. R. Co. 15
McKinney v. Peck 218
v. Reader 441, 538
Mackintosh v. Trotter 710, 721
McKissack v. Bullington 6
McKissick v. Ashby 255, 688
McLaughlin v. Dunn 652
v. Kennedy 51
McLean v. Fiske &c. Co. 588, 589, 593
v. Nicol 133, 575
v. Rockey 171
v. Spratt 260, 262, 268, 427
McLellan v. Whitney 52, 53
McLendon v. West Point &c. R. Co. 2
McLennan v. Grant 1, 99, 437
McLeran v. Benton 190, 226, 227, 280
McMahan v. Jacoway 428, 429
McMann v. Autenreith 681
McManus v. Fair Shoe &c. Co. 411, 417
McMath v. Levy 728
McMichael v. Craig 477, 479
McMillan v. Love 25
v. Robbins 637, 639, 690
v. Solomon 102, 677
McMurphy v. Minot 458, 503
McMurtry v. Adams 707
McNairy v. Hicks 361, 640
McNamee v. Relf 705
McNeal v. Rider 47, 54
McNeeley v. Hart 46
McNeil v. Ames 444, 496
v. Kendall 446
v. Tenth Nat. Bank 473
McNichol v. Eaton 636
McPherson v. Atlantic &c. R. Co. 413
McQuade v. Emmons 20
McQuesney v. Hiester 666
McQuesten v. Morgan 503, 504, 523
McSloy v. Ryan 272
Mactier v. Osborn 491, 492
McVicker v. Dennison 374
Maddon v. White 95, 97
Maddox v. White 383, 384, 638
Madigan v. McCarthy 715
Madox v. Humphries 358
Magaw v. Lambert 675, 676
Magee v. Fisher 76
Maggort v. Hansbarger 393
Magruder v. Peter 89
Magwire v. Tyler 471
Mahana v. Blunt 160
Maher v. Hanley Brewing Co. 266
v. James Hanley &c. Co. 174
Mahoney v. Farley 6
Maidstone v. Stevens 533
Main v. Davis 669
v. Feathers 449
Maine v. Cumston 318
Makin v. Watkinson 409, 592, 593
Malley v. Thalheimer 384
Mallory v. Stodder 541
Maltman v. Williamson 666
Manchester &c. Co. v. Carr 409, 578
Mann v. Brewer 652
v. Fuller 596
v. Nunn 133
Manning v. Brown 221,228, 324
v. Franklin 159, 160
Mansel v. Norton 332
Manwaring v. Jenison 715
Marburg v. Cole 87
Marchand v. York 357
Mark v. North 171
Markland v. Crump 658
Marks v. Ryan 718
Marle v. Flake 430
Marley v. Rodgers 421
v. Wheelwright 593
Marlow v. Wiggins 75
Marney v. Byrd 421

[*References are to Sections.*]

Marquart v. LaFarge 219
Marr v. Ray 159, 217, 651
Marsh v. Brace 447, 452
v. Bristol 486
v. Butterworth 363
v. McNider 109
Marshall v. Cohen 616
Marsters v. Cling 186
Martens v. O'Connor 86
Martin v. Black 461
v. Blanchett 5, 161
v. Davis 142
v. Hamersky 202
v. Knapp 2, 237
v. Martin 430, 670
v. Ohio River R. Co. 535
v. O'Conner 446
v. Rector 525
v. Richards 584
v. Splivalo 280
v. Stearns 548, 550
Martindale v. Price 438
Martineau v. Steele 670
Martinez v. Thompson 397
Marwedel v. Cook 619
Marys v. Anderson 119
Mason v. Breslin 442
v. Delancy 29, 30, 563
v. Fenn 725
v. Hawes 561
v. Howes 592
v. Kempf 255
v. Moyers 569
v. Smith 328, 411, 447, 451
v. Stiles 626
v. Wierengo 206, 208
Massachusetts Gen. Hospital v. Somerville 20
Massan v. French 122
Massie v. State Nat. Bank 140
Mast v. Pearce 575
Masury v. Southworth 328, 335, 389
Mathewson v. Thompson 311
Mathinet v. Giddings 717
Matthews' Appeal 704
Matthews v. Matthews 19, 563
v. Sawell 543
v. Whitaker 434
Mattis v. Robinson 688, 689
Mattler v. Strangmeier 588, 589
Mattox v. Helm 701
v. Hightshue 29
Maughlin v. Perry 387
Maule v. Ashmead 349, 368
v. Weaver 318
Maverick v. Jones 705
v. Lewis 59
Maxwell v. Jones 642
v. Todd 483, 488
May v. Calder 89
v. Gillis 396
May v. Rice 274
Mayberry v. Johnson 57, 74
Mayer v. Lawrence 153
v. Morehead 676
v. Waters 121
Mayhew v. Hardesty 164, 456, 458
Maynard v. Maynard 456
Mayo v. Fletcher 223
Mayor v. Morehead 675
Mayor &c., In re 415
Mayor &c. v. Bridge Co. 694
v. Brooklyn &c. Ins. Co. 726
v. Cashman 415
v. Huntington 661
v. Ketcham 667
v. Mabie 351, 354, 365, 368
v. Pattison 431
v. Rice 343
v. Sonneborn 683
v. Whitt 706
Mays v. Dwight 702
Maywood v. Logan 674
Mead v. Pollock 20
Meader v. Stone 558
Meadow v. Hopkins 30
Meany v. Abbott 597
Meath v. Watson 473
Medary v. Cathers 404
Medinah Temple Co. v. Currey 457, 461, 464, 466, 473
Meeker v. Spalsbury 354, 539
Meeks v. Bowerman 361, 576
Meetze v. Charlotte &c. R. Co. 45
Meier v. Thiemann 190, 226
Melchoir v. McCarty 61
Melhop v. Meinhart 112
Mellen v. Morrill 585, 599
v. Whipple 462
Melms v. Pabst Brew. Co. 625, 633, 636
Mendel v. Fink 616
v. Hall 209, 221, 238
Menger v. Ward 434, 454
Meni v. Rathbone 420
Meno v. Hoeffel 229, 230
Menough's Appeal 661
Merchants' Bank &c. v. Clavin 699
Merchants' Ins. Co. v. Mazange 389, 444, 454
Mercil v. Broulette 559
Meridan Land &c. Co. v. Ball 696
Meroney v. Wright 502
Merraman v. Caldwell 474a
Merriam v. Ridpath 719
v. Willis 559
Merrifield v. Cobleigh 471
Merrill v. Bullock 1, 3, 177, 229
v. Frame 321, 349
v. Willis 539, 549
Merritt v. Fisher 52
v. Judd 713, 716, 718, 722

[*References are to Sections.*]

Merry v. Hallet 172
Merryman v. Bourne 706
Mershon v. Williams 340, 349
Merwin v. Camp 116
Messenger v. Armstrong 255
Messerly v. Mercer 23
Messersmith v. Messersmith 485, 491
Messinger v. Union Warehouse Co. 54
Messley v. Ladd 695
Metropolitan Land Co. v. Manning 485, 490, 491
Meyer v. Harris 604
v. Rothschild 464
v. Smith 549
Meyers v. Myrrell 392, 397
Meyers Bros. v. Gaertner 456
Michael v. Curtis 178
Michigan &c. R. v. Bullard 702
Michigan M. Ins. Co. v. Bowes 496
Mickie v. Lawrence 10
Middlebrook v. Corwin 573
Middlebrooks v. Mayne 604
Middlefield v. Church Mills &c. Co. 328
Middlekauff v. Smith 397, 410
Middleton v. Dodswell 91
Miland v. Meiswinkel 679
Miles v. Elkin 29, 655
v. Lauraine 385
v. Miles 635
v. Stanke 394
Milford v. Holbrook 601, 613, 618
Milhouse v. Patrick 699
Milliken v. Faulk 163
Millan v. Kephart 66
Miller v. Ammon 120
v. Benton 681
v. Buchanan 654
v. Campbell 98
v. Clement 572
v. Dennis 540
v. Finch 344
v. Fitzgerald &c. Co. 642
v. Fulton 640
v. Green 421
v. Hancock 617
v. Havens 482, 486
v. Lampson 232
v. Lang 688, 697
v. Levi 115, 170, 482
v. McCardell 408
v. Maguire 121, 356
v. Mariner's Church 594
v. Mead 378
v. Michel 365
v. Morris 393
v. Prescott 331, 386, 473
v. Ridgely 555
v. Shackleford 251
Miller v. Shields 635, 687
v. Smythe 91, 587
v. Sparks 503
v. Stewart 453
Miller Lumber Co. v. Wilson 378
Millikan v. Davenport 703
Milliken v. Thorndike 126
Milling v. Becker 549
Mills v. Auriol 447
v. Baehr 680
v. Goff 261
v. Hamilton 709
v. Heaton 709
v. Peed 705
Milne v. Davidson 121
Milnes v. Gery 346
Milsap v. Stone 682, 689, 705
Milton v. Haden 701
Mims v. Chandler 26
Miner v. Stevens 558
v. Tagert 389
v. Williams 93
v. Tobin 428, 437
Minneapolis Coöp. Co. v. Williamson 665
Minot v. Joy 679
Minshall v. Lloyd 710, 721
v. Oakes 329
Mirick v. Bashford 334
v. Hoppin 355
Missouri &c. Co. v. Richardson 447
Mitchell v. Blossom 553
v. Commonwealth 6
v. McNeal 714
v. McNeil 331
v. Nelson 392
v. Pendleton 657
v. Stevens 110
v. Zimmerman 128
Mixon v. Coffield 422, 658
Mizner v. Munroe 188
Moak v. Johnson 369
Moffat v. Henderson 412, 414
v. Smith 404, 430, 459, 588
Monday v. O'Neil 572
Mondschein v. State 51
Monk v. Noyes 401
Montague v. Gay 668, 669
v. Jamison 431, 432
Montanye v. Wallahan 76, 363
Montecon v. Faures 465
Montgomery v. Board &c. 340
v. Craig 476
v. Tate 88
v. Willis 201, 212
Moody v. King 644
v. Seaman 270, 271
Mooers v. Wait 635, 636
Moore v. Beasley 686
v. Boyd 254
v. Calvert 1

[*References are to Sections.*]

Moore v. Davis 554
v. Faison 7
v. Foley 343
v. Gardiner 410
v. Goedel 624
v. Guardian Trust Co. 467
v. Harvey 1, 654, 655
v. Luce 479
v. Mason 228
v. Miller 59
v. Morrow 220, 230
v. Parker 581
v. Smith 31, 303, 712
v. Spruill 50
v. Townshend 625, 627, 630
v. Valentine 727
v. Weber 404
v. Wood 712
Moran v. Moran 516
Morehead v. Watkyns 180, 251, 259
Morey, Estate of 393
Morey v. Hoyt 715, 716
v. Pierce 580
Morgan v. Bissell 142
v. Griffith 130, 134
v. McCollister 543
v. Milman 346
v. Morgan 7
v. Powers 271
v. Slaughter 464
v. Smith 453, 501, 549
v. United States 36, 42
v. Varick 653
Moring v. Ward 38
Moroney v. Hellings 672
Morphett v. Jones 160
Morrill v. De la Granja 559
v. Mackman 9, 39, 40
Morris v. De Wolf 495
v. Kettle 66, 67, 364, 365
v. Shakespeare 126
v. Sliter 323
v. Summerl 389
v. Tillson 357
Morris Canal &c. Co. v. Mitchell 20
v. Ryerson 603
Morrison v. Bassett 682
v. Chadwick 364
v. Herrick 160
v. Marquardt 381
v. Peay 159, 160
v. Sohn 722
Morrow v. Sawyer 563
Morse v. Byam 474a, 478
v. Copeland 37
v. Goddard 363, 688
v. Maddox 588
v. Stafford 25
Morton v. Lawson 696
v. Leland 71
v. Weir 114
Moseley v. Allen 69
Moser v. Lower 46, 47, 51
Moses v. Loomis 496
v. Old Dominion &c. Co. 403
Mosher v. Cole 701, 707
Moshier v. Reding 59
Moss v. Gallimore 25, 422
Mott v. Palmer 714
Moule v. Garrett 411, 451
Moulton v. Faught 45
v. Norton 29
v. Robinson 52, 54, 55, 568
Mound v. Barker 124
Mountnoy v. Collier 703
Mounts v. Goranson 249
Moxon v. Townsend 401
Moyer v. Mitchell 319, 323, 324, 404
Moynihan v. Allyn 614, 619
Mueller v. Kuhn 558
Mugford v. Richardson 558
Muggridge v. Eveleth 10
Muldoon v. Hite 455, 456
Mulford v. Young 367
Mull v. Graham 373, 590
Mullen v. Pugh 347
v. Rainear 576, 579
v. St. John 607
v. Stricker 106, 381
Mullone v. Klein 524
Mulloy v. Kyle 171
Mulvaney v. Gross 462
Mumford v. Brown 404, 588
v. Whitney 45
Mundy v. Warner 52
Munigle v. Boston 170, 388
Munkwitz v. Uhlig 469
Munn v. Worrall 63, 110
Munroe v. Carlisle 601
v. Luke 651, 657
v. Perkins 135, 136
Munson v. Wray 59, 337
Murdock v. Ratcliff 171
v. Reed 173
Murphey v. Illinois &c. Bank 590
Murphy v. Farley 673
v. First Nat. Bank 70
v. Illinois 588
Murray v. Albertson 577, 578
v. Armstrong 81
v. Cherrington 112, 113, 170, 240
v. Harway 471, 496
v. Moross 397
v. Richards 596
Mussey v. Holt 86, 363
v. Scott 558, 561
Mutton's Case 79
Myers v. Burns 331, 369, 408
v. Gemmel 106, 359, 381, 681
v. Sanders 547
v. Silljacks 454

[*References are to Sections.*]

Myers v. Zetelle 90
Myerson v. Neff 255

N

Nagel v. League 496, 497
Nally v. Reading 440
Nance v. Alexander 654
Napier v. Bulwinkle 381
Nash v. Berkmeir 87, 199, 236
National &c. Asso. v. Brewer 538, 540
National &c. Bank v. Hand 389
Naumberg v. Young 130, 132, 575, 576, 578
Nave v. Berry 133, 382, 393, 431
Naye v. Noezel 631
Naylor v. Arnitt 90
v. Collinge 713
Neal v. Brandon 49
Neale v. Mackenzie 15, 364
Nearing v. Coop 682
Necklace v. West 563
Needham v. Allison 573
Neel v. Neel 637
Neff v. Ryman 679, 695
Negley v. Morgan 456, 458
Nellis v. Lathrop 668, 703, 704
Nelson v. Liverpool &c. Co. 599, 607
v. Oren 324
v. Rountree 14
v. Thompson 548
v. Ware 259, 289, 309
v. Webb 5
Neppach v. Jordan 146
Neuenberger v. Neuenberger 70
Neuman v. Rutter 474a
Neumeister v. Palmer 207, 555
Newall v. Wright 428, 668
Newbrough v. Walker 140, 369, 371
Newby v. Vestal 29, 654, 655
Newell's Appeal 34
Newell v. Gibbs 703
v. Sanford 271
Newhoff v. Mayo 376
Newman v. Met. El. R. Co. 105
Newson v. Douglas 666
v. Smythies 324
Newton v. Harland 558
v. Speare &c. Co. 548
v. Wilson 10, 669
New York Academy &c. v. Hackett 592
New York & B. Bridge v. Clark 680
New York &c. R. Co. v. Randall 39, 201
Neyer v. Miller 621
Nichols v. Dusenbury 673
v. Sargent 373
v. Williams 304
Nicholson v. Munigle 189, 667
Nickel v. Brown 455, 456
Nickells v. Atherstone 538, 543
Nickolls v. Barnes 75, 180, 218
Nicoll v. Burke 660
Nicrosi v. Phillipi 563
Niedelet v. Wales 674
Nielander v. Chicago &c. R. Co. 70
Nightingale v. Barens 14, 19, 26, 29
Niles v. Ransford 703
Nindle v. State 117
Nissen v. Turner 701, 707
Nobles v. McCarty 31
Noel v. McCrory 5, 201, 206, 215
Nokes'.Case 350
Nokes v. Gibbon 491
Norcross v. James 328
Norman v. Wells 330, 331
Norris v. Harris 487
v. Jackson 346
v. Morrill 498, 503
v. Showerman 67
North v. Barnum 696
North & South &c. Co. v. O'Hara 486
North Chicago St. R. Co. v. Le Grand Co. 139, 337, 471
Northern &c. R. Co. v. Canton Co. 716
Northern Bank v. Roosa 171
Northern Pac. R. Co. v. McClure 331
Northrup v. Northrup 323
Northwestern &c. Co. v. Brant 82
North Western R. Co. v. M'Michael 92
Norton v. Doe 689
v. Wiswall 606
Norwood v. Kirby 682
Nott v. Owen 86
Nowell v. Wentworth 302, 523
Nowlin Lumber Co. v. Wilson 39
Noyes v. Anderson 491
v. Loughead 113
v. Stauff 98, 100
v. Stillman 604, 644, 646
Nugent v. Boston &c. R. Co. 603

O

Oakes v. Munroe 684
Oakley v. Schoonmaker 29, 668
Oates v. Frith 648
Oberfelder v. Kavanaugh 71
Obermyer v. Nichols 666
O'Brien v. Ball 362
v. Cavanaugh 184
v. Smith 74, 366
v. Troxel 237
v. Wetherell 382
Ocean Grove &c. Asso. v. Berthall 495
v. Sanders 487

[*References are to Sections.*]

Ocean Steamship Co. v. Hamilton 587
O'Connell v. M'Grath 489
O'Connor v. Andrews 607, 618
v. City of Memphis 350, 369
v. Daily 349, 388
v. Delaney 28
v. Kelly 503
Odell v. Durant 111
O'Donnell v. McIntyre 8, 709
O'Fallon v. Nicholson 334
Ogilvie v. Hall 364
Ohio &c. R. Co. v. Singletary 645
Ohio Iron Co. v. Auburn Iron Co. 494
O'Keefe v. Kennedy 473
Okey v. State Ins. Co. 497
Old Colony R. Corp. v. Evans 77
O'Leary v. Delaney 595
v. Roe 378
Oliver v. Dickinson 102, 104, 107, 359, 677
v. Gary 683
v. Moore 24, 666
v. Olmstead 9
v. Phelps 663
Olt v. Lohnas 152
Olympic Theater 710
O'Malley v. Twenty-five Associates 581, 582, 593
Ombony v. Jones 716, 727
Oneal v. Orr 375
O'Neil v. Davis 427
v. Flanagan 392
O'Neill v. Cahill 271
Oneto v. Restano 83
Onslow's Case 573
Orcutt v. Isham 356
v. Moore 46
Ordway v. Remington 661
Orleans Co. &c. School v. Parker 703
Ormsby v. Dearborn 368
Orton v. Noonan 337, 338, 410
Osborne v. Humphrey 6
Osgood v. Dewey 30
Oskaloosa College v. Western Union &c. Co. 383
Ossowski v. Wiesner 545
Ostotag v. Taylor 558
Ostner v. Lynn 661
Oswald Fratenburgh 447, 453
v. Mollet 424, 426
Otis v. McMillan 421, 427, 428
Ott v. Rape 19
Otto v. Jackson 662
Otway v. Braithwaite 77
Oury v. Saunders 699
Outtown v. Dulin 650
Overdeer v. Lewis 228, 254, 558, 559
Overman v. Sanborn 455
v. Sasser 725, 728
Owens v. Lewis 38
v. Wight 349
Owings v. Jones 600
Oxford v. Leathe 43

P

Pacific &c. Ins. Co. v. Stroup 702
Pacific Express Co. v. Tyler &c. Co. 13
Packard v. Cleveland &c. R. Co. 197
Packer v. Roberts 117
Padberg v. Kennerly 603
Padelford v. Padelford 635
Page v. Culver 422, 667
v. De Puy 228, 561
v. Esty 424
v. Kinsman 688, 703
v. Lashley 427, 670
v. McGlinch 2, 442
v. Monks 131
v. Wight 116
Paget v. Electrical &c. Co. 207
Paige v. Akins 1
Paine v. Trinity Church 376
Pakenham's Case 333
Palethorp v. Bergner 372
Palmer v. Bowker 685
v. Dearing 614, 621
v. Edwards 446
v. Ekins 700
v. Ford 490, 496
v. Melson 700
v. Meriden &c. Co. 324
v. Meyers 550
v. Myers 543
v. Rich 565
v. Wetmore 106, 359, 381, 681
v. Young 625, 638
Palmtag v. Doutrick 707
Panton v. Jones 697
Pappe v. Frout 216
v. Trout 682
Paradine v. Jane 392, 675
Parent v. Callerand 87
Parer v. Manning 700
Parish v. Camplin 637
v. Rogers 111
Park v. Castle 194
v. Ensign 410
Parke v. Castle 304
Parker v. Foote 106
v. Gravenor 319
v. Hollis 210
v. Kane 541
v. Nanson 689
v. Page 201, 202, 375
v. Parmele 323
v. Raymond 682
v. Redfield 412
v. Shackelford 641

[*References are to Sections.*]

Parker v. Tainter 156, 159
v. Taswell 346
v. Wulstein 724
Parkhurst v. Van Cortland 387
Parks v. Boston 362
v. Hays 486, 503
v. Union Mfg. Co. 466
Parmelee v. Oswego &c. R. Co. 324
Parmenter v. Webber 446
Parrish v. Commonwealth 49
Parrott v. Barney 628
v. Hungelburger 697
v. Palmer 638
Parsons v. Roumfort 310
v. Wright 505
Partridge v. Strange 85
Pasteur v. Jones 372, 392
Patchin v. Dickerman 533
Pate v. Turner 705
Patrick v. Colerick 44
Patten v. Deshon 411, 430, 438, 446, 447, 451, 658
v. Garrett 656
Patterson v. Graham 103, 104, 355, 356
v. Hansel 697
v. Hubbard 98
v. Pease 72
v. Stoddard 655
Pattison v. Dryer 225
Paul v. Chickering 418
Pause v. Atlanta 643
Payne v. Haine 397, 408
v. Irvin 613
v. James 628
v. Rogers 595, 600
Payson v. Holden 164
Payton v. Sherburne 222, 225, 311
Peaks v. Blethen 112
Pearce v. Nix 697
Pearcy v. Heath 431
v. Henley 87
Pearson v. Germond 505
v. Sanderson 379
Peck v. Christman 455
v. Henaley 435
v. Hiler 59
v. Jones 362
v. Northrop 422
v. Peck 116
v. Scoville Mfg. Co. 394
Peehl v. Bumbalek 201, 317, 340
Peers v. Consolidated Coal Co. 319, 322, 447
Peil v. Reinhart 614, 621
Peirce v. Grice 201, 202, 373, 375
Peirse v. Sharr 446
Pelton v. Minah Con. Min. Co. 22
v. Place 421, 422, 436
Pemberton v. King 725, 727
Pence v. Williams 709
Pence v. St. Paul &c. R. Co. 468
Pendergast v. Young 366, 421
Pendill v. Eells 357
v. Union Mining Co. 490, 498, 504, 558
Penniall v. Harborne 471
Pennock v. Lyons 471
Penton v. Robart 721
People v. Annis 19, 20, 222, 563
v. Barker 412
v. Bennett 489
v. Bigelow 29
v. Commissioners, &c. 412
v. Culver 27
v. Darling 217, 253
v. Dudley 503, 667
v. Gedney 107
v. Gilbert 487
v. Gillis 146
v. Goodwin 37
v. Ingersoll 89
v. Kelsey 143
v. McCarty 489
v. Mayor 85
v. Paulding 251
v. Rickert 180, 217
v. St. Nicholas Bank 146
v. Schackno 253
v. Simonson 125
v. Stuyvesant 668
v. Walden 586
People's Ice Co. v. Steamer Excelsior 9
People's Loan &c. Asso. v. Whitmore 702
Peoples v. Evens 199
Peoria v. Simpson 607
Pepper v. Rowley 381
Peralta v. Ginochio 126, 698
Perez v. Rabaud 574, 580, 595, 598
Perine v. Teague 177, 221
Perkerson v. Snodgrass 670
Perkins v. Hadsell 387
v. Morse 87
v. Peterson 118
v. Potts 705
v. Swank 725
v. Washington Ins. Co. 389
Perrin v. Lepper 421, 422, 430
Perrine v. Cheeseman 74
Perry v. Aldrich 661, 667
v. Bailey 641
v. Carr 573, 627
v. Hamilton 571
v. Wall 361
Peter v. Schley 164
Peters v. Balke 221, 254
v. Barnes 441
v. Elkins 651
v. Fisher 566
v. McKeon 140

[*References are to Sections.*]

Peterson v. Edmonson 675
v. Haight 377
v. Krenger 505
v. Smart 579
Petsch v. Biggs 159, 261
Pettingill v. Evans 627
v. Porter 104
Pettigrew v. Mills 682
Petty v. Malier 2, 257
Pettygrove v. Rothchild 497
Petz v. Voigt Brewing Co. 588
Pevey v. Skinner 108
Peyton v. Stith 474a
Pfaff v. Golden 430, 447
Pharis v. Jones 692
Phelan v. Anderson 180
v. Boylan 637, 639
Phelps v. Illinois &c. R. Co. 498
v. Long 261
Phene v. Popplewell 538, 540, 553
Philadelphia &c. R. Co. v. Appeal Tax Court 412, 413
Philips v. Doe 487
Phillbrook v. Emswiler 132
Phillips v. Covert 488, 627
v. Doe 503
v. Monges 202
v. Reynolds 343
v. Robertson 199
v. Rothwell 688
v. Stevens 392, 393
v. Sun Dyeing &c. Co. 394
v. Vandergrift 495
Phillips &c. Mfg. Co. v. Whitney 679
Philpot v. Hoare 466
Phippen v. Stickney 346
Phipps v. Ingrahm 148
v. Sculthorpe 693
Phœnixville Borough v. Walters 201
Pickard v. Kleis 487
v. Perley 265, 269
Pickett v. Breckenridge 709
v. Ferguson 349, 703, 704
Pico v. Phelan 2
Pierce v. Brown 689, 703
v. Grice 726
v. Joldersma 410
v. Minturn 99, 659, 682
Pierre v. Fernald 381
Pierrepont v. Barnard 36, 38
Pierson v. Doe 255
v. Glean 604
Piggot v. Mason 343
Pike v. Brittan 623
v. Brown 77, 462
Pike & Hassen's Case 558
Pilkington v. Shaller 458
Pillsbury v. Moore 603, 604
v. Morris 132
Pinero v. Judson 79, 195
Pingrey v. Watkins 669
Pinhorn v. Souster 188, 191, 254
Pintard v. Irwin 379
Pioneer Press Co. v. Hutchinson 673
Piper v. Fletcher 408, 410
Pistol v. Riccardson 171
Pitcher v. Tovey 447
Pittfield v. Ewing 267
Pitkin v. Leavitt 370
Pitman v. Poor 45
v. Woodbury 75
Pittsburgh &c. R. Co. v. Thornburgh 654
Plaisted v. Palmer 61
Planters' Ins. Co. v. Diggs 495, 496
Plato v. Roe 19, 26
Platt v. Farney 579, 614
Platto v. Gettelman 722
Playter v. Cunningham 366
Pleasant v. Benson 446
Ploen v. Staff 409, 592, 593
Pluck v. Digges 446
Plumer v. Harper 604
v. Plumer 573, 682
v. Currier 570
Plymouth v. Throgmorton 661, 667
Poindexter v. Blackburn 571
Polack v. Ploche 392
v. Shafer 63
Polk v. Reynolds 164
Polley v. Johnson 567
Pollock v. Whipple 522
Pollok v. Kelly 88
Pollman v. Morgester 372
Pomeroy v. Lambeth 373
Pomfret v. Ricroft 404, 588, 612, 626, 647
Pond v. Holbrook 69
Ponder v. Rhea 48, 53
Pool v. Lamb 701
Poole's Case 711, 716
Poole v. Bently 141
v. Engelke 221
Pope v. Boyle 605
v. Garland 197
v. Harkins 658
v. Linn 61
Poposkey v. Munkwitz 370
Poppers v. Meagher 255
Pordage v. Cole 321, 323
Port v. Jackson 447, 462
Porter v. Bleiler 12
v. Hammond 479
v. Hooper 654
v. Hubbard 3
v. Mayfield 693
v. Merrill 24
v. Noyes 547
v. Tull 675, 677
v. Witham 642
Portington's Case 327
Post v. Davis 137a, 140

[*References are to Sections.*]

Post v. Kearney 328, 411, 446, 455
v. Phelan 22
v. Post 178
v. Vetter 404
Postal Tel. &c. Co. v. Western Union &c. Co. 382, 384
Poston v. Jones 364, 669
Potter v. Arnold 440
v. Bassett 81
v. Bower 213
v. Cunningham 53
v. Mercer 37, 146, 162
Pouder v. Catterson 683
Poultney v. Holmes 439
Powell v. Bergner 725
v. Crampton 159
v. Dayton &c. R. Co. 627
v. F. C. Linde Co. 128
v. McAshan 131
Powers v. Cope 392
Powley v. Walker 631
Pratt v. Farrar 187, 188, 226, 254, 559
v. Hudson River Co. 138
Pray v. Stebbins 87, 88
Preble v. Hay 255
Prentiss v. Wood 604
Presby v. Benjamin 464, 468
Presbyterian Church v. Pickett 486, 487
Prescott v. De Forest 446
v. Elm 253, 261
v. Otterstatter 410
Preston v. Hawley 654
v. Ryan 567
Pressman v. Silljacks 703
Pretty v. Bickmore 599
Prettyman v. Walston 413, 637, 639, 690
Prevot v. Lawrence 697
Price v. Assheton 343
v. Leyburn 200
v. Pickett 566
Prichard v. Tabor 33
Prickett v. Ritter 215
Pridgeon v. Boat Club 353
v. Excelsior Boat Club 105
Priest v. Nichols 612
Priestley v. Johnson 713
Prindergast v. Searle 272
Prior v. Kiso 538
Probst v. Rochester &c. Co. 342
Proctor v. Keith 392, 393, 404, 495, 588, 598
v. Tows 229
Proffitt v. Henderson 625, 635
Propagation Society v. Sharon 58
Proprietors &c. v. Hilton 319
Proprietors of No. 6 v. McFarland 30
Proprietors, &c. v. State 59
Prosser v. Pretzel 628
Proudfoot v. Hart 397, 401
Prout v. Roby 387, 428
Providence &c. Bank v. Hall 201, 206, 215
Providence &c. Union v. Elliott 77, 80
Providence Co. Sav. Bank v. Phalen 531, 705
Providence v. St. John's Lodge 379
Provost v. Hallett 403
Pryor v. Foster 128, 592
Pugh v. Arton 716
v. Chesseldine 158, 437
v. Davis 682
v. Duke of Leeds 119
Pulse v. Hamer 146, 162
v. Miller 98
Pulteney v. Shelton 573
Purcell v. English 373, 404, 594, 615
Pursel v. Teller 580
Purvis v. Rayer 435
Pust v. Dowie 324
Putnam v. Ritchie 89, 90
v. Smith 110
v. Westcott 172
v. Wise 48, 50, 54
v. Wyley 10
Pynchon v. Stearns 388, 631, 633

Q

Quackenboss v. Clarke 442
Quackenbush v. Sawyer 50
Quay v. Lucas 595
Quertermous v. Hatfield 31
Quincy, Ex parte 716
Quincy v. Carpenter 389
Quincy &c. R. Co. v. Humphreys 443
Quinette v. Carpenter 201
Quinlan v. Bonte 206
Quinn v. Perham 619
v. Quinn 696

R

Raband v. Frank 642
Rabe v. Fyler 257
Radley v. O'Leary 519
Ragan v. Simpson. 19, 26
Ragsdale v. Kinney 56
v. Lander 200
Railsback v. Walke 199
Railton v. Taylor 574, 586
Rainey v. Capps 5, 61
Railway v. Smith 640
Ralph v. Lockwood 49
Ralston v. Boady 121, 122
Ramsay v. Blair 63
Ramsdell v. Maxwell 226
Rand v. Purcell 213
Rand &c. Co. v. Wickham 126, 127

[*References are to Sections.*]

Randall v. Cleaveland 626
v. Rich 543, 551
v. Thompson 549
v. President &c. 318
v. Chubb 431
v. President &c. 322
Randol v. Scott 466, 473
v. Tatum 465, 473, 495, 497
Randolph v. Carlton 703
v. Helps 132
Rank v. Rank 569
Ranlet v. Cook 338, 343
Rann v. Hughes 74
Rashleigh v. South Eastern R. Co. 319
Ratcliff v. Bellfonte Iron Works Co. 709
Ratkowski v. Masolowski 366
Rawlings v. Duvall 462
Rawlins v. Turner 74
Rawlyns' Case 421
Rawson v. Babcock 224
Ray v. Ayers 641
v. Western Pa. &c. Co. 87
Raybourn v. Ramsdell 502
Rayburn v. Mason Lumber Co. 663
Raymond v. Andrews 566
v. Krauskopf 136
v. White 725
Raynor v. Drew 154
v. Valentine Blatz &c. Co. 370
v. Wilson 541
Read v. Allen 692
v. Pennsylvania R. Co. 827
v. Tuttle 483
Readey v. American &c. Co. 456
Reading Iron Works 67
Readman v. Conway 618, 620
Ream v. Harnish 53
Reay v. Cotter 563
Rector v. Buckhart 607
v. Hartford Deposit Co. 447
Rector &c. v. Higgins 420
Rector of Chedington's Case 112
Redding v. Hall 675
Redington v. Browne 111
Redman v. Bedford 52, 671
Reed v. Bartlett 94
v. Hawley 265
v. Kitchen 6
v. Lewis 112, 116, 382, 384
v. Reed 186
v. Reynolds 367a
v. Shepley 699
v. Snowhill 403
v. Todd 691
v. Ward 668
Reeder v. Bell 20, 475
v. Purdy 228, 561
v. Sayre 180, 199
Rees v. Lowry 447
Reese v. Caffee 682
Reeve v. Bird 365
Reeves v. Hyde 673
Reg. v. St. George's Union 23
Reid v. John F. Wiessner Brewing Co. 455, 456, 463, 471
Reiff v. Reiff 566
Reilly v. Ringland 570
Reithman v. Brandenburg 267
Remington v. Linthicum 444
Remsen v. Conklin 503
Reniger v. Fogossa 322
Rennell v. Kimball 131
Reno v. Mendenhall 392, 673
Renoud v. Daskam 339
Renwick v. Morris 562
Resser v. Corwin 125, 126
Reusens v. Lawson 696
Rex v. Bake 556
v. Bathhurst 556
v. Cheshunt 20
v. Collett 175
v. Horndon 36
v. Horndon-on-the-Hill 36, 44
v. Little Dean 74
v. Pedly 599, 604
v. Philipps 122
v. St. Nicholas 710
v. Sutton 89
v. Topping 715
v. Wilson 556
Reybold v. Reybold 822
Reynolds v. Chynowith 52, 631
v. Commissioners 171
v. Davison 130
v. Greenbaum 83
v. Lewis 701
v. Pitt 492
v. Shuler 721
v. Williams 640
Rhett v. Poe 662
Rhode Island Hospital &c. Co. v. Baxter 388
Rhodes v. Baird 140
v. Bullard 588
Rhone v. Gale 389
Rhyne v. Guevara 703
Rice v. Baker 464
v. Brown 74, 146
v. Dudley 365, 549, 551
v. Loomis 662
v. Stone 494, 495
v. Whitmore 85
Rich v. Basterfield 603
v. Bolton 185, 197, 215, 254
Richard v. Bestor 64
Richard C. Tavener's Case 10
Richards v. Gauffret 40
v. Killam 652
v. Wardwell 53
Richardson v. Bates 72

[*References are to Sections.*]

Richardson v. Chasen 140
v. Copeland 715
v. Gifford 75
v. Langridge 197
v. Richardson 89, 651, 654, 657
Richburg v. Bartley 497
Richey v. Du Pre 49
v. Hinde 651, 653, 654
Richmond v. Connell 54
v. Davis 91, 111
Richmond &c. R. Co. v. Durham 37
Richmond &c. Tp. Co. v. Rogers 29
Richmond Ice Co. v. Crystal Ice Co. 675, 681
Rickards v. Rickards 343
Ricketson v. Galligan 682
Riddle v. Brown 41
v. Dow 54
v. Hill 93
v. Hodge 547
v. Littlefield 107, 108
Rider v. Clark 599
Ridge v. Railroad Transp. Co. 641, 644
Ridgely v. Stillwell 174, 251
v. Stillwell 197, 661
Ridgway v. Stafford 53
Riggs v. Rursell 464, 466
Right v. Beard 183
v. Cuthell 265, 269
v. Darby 201
Riley v. Farnsworth 156
v. Hale 368, 369
v. Jordan 29, 35
v. Pettis County 408
v. Simpson 605, 606
Rinehart v. Olwine 53
Ripley v. Wightman 678
v. Yale 627
Rising v. Stannard 86, 570, 713
Rising Sun Lodge v. Buck 318
Rispini v. Porta 549
Rives v. Nesmith 689
R. J. Gunning Co. v. Cusack 40
Roach v. Cosine 19, 26, 563
v. Peterson 206
Roads v. Symmes 72
Robb v. Montgomery 323
Robbins v. Atkins 597, 620
v. Conway 498
v. Jones 579, 585, 595
Roberson v. Simons 201, 204, 251
Roberts v. Barker 573
v. Bettman 495
v. Davey 483, 495
v. Grubb 274, 283
v. Hayward 267
v. Nelson 71
v. Robertson 63
v. Tennell 199, 200
v. Wiggin 92
Robertson v. Amazon &c. Co. 578
v. Biddell 682, 703
v. French 68
v. George 640
v. Hayes 111
v. Norris 88
Robey v. Prout 482
Robins v. Cox 430
v. Kitchen 702
Robinson v. Boys 494, 497
v. Deering 186, 667
v. Eagle 87
v. Harman 140
v. Lehman 445
v. L'Engle 675
v. Perry 431
v. State 386
v. Troup Min. Co. 703
Rochester Lodge No. 21 v. Graham 328
Rochford v. Hackman 466
Roe v. Archbishop 538, 541
v. Ashburner 141, 142
v. Galliers 466
v. Harrison 473, 497
v. Hodgson 90
v. Lees 197
v. Sales 464, 467, 469
v. Street 272, 273
v. Ward 202, 261
Roff v. Duane 76, 556
Rogan v. Dockery 404
Rogers v. Brown 216
v. Coy 1, 40
v. Grider 87
v. Humphreys 94
v. Libbey 651
v. McKenzie 422
v. Pitcher 198
v. Saunders 387
v. Sawin 359
v. Snow 102, 677, 679
v. Waller 682
v. Wheaton 197
Rohrer v. Babcock 54
Rollins v. Moody 258, 293
v. Proctor 137
Ronald v. Barkley 89
Rood v. Willard 85
Rooks v. Moore 9
Rooney v. Gillespie 428
Roosevelt v. Hopkins 468, 469
v. Hungate 257
Rose v. Bartlett 171
v. Riddle 434
Rose Clare Lead Co. v. Madden 70
Rosen v. Rose 154
Rosenblat v. Perkins 180, 308
Rosenfield v. Newman 616
Rosenthal v. Freeburger 160
Rosewell v. Prior 599, 603, 604

[*References are to Sections.*]

Ross v. Campbell 718
v. Cobb 89
v. Dysart 362
v. Garrison 182
v. Gill 89, 90
v. McManigal 695
v. Schneider 236, 441
v. Stockwell 410, 672, 673
v. Swaringen 55
Rosseel v. Jarvis 478
Roth v. Collins 725
Rothbauer v. State 14
Rothschild v. Hudson 97
v. Williamson 215, 236
Rotter v. Goerlitz 357
Rowan v. Lytle 220, 230, 541
Rowbotham v. Pearce 360
Rowe v. Baber 673
v. Williams 661
Rowlands v. Voechting 52, 53
Rowsey v. Lynch 420
Roxbury v. Haston 651
Royce v. Guggenheim 354, 576
v. Latshaw 727
Rubery v. Jervoise 339
Rudolph v. Herman 670
Rump v. Schwartz 496
Russell v. Allard 523, 682, 700, 703
v. Doty 85
v. Erwin 3, 81
v. Fabyan 226, 336, 660, 667
v. McCartney 219
v. Richards 713
v. Rush 629
v. Russell 19, 563
Rutgers v. Hunter 343
Rutherford v. Ullman 705
Rutland &c. Co. v. King 672
Rutz v. Kehn 109
Ryan v. Clark 15, 458
v. Kirchberg 545
v. Mills 256
v. Potwin 121, 124
v. Wilson 585
Ryder v. Faxon 131
v. Mansell 703, 704
v. Robinson 138
Ryerson v. Quackenbush 430, 648, 658
Ryley v. Hicks 147

S

Sabastian v. Ford 682, 703
Sackett v. Barnum 31
v. Sackett 625, 639
Sage v. Halverson 682
St. Andrews Lutheran Church's Appeal 331
St. Anthony Falls &c. Co. v. Morrison 688
St. John v. Palmer 354
v. Quitzon 703
St. Joseph &c. R. Co. v. St. Louis &c. R. Co. 397, 445, 446
St. Louis v. Kaime 610
v. Regenfuss 413
St. Louis &c. R. Co. v. Hart 651
v. Trigg 645
St. Louis &c. Yards v. Wiggins Ferry Co. 565
St. Louis Pub. Schools v. Boatmen's Ins. Co. 458, 460, 669
v. Hollingsworth 110
Salisbury v. Andrews 353
v. Shirley 328, 417, 455
Sallada v. James 572
Salmon v. Matthews 667
v. Smith 364
Salmon Falls Mfg Co. v. Goddard 158, 437
Salomon v. O'Donnell 281
Salop v. Crompton 627
Salzberger v. Mickel 388
Sampson v. Burnside 39, 45
v. Henry 228, 559
Samson v. Rose 484, 493
Samuelson v. Cleveland &c. Co. 603, 605
San Antonio v. French 202
Sanborn v. Chamberlin 444
v. Colman 10
v. First Nat. Bank 59
v. French 87
v. Woodman 491
Sanders v. Ellington 547, 569
v. Partridge 438, 439, 440, 447, 456, 458
v. Pope 491
v. Richardson 224
v. Sharp 82
v. Smith 592
Sands v. Pfeiffer 715
Sanford v. Herron 12
v. Johnson 181
Sanitary Dist. v. Cook 718
Sansing v. Risinger 445
Sargent v. Adams 101, 110
v. Courrier 53
v. Pray 412, 418, 420
v. Robertson 135
v. Smith 566
v. Stark 606
v. Towne 635
Sarles v. Sarles 635
Sarsfield v. Healy 178
Sartwell v. Sowles 180, 251
Sauer v. Meyer 486
Saunders' Case 637
Saunders v. Moore 697
Saunderson v. Hanson 413
Sausser v. Steinmetz 162

[*References are to Sections.*]

Sawyer v. Hanson 18, 25
v. McGillicuddy 614
Say v. Smith 112
v. Stoddard 174, 431
Sayers v. Hoskinson 636, 637
Scales v. Anderson 2, 651, 654
Scanlan v. Wright 87
Schaefer v. Henkel 81
v. Silverstein 504
Schee v. Wiseman 171
Scheelky v. Koch 340
Scheerer v. Dickson 629
Scheidt v. Belz 328, 422
Schenck v. Stumpf 87, 687
Schile v. Brokhahus 371
Schilling v. Holmes 266
v. Klein 555
Schley v. Fryer 463
Schlicht v. Callicott 50
Schluter v. Harvey 670
Schmalz v. Mead 378
Schmidt v. Pettit 393
Schmitz v. Lauferty 154, 236
Schmucker v. Sibert 76
Schmohl v. Fiddick 67
Schnittger v. Rose 508
Schneider v. Lord 218
v. Patterson 99
School District No. 11 v. Batsche 20, 222, 296
Schrage v. Miller 378
Schreiber v. Chicago &c. R. Co. 255
Schreiner v. Stanton 247, 367
Schroeder v. Gemeinder 387, 454
v. King 468
Schuisler v. Ames 206, 547, 549, 551
Schulenberg v. Harriman 446
Schulte v. Schering 70, 71
Schulting v. Schulting 637
Schutt v. Large 541
Schuylkill &c. R. Co. v. Schmoele 362
Schuyler v. Leggett 180, 199
v. Smith 206, 209
Schwandt v. Metzger &c. Co. 614
Schwartz v. Salter 627
Scmitz v. Lauferty 152
Scofield v. Lansing 565
Scott v. Beecher 202, 204, 205, 210, 549
v. Haverstraw &c. Co. 397
v. Levy 704
v. Lunt 422
v. Scott 669
v. Simons 576, 586, 588
v. Society &c. 418
v. Willis 114
Scriven v. Moote 572
Scudder v. Anderson 710
Seago v. Deane 199
Seaman v. Ashchermann 138, 162
v. Civill 428
Sears v. Smith 152, 201, 202, 267
Seaver v. Coburn 81, 471
v. Thompson 69
Seavey v. Cloudman 186, 293
Sebastian v. Hill 216
Second Nat. Bank v. O. E. Merrill Co. 213, 720, 721
Second Unitarian Soc. v. Woodbury 91
Secor v. Pestana 210, 212, 255
Seeger v. Smith 519
Seevers v. Gabel 393
Seidel v. Bloeser 102
Selb v. Montague 422
Semmes v. United States 226
Serfling v. Andrews 369, 371
Sexton v. Carley 503, 682, 699
v. Chicago Storage Co. 446, 456, 494
v. Hull 33
Seyfert v. Bean 81
Schaaber v. Reading City 226
Shackford v. Coffin 581
Shaffer v. Stevens 53, 168, 570, 571
Shaft v. Carey 104, 353, 551
Shahan v. Herzberg 547
Shakespeare v. Alba 161
Shallenberger v. Ashworth 88
Shally v. Shute 353
Shamp v. White 337, 339
Shannon v. Comstock 140
Sharon Iron Co. v. Erie 471
Sharp v. Kensman 558
v. Milligan 391
Shattuck v. Gragg 626
v. Lovejoy 465, 659
Shanfelter v. Horner 504
Shaw v. Appleton 388
v. Farnsworth 5, 143, 145, 146
v. Hill 6
v. Hoffman 170, 557
v. McCarty 489
v. Mayer 49
v. Partridge 328, 447
v. Schietinger 219, 303
v. Wallace 110
Shawmut &c. Bank v. Boston 102, 474, 677
Sheaff v. Husted 709
Sheaffer v. Sheaffer 483
Shearer v. Handy 413
Shedlinsky v. Budweiser &c. Co. 121
Sheer v. Fisher 629
Sheets v. Allen 199
v. Joyner 350, 361
v. Selden 323, 384, 404, 467, 588, 676
Shelby v. Hearne 331
Sheldon v. Dunlap 660
v. Hamilton 412, 414
Shell v. West 682

[References are to Sections.]

Shelton v. Carrot 697
v. Codman 352
v. Doe 688
Shenandoah Land &c. Co. v. Hise 488
Shepard v. Martin 682
v. Philbrick 572
Shepardson v. Elmore 417
Shepherd v. Cummings 5, 180, 199
Sheppard v. Rosenkrans 342
Shepperd v. Thompson 554
Sherburne v. Jones 178, 570
Sherlock v. Thayer 661
Sherman, Ex parte 466
v. Cobb 346
v. Spaulding 703
v. Wilder 121, 124
v. Williams 102, 354
Sherrill v. Connor 625, 633
Sherwood v. Harral 389
v. Seaman 613
Shew v. Call 682
Shields v. Kimbrough 55
v. Lozear 555
Shiffer v. Broadhead 560
Shillito v. Pullan 428
Shine v. Wilcox 636
Shiner v. Abbey 651
Shipley v. Fifty Asso. 602, 618
Shipman v. Mitchell 201, 210, 253
Shirk v. Hoffman 215
Shores v. Brooks 560
Shouse v. Krusor 28
Shrewsbury's Case 627
Shrewsbury v. Gould 321
Shrum v. Simpson 50
Shultz v. Elliott 697
v. Spreain 668
Shuman v. Smith 369
Shumway v. Collins 365, 383, 465
Shuver v. Klinkenberg 289
Siefke v. Koch 471
Siegel &c. Co. v. Colby 117
Siems v. Pierre Sav. Bank 670
Sievers v. Brown 30
Sigmund v. Howard Bank 349, 361, 366
v. Newspaper Co. 75
Silbar v. Ryder 70
Sigur v. Lloyd 373
Silsley v. Allen 197, 261
Silva v. Campbell 497, 498
Simers v. Saltus 703
Simkins v. Cordele Compress Co. 400
Simmons v. Robertson 705
v. Simmons 160
Simonds v. Turner 415
Simonton v. Loring 624
Simpkins v. Rogers 6, 185
Simpson v. Applegate 257, 280
v. Wood 121, 124
Sims v. Bond 158
Sims v. Cooper 257
v. Humphrey 19, 33, 220, 563
Singer Mfg. Co. v. Sayre 210
Sinnard v. McBride 651
Sinton v. Butler 593
Sisson v. Kaper 124, 126
Skaggs v. Elkus 207, 215
v. Emerson 364, 365
Skally v. Shute 354, 365, 381
Skidmore v. Pittsburg &c. R. Co. 84
Skinner v. Skinner 1
Slacum v. Brown 543
Slator v. Brady 95
Sloan v. Cantrell 326, 388
Sloat v. Rountree 285, 555
Slocum v. Despard 324
Slyfield v. Cordingly 129
Small v. Clark 494
Smalley v. Mitchell 686
Smart v. Smith 688
Smelling v. Valley 159, 160
Smiley v. McLauthlin 319, 652
v. Van Winkle 446
Smith, Ex parte 667
v. Allt 210
v. Asbell 474a
v. Atkins 53
v. Barrie 382
v. Bell 206, 297, 555
v. Benson 713
v. Blake 663
v. Brinker 458
v. Brown 373
v. Bushy 323
v. Clark 273
v. Coe 177, 391
v. Coker 709
v. Cooke 638
v. Countryman 580
v. Detroit &c. Asso. 518, 557, 558
v. Devlin 131
v. Dodds 171, 349
v. Elliott 603
v. Goodman 461, 466
v. Harrison 328, 447, 658
v. Hess 408
v. Hill 280
v. Houston 227
v. Humble 412
v. Ingram 456, 457, 461
v. Jewett 635
v. Kerr 404, 405, 543
v. Littlefield 220, 221, 226, 227, 230, 255
v. McEnany 364, 365
v. McLean 675, 677, 679
v. Marrable 578
v. Martin 102
v. Meech 50
v. Miller 109, 495
v. Mundy 688

[*References are to Sections.*]

Smith v. Newman 690
v. Niles 322
v. Park 93, 555, 719, 723
v. Peat 449
v. Pendergast 539
v. Phillips 371
v. Price 389, 728
v. Putnam 466
v. Raleigh 354, 365
v. Rector &c. 374
v. Reeder 557, 558
v. Saint Michael 23
v. Saratoga Co. &c. Ins. Co. 496
v. Scanlan 704
v. Schultz 50, 52, 53
v. Shepard 364
v. Simons 45
v. Singleton 224
v. Smith 151, 242, 258, 440, 691
v. State 579, 585, 608
v. Stewart 3, 655
v. Sutton 682
v. Turnley 433
v. Waggoner 714
v. Walsh 579
v. Whitbeck 503
v. White 124
v. Whitney 725
v. Wise 365
v. Wooding 30
Smithwick v. Ellison 573
Smyth v. Tankersley 48, 53
Smythe v. Sprague 164
Snead v. Tretjin 575
Snedaker v. Powell 21
Sneed v. Jenkins 363
Snelson v. Franklin 435
Snook v. Sutton 89
Snow v. Pulitzer 370, 371
Snowden v. Memphis Park Asso. 444
Snydam v. Jackson 628
Snyder v. County Com'rs 132
v. Hersberg 108
v. Parker 299, 442
Sobey v. Brisbee 152
Sohier v. Eldredge 635
Somers v. Joyce 47
v. Loose 488
Sommers v. Reynolds 468
Sortwell v. Hughes 121
Souders v. Vansickle 25
Souffrain v. McDonald 387
Soule v. Union Bank 389
Sourwine v. Truscott 137a
Souter v. Drake 435
South v. Marcum 701
Southard v. Central R. Co. 446
Southern R. Co. v. Georgia 644
Sovereign v. Ortmann 38
Spafford v. Meagley 393
Spalding v. Archibald 38
Spalding v. Conzelman 160
v. Hall 220, 233
Spalding Hotel Co. v. Emerson 384
Sparkes v. Smith 458
Sparkman v. Gove 463
Spaulding v. Hallenbeck 318
v. M'Osker 503
Spear v. Fuller 465, 482, 487
v. Orendorf 336
Spears v. McKay 563
v. Robinson 31
Speers v. Flack 555
Spellman v. Bannigan 592, 593
Spencer's Case 328, 329, 335, 377
Spencer v. Burton 367
v. Commercial Co. 468, 556, 561, 718
v. Hamilton 672
v. Lewis 570, 571
v. World's Columbian Exposition 50
Sperry v. Pond 114
v. Sperry 485
Spicer v. Spicer 656
Spies v. Voss 216, 548
Spillman v. Brown 63, 110
Spooner v. French 519
Sprague v. Quinn 270
Springer v. Chicago &c. Co. 465, 495
v. De Wolf 462, 463
Springs v. Schenck 474a, 699
Spruill v. Arrington 671
Squires v. Huff 197
Stabler v. Cowman 320
Stack v. Harris 587
Stackberger v. Mosteller 153
Stacy v. Bostwick 695, 696
v. Vermont Central R. Co. 2, 654, 655
Stadden v. Hazzard 26
Stafford v. Ingersol 562
v. Staunton 132
Stagg v. Eureka &c. Co. 699
Stamper v. Sunderland 23
Stamps v. Cooley 492
Stanford Land Co. v. Steidle 255
Staniforth v. Fox 142
Stanley v. Hotel Corporation 121, 123, 141
v. Turner 661
Stansbury v. Fringer 387
Staple v. Spring 603
Staples v. Emery 573
Starbird v. Cranston 462
Stark v. Miller 641
Starkey v. Horton 348
Starr v. Jackson 626, 627
State v. Austin 46, 56
v. Boyce 608, 692
v. Burr 566
v. Burwell 46, 50

[*References are to Sections.*]

State v. Curtis 20, 21
v. Fort 201
v. Howell 709
v. Jackson 626
v. McBride 648
v. McClay 549
v. Martin 328, 444, 455, 456
v. Massey 610
v. Moore 566
v. Page 6, 59, 69
v. Smith 21
v. Surles 56
v. Votaw 700
v. Whitener 634
Stater v. Kimbro 340
Stearns v. Godfrey 115, 327
v. Sampson 228, 558, 559
Stebbins v. Peck 61
Stedman v. Gassett 656
v. McIntosh 251
Steed v. Cragh 88
v. Hinson 658
Steele v. Anheuser-Busch &c. Asso. 199
v. Bond 337
v. Frick 47
v. Steele 19
Steen v. Scheel 555
Stees v. Kranz 384
Steese v. Johnson 272
Steffens v. Earl 215, 253, 261
Stein v. Jones 453
Steinfield v. Wilcox 143
Steinhardt v. Buel 137a
Steinhauser v. Kuhn 257, 476
Steketee v. Pratt 197
Stephani v. Catholic Bishop 415
Stephens v. Brown 255, 474a
v. Ely 718
Stephenson v. Osborne 87
Sterling v. Warden 228, 559
Stern v. Thayer 539
Sterrett v. Wright 655
Stetson v. Briggs 83, 447
v. Day 625, 626, 637, 639
Steubben v. Granger 132
Stevens v. Andrews 655
v. Dewing 58
v. Haskell 132
v. Hulin 222, 227
v. Pantlind 115
v. Pierce 575, 576
v. Rose 625, 626, 630
Stevenson v. Hancock 428
v. Lambard 460, 669
Steward v. Winters 382, 383, 384
Stewart v. Apel 74
v. Doughty 47, 53
v. Keener 699
v. Lanier House Co. 672, 673
v. Long Island R. Co. 446, 455
Stewart v. Mumford 538
v. Murrell 253, 279
v. Perkins 669
v. Pier 114, 388
v. Putnam 600
v. Smiley 93, 422
v. Sprague 448, 549
Stickney v. Burke 302
v. Stickney 54
Stier v. Surget 661
Stillman v. Harvey 439
Stimmel v. Waters 452
Stinson v. Dousman 34
v. Hardy 36, 37
Stobie v. Dills 81, 539, 543
Stockdale v. Dunlop 157
Stockett v. Howard 377
v. Watkins 26
Stockwell v. Hunter 102, 677
v. Marks 255
Stoddard v. Waters 66
v. Whiting 74
Stoddert v. Newman 654
Stoetzele v. Swearingen 600
Stoker v. Wilson 140
Stokes v. Cooper 365
v. McKibbin 697
Stoltz v. Kretschmar 641
Stone, Succession of 447
Stone v. Clark 99
v. Lahey 558
v. Patterson 670
v. Proctor 573
v. St. Louis Stamping Co. 340, 342
v. Wood 81
Stoops v. Devlin 201
Stoppelkamp v. Mangeot 216
Storch v. Carr 653
v. Harvey 341
Stose v. Heissler 346
Stott v. Rutherford 321
Stoudemeier v. Williamson 93
Stoughton, Appeal of 89
Stout v. Folger 463
v. Merrill 703
Stover v. Hazelbaker 497
Strain v. Gardner 52
Stratford Turf Asso. v. Fitch 123
Strauss v. Hamersley 616
Street v. Chicago Wharfing &c. Co. 67
v. Nelson 635
Streeter v. Ilsley 700
v. Streeter 349
Strickland v. Stiles 7, 84
Strohlburg v. Jones 642
Strohmaier v. Zeppenfeld 346
Strohmeyer v. Zeppenfeld 324
Strong v. Garfield 3, 437, 655
Strousse v. Bank 339

[*References are to Sections.*]

Stubbings v. Evanston 362, 680
Stubbs v. Parsons 413
Stultz v. Dickey 569
v. Fleming 433
v. Locke 397, 629
Stuyvesant v. Davis 495, 497, 498
v. Mayor &c. 332, 334, 372
Style v. Hearing 349
Suchaneck v. Smith 519
Suddarth v. Robertson 702
Suffern v. Townsend 488
Sullivan v. Carberry 555, 716
v. Cary 251
v. Enders 198
v. O'Hara 639
Sully v. Schmitt 354, 355, 360
Sumner v. Williams 350
Sunasack v. Morey 581, 583
Sunday Lake Mining Co. v. Wakefield 491
Sutherland v. Goodnow 337, 347, 431, 471
Sutliff v. Atwood 447, 449
Sutphin v. Seebas 681
Sutton v. Casselleggi 695
v. Head 382
v. Hiram Lodge 116
v. Mandeville 650
v. Temple 574, 576, 578, 579
Suydam v. Jackson 681
Swank v. St. Paul City R. Co. 347
Swan v. Clark 236
Swanner v. Swanner 14
Swatman v. Ambler 75
Sweeney v. Garrett 504
Sweet v. Myers 716
v. Cutts 624
v. Patrick 370
Swift v. Dean 702
v. Gage 699
v. Heath 544
v. Moseley 10
v. New Durham Lumber Co. 1, 3
Switzer v. Allen 376
v. Gardner 542
Swope v. Hopkins 195
Swords v. Edgar 603, 605, 607
Swyft v. Eyres 110
Sykes v. Benton 84
Sylvester v. Ralston 90
Syme v. Sanders 682
Symonds v. Hall 52, 53
Szathmary v. Adams 601

T

Taft v. Brewster 81
Taggard v. Roosevelt 152
Tainter v. Cole 86
v. Lombard 158
Tait v. Central &c. Asylum 708
Talamo v. Spitzmiller 197
Talbot v. Cruger 718
v. Hill 570
v. Whipple 538, 716, 727
Talbott v. English 64, 355, 356
Tallman v. Bresler 458
v. Coffin 329, 377
v. Murphy 356
Tantlinger v. Sullivan 289, 568
Tanton v. Van Alstine 195
Tarlotting v. Bokern 299
Tarpy v. Blume 363
v. Blackburne 711, 728
v. Crowson 486, 496, 503
v. Field 634
v. McClure 655
v. McCormick 456
Tatem v. Chaplin 331, 385
Tatum v. Thompson 679
Taunton v. Costar 558
Tavener's Case 669
Taylor v. Bradley 54, 140, 616
v. Cole 444
v. Coney 53, 56
v. Cooper 369, 370
v. DeBus 447, 450, 456, 462
v. Frohock 114
v. Hart 393, 675, 678
v. King 125
v. Koshetz 384
v. Lehman 64, 410, 672, 673
v. Levy 121
v. Moffatt 431
v. O'Brien 225
v. Shum 456, 458
v. Soldati 135
v. Sweet 125
v. Syme 394
v. Taylor 35, 171
v. Tuson 258
v. Winters 213
Tays v. Ecker 394
Teft v. Hinchman 256
Ten Eyck v. Rector &c. 415
v. Sleeper 135
Terrell v. Cunningham 657
Terstegge v. First German &c. Soc. 340
Tew v. Jones 227, 257, 654
Tewksbury v. Magraff 698
Texas &c. Co. v. Lawson 326
Texas &c. R. Co. v. Bayliss 52, 645
v. Mangum 579
v. Settegast 497
Texas Land Co. v. Williams 692
Texas Loan Agency v. Heming 599
Thayer v. Luce 158, 437
v. Society &c. 697, 702
v. Waples 474a
Theobalds v. Duffoy 111
Thiebaud v. First Nat. Bank 339

[References are to Sections.]

Thomas v. Cook 543
v. Cront 711
v. Dering 138
v. Frost 555
v. Hatch 61
v. Nelson 180, 548
v. Pemberton 461
v. Pickering 657
v. Sanford &c. Co. 548
v. Vonkapff 335
v. Walmer 504
v. Wiggers 104
v. Wright 197, 251
v. Zumbalen 542
Thomasson v. Wilson 494
Thompson v. Bower 651
v. Clemens 592
v. Cummings 631
v. Fischesser 413
v. Gray 438
v. Gregory 45
v. Lawley 171
v. Leach 79
v. Marsh 554
v. Mawhinney 48
v. Pendell 675, 679
v. Phenix Ins. Co. 443
v. Pioche 707
v. Rose 329, 377
v. Shattuck 410
Thompson &c. R. Co. v. Young 725
Thomson-Houston &c. Co. v. Durant &c. Co. 410
Thorndike v. Burrage 397, 555
v. Norris 699, 700
Thornston v. Payne 141, 142
Thornton v. Dixon 86
v. Strauss 31, 35
Thorp v. Bradley 159
Thrall v. Omaha Hotel Co. 689
Thresher v. East London &c. Co. 713
Throop v. Broadus 371
Thropp v. Field 104, 496
Thruston v. Minke 323
Thum v. Rhodes 574, 576
Thunder v. Belcher 25, 180
Thurber v. Dwyer 199, 251
Thursby v. Plant 447
Tibbals v. Iffland 456
Tibbits v. Percy 324
Tibeau v. Tibeau 541
Tiefenbrun v. Tiefenbrun 242, 440
Tignor v. Bradley 661
v. Toney 52, 53
Tiley v. Moyers 354, 358
Tilford v. Fleming 421, 426
Tilghman v. Little 703
Tilleny v. Knoblauch 337
Tillman v. Fuller 141, 152
Tillotson v. Boyd 462
Tillotson v. Doe 474a
Times Co. v. Seibrecht 496
Timmins v. Rowlinson 192, 564
Tinder v. Davis 654
Tinney v. Ashley 323
Tinsley v. Craige 49
v. Tinsley 2
Tipping v. Robbins 86
Toan v. Pline 181
Tobey v. County of Bristol 346
Tobin v. Young 257, 474a
Todd v. Flight 599, 603, 605
v. Hall 495
Toler v. Seabrook 656
v. Slater 87
Tolle v. Orth 201, 206, 209
Tomkins v. Lawrence 195, 219
Tomle v. Hampton 607
Tompkins v. Staiger 3
Toms v. Williams 111
Tone v. Brace 351
Toner v. Meussdorffer 580
Tooker v. Grotenkemper 350
Toole v. Beckett 612
Topping v. Parish 163
v. Sadler 88
Torrent v. Muskegon &c. Co. 565
Torrey v. Burnett 716
v. Walles 411
Torriano v. Young 625, 627
Toun v. Armstrong 598
Toupin v. Peabody 71, 167
Towell v. Etter 558
Towery v. Henderson 686
Towey v. Wallis 328
Town v. Armstrong 594
Towne v. Bowers 570
v. Butterfield 30, 555, 685, 696
v. Thompson 576, 579, 583, 585
Townley v. Bedwell 387
Townsend v. Albers 548
v. Gilsey 360
v. Hubbard 320
v. Isenberger 53, 645
v. Scholey 462
v. Sharp 160
Townshend v. Stangroom 412
Townson v. Tickell 456
Trabue v. McAdams 456, 458
Tracy v. Albany Exc. Co. 343, 369
Tradesman Pub. Co. v. Knoxville &c. Co. 444
Trainer v. Trumbull 96
Trammell v. Chambers 111
v. Trammell 45
Trapnall v. Merrick 80, 650
Trask v. Graham 328, 455
v. Wheeler 494, 495
Trathen v. Kipp 672
Traynor v. Johnson 497

[*References are to Sections.*]

Treadway v. Sharon 711
Treadwell v. Bulkley 79
Tredt v. Wheeler 581
Tresham v. Lamb 631
Tress v. Savage 256
Trevivan v. Lawrence 84
Tribble v. Frame 558
Trimble v. Ward 101
Triscony v. Orr 10
Tritton v. Frote 343
Trobock v. Caro 122
Troewert v. Decker 61
Trout v. Perciful 388
Trowbridge v. Wetherbee 131
Trower v. Wehner 612
Troxell v. Wheatley 439
Troy &c. R. Co. v. Kerr 9
Trubee v. Miller 653
Trull v. Granger 143, 367a, 369
Truss v. Old 635
Trust Co. v. Palmer 357
Trustees v. Jennings 474a, 479
v. Spencer 80
Trustees &c. v. Burt 686
v. Cowen 331
v. Dunn 690
v. Meetze 257, 474a, 479
v. Streeter 446
Tryon v. Davis 88
Tscheider v. Biddle 346
Tubb v. Fort 658
Tucker v. Adams 1, 29
v. Byers 3
v. Whitehead 707
Tufts v. DuBignon 702
Tully v. Dunn 549, 661
Tumbridge v. Read 98
Tunis v. Grandy 354, 365, 669
Turley &c. Inst. v. Memphis 412
Turner v. Bachelder 53
v. Johnson 431
v. Revere Water Co. 414
v. Richardson 461
v. Townsend 404, 588, 590
Tuttle v. G. H. Gilbert Mfg. Co. 579, 592
v. Harry 58
v. Lane 223
v. Langley 180, 194, 568
v. Reynolds 257, 682
Twiss v. Baldwin 361
v. Boehmer 1
Twycross v. Fitchburg R. Co. 415
Twyman v. Hawley 183, 314
Tyler v. Davis 697
v. Disbrow 583
v. Giesler 456
v. Heidorn 58, 649
v. Williamson 109
Tyson v. Chestnut 363, 369

U

Uhl v. Pence 30
Uhlig v. Garrison 691
Uhrig v. Williamsburg City Fire Ins. Co. 346
Ullman v. Herzberg 564
Underhill v. Collins 543, 549, 550
Underwood v. Ainsworth 87
v. Birchard 361, 366
Unger v. Bamberger 238, 340
Unglish v. Marvin 50
Union &c. Ins. Co. v. Tillery 713, 715
Union Bank v. Kansas City Bank 443
Union Banking Co. v. Gittings 149, 153
Union Brewing Co. v. Meier 87
Union Depot Co. v. Chicago &c. R. Co. 40
Union Water Power Co. v. Pingree 679
United Order &c. v. Fitzgerald 128
United States v. Appleton 107
v. Bostwick 628, 631
v. Gratiot 112
v. Parrott 638
United States Trust Co. v. Wabash &c. R. Co. 9, 443
University of Vermont v. Joslyn 458
Updegraff v. Lesem 716, 725, 727
Updike v. Campbell 121, 123
Upper Appomattox Co. v. Hamilton 59
Upton v. Greenlees 365
v. Townend 354, 365
Uridias v. Morrell 228
Usher v. Moss 555
Utah L. & T. Co. v. Garbutt 93, 159, 216, 253
Utah Optical Co. v. Keith 148, 474, 677

V

Vai v. Weld 404, 612
Vale v. Trader 675, 678
Valentine v. Healey 86
Valle v. Fargo 417
Van v. Rouse 681
Van Alstyne v. Van Slyck 320
Vanatta v. Brewer 487
Van Bergen v. Van Bergen 642
Van Beuren v. Wotherspoon 375
Van Blarcom v. Kip 474a
Vanbuskirk v. McNaughton 121
Van Campden v. Depue 303
Vance v. Johnson 25
Van Cortlandt v. Underhill 379
Vandegrift v. Abbott 93, 130, 672, 673

[*References are to Sections.*]

Vandenheuvel v. Storrs 29
Vanderford v. Foreman 204
Vanderkarr v. Vanderkarr 350
Van Doren v. Everitt 569
Van Driel v. Rosierz 424
Van Hoozier v. Hannibal &c. R. Co. 645
Van Horne v. Crain 460
Van Ness v. Pacard 712, 713, 716, 725, 727
Van Rensselaer v. Ball 649
v. Bonesteel 455
v. Bradley 460, 669
v. Dennison 525
v. Gallup 669
v. Jewett 503, 661, 666
v. Jones 458, 460, 666, 669
v. Penniman 555
v. Platner 447, 666
Van Schaick v. Third Ave. R. Co. 660
Van Studdiford v. Kohn 272
Van Wagner v. Van Nostrand 422
Van Wicklen v. Paulson 648, 670
Van Winkle v. Hinckle 474a
Van Wormer v. Crane 395
Varley v. Coppard 468, 469
Varner v. Rice 410
Varney v. Stevens 413, 637, 690
Vason v. Augusta 605, 607
Vass v. Wales 404
Vaughan v. Matlock 319
Vaughn v. Locke 422
Veale v. Warner 682
Vegely v. Robinson 270
Vere v. Loveden 464
Vermilya v. Austin 365
Vernam v. Smith 351
Vernon v. Smith 389
Verplanck v. Wright 326, 329
Vick v. Ayres 34
Vicksburg &c. R. Co. v. Ragsdale 496
Victory v. Stroud 11
Vincent v. Buhler 87
v. Corbin 257, 305, 474a
v. Defield 367
v. Spicer 632
Vinson v. Flynn 558, 682
Vinz v. Beatty 61
Virden v. Ellsworth 333
Virginia Min. & Imp. Co. v. Hoover 12
Vivian v. Champion 410
v. Moat 474a
Voege v. Ronalds 154, 340
Voiht v. Resor 12
Voltz v. Harris 662
Vorrath v. Burke 594
Vorse v. Des Moines &c. Co. 420, 555
Voss v. King 201, 202, 695, 701
Vrooman v. McKaig 202
Vyse v. Wakefield 409

W

Wacholz v. Griesgraber 368
Waddell v. Defet 395, 397
Wade v. Baker 89
v. Halligan 349
Wadley v. Williams 50
Wadman v. Calcraft 491
Wafer v. Mocato 492
Wakefield v. Sunday Lake Min. Co. 502
Wakeman v. Johnson 524
Waggener v. McLaughlin 690
Wahl v. Barroll 330, 428, 429, 463
Wainscott v. Silvers 393
Wait, Ex parte 650
Waite v. O'Neil 392
v. Teeters 432
Walden v. Bodley 474a
v. Conn 432, 642, 644
Waldo v. Hall 352, 435
Walker's Case 658
Walker v. Clifford 644
v. Ellis 255
v. Engler 495, 497
v. Fitts 48, 51
v. Forbush 548
v. Gilbert 409, 612
v. Harper 682
v. Harrison 413
v. Hatton 397
v. Moore 140
v. Physick 322, 463
v. Reeves 458
v. Shakelford 199
v. Sharpe 273
v. Tucker 631
v. Walker 642
v. Whittemore 415
Wall v. Goodenough 474a
v. Hinds 416, 447, 713
v. Hinson 163
Wallace v. Bahlhorn 348
v. Kennelly 543
v. Lent 128, 583
v. Rippon 87
v. Scoggins 159, 160
Waller v. Deane 75
v. Morgan 20, 432
v. Vermitt 289
Wallis v. Harrison 44
Walls v. Atcheson 540
v. Preston 47, 52, 53, 209
Walsh v. Martin 336, 436, 442
v. Packard 333
v. Watson 331
Walter v. Maunde 668
Walters v. Hutchins 635
v. Meyer 29
Walton v. Cronly 458
v. File 558

[*References are to Sections.*]

Walton v. Stafford 661
v. Waterhouse 392
Wampler v. Weinmann 679
Wamsganz v. Wolff 254
Waples v. City of New Orleans 258, 292
Ward v. Bull 654, 676
v. Dewey 565
v. Fagin 586, 613
v. Hasbrouck 152, 154
v. Lumley 541
v. Neal 381
v. Robertson 132
v. Sheppard 636
v. Small 18
v. Ward 88
v. Warner 2
Wardell v. Etter 254
Warder v. Henry 631
Ware v. Grand Junction &c. Co. 9
Waring v. King 207, 554, 555
Warner v. Abbey 46, 50, 53
v. Hale 152, 159, 217
v. Hitchins 393
v. Hoisington 51
v. Tanner 111, 114, 171
Warnock v. Harlow 654
Warren v. Ferdinand 652
v. Leland 74, 439
v. Lyons 221
v. Wagner 354, 365, 675, 677
Warren &c. Mfg. Co. v. Holbrook 154
Warren Co. v. Gans 635
Washburn, In re 461
Washburn v. Burns 88
Washington v. Conrad 682, 697, 699
Washington Bank v. Brown 653
Washington Gas Co. v. Johnson 411
Waterhouse v. Schlitz Brew. Co. 609
Waterman v. Harkness 417
v. Johnson 99
Waters v. Roberts 266
v. Williamson 261
v. Young 261
Watertown v. White 9
Watkins v. Goodall 614
Watriss v. First Nat. Bank 718
Watrous v. Allen 382
Watson v. Alexander 705
v. Brainard 3
v. Fletcher 497
v. Gardner 377
v. Harrigan 641, 644
v. Hunkins 430
v. Janion 137
v. O'Hern 59
v. Pugh 31
Watson &c. Co. v. Casteel 455
Wattles v. South Omaha &c. Co. 392, 678
Watts v. Coffin 324
Way v. Holtan 659
v. Reed 448, 453
Weathersby v. Sleeper 725
Weatherly v. Baker 431
Weaver v. Coumbe 71
v. Shipley 98, 99
v. Southern Oreg. Co. 5
v. Wood 59, 137a
Webb v. Plummer 321
v. Russell 328, 428, 429, 659
v. Seekins 174
Webber v. Shearman 202
Webster v. Blodgett 160
v. Nichols 465
Weddall v. Capes 160
Weed v. Crocker 5, 143
v. Lindsay 141, 146, 285
Weeks v. Sly 272, 276
Weeton v. Woodstock 716, 721
Weichselbaum v. Curlett 412, 690
Weigall v. Waters 392, 404, 591, 592
Weil v. Kahn 133
Weinsteine v. Harrison 404, 588
Welch v. Myers 461
v. Winterburn 146
Welcome v. Hess 538, 539, 550
Weld v. Traip 143
Welden v. Schlosser 563
Weldon v. Lytle 89, 90
Weller v. McCormick 600
Welles v. Castles 394
Wells v. Cowles 658
v. De Leyer 346
v. Mason 321, 349
v. Porter 413
v. Sheerer 474a
Welsh v. Schuyler 440, 442
Welshbillig v. Dienhart 133
Welz v. Rhodius 130, 382
Wentworth v. Portsmouth &c. R. 50, 640
Wenzlick v. McCotten 604
Wertheimer v. Circuit Judge 331, 471, 472
v. Hosmer 331
v. Saunders 596, 597
West v. Blakeway 392
v. Cartledge 652
v. Emmons 323
v. Treude 626
West Chicago &c. Works v. Sheer 666
West Chicago St. R. Co. v. Morrison &c. Co. 59, 137
West London R. Co. v. London &c. R. Co. 9
West River Bridge Co. v. Dix 708
West Shore Mills Co. v. Edwards 422, 703
West Side &c. Co. v. Connecticut &c. Ins. Co. 88

[*References are to Sections.*]

West Virginia &c. R. Co. v. McIntire 411, 455
Western &c. R. Co. v. Cox 604
v. Gannon 141, 143, 144
v. State 412
Western Bank v. Kyle 495
Western North Carolina R. v. Deal 727
Western Transp. Co. v. Lansing 112, 343
Westervelt v. Ackley 87
Westlake v. De Graw 673
Westmoreland &c. Co. v. De Witt 63
Weston v. Gravlin 640
Westropp v. Elligott 631
Wetherbee v. Ellison 573
Wetzell v. Richcreek 435
Whalen v. Leisy &c. Co. 121
Whaley v. Whaley 13
Whalin v. White 703
Wharton v. Anderson 136
v. Stoutenburgh 138
Wheat v. Brown 201
v. Watson 547, 656
Wheeler v. Baker 136
v. Bramah 461
v. Cowan 131, 202, 239
v. Dascomb 326, 327
v. Earle 331, 386, 489
v. Frankenthal 152, 217
v. Hill 374, 431, 446
v. Montefiore 15
v. Walden 540
v. Wood 254
Wheeler &c. Mfg. Co. v. Hasbrouck 726
Wheelock v. Tuttle 413
v. Warschauer 706
Whetstone v. Davis 255
v. McCartney 447
Whicher v. Cottrell 258
Whipley v. Dewey 716
Whipple v. Earick 695
v. Shewalter 99, 262
Whitaker v. Allday 657
v. Cawthorne 37
v. Hawley 676, 678
Whitbeck v. Cook 354
v. Skinner 673
Whitcomb v. Starkey 457
White v. Albany Ry. 397
v. Arndt 716
v. Cannon 91
v. Foster 38
v. Gillman 324
v. Griffing 461
v. Holland 152
v. Kane 382, 383, 424
v. Levy 152
v. Livingston 31
v. Maynard 23, 24
White v. Montgomery 587, 616
v. Naerup 383
v. Stuart 675
v. Wagner 625, 626
v. Walker 453, 662, 666
v. Wieland 159
Whitehead v. Clifford 540
Whitfield v. Bewit 637
Whiting v. Edmunds 481
v. Mass. &c. Ins. Co. 156
v. Ohlert 152
Whitlock v. Duffield 343
Whitmarsh v. Cutting 569
Whitmore v. Orono Pulp & Paper Co. 579, 585
Whitney v. Allaire 126
v. Clifford 22
v. Olney 107
v. Salter 689
v. Swett 156, 180, 302
Whittaker v. Collins 630
Whittemore v. Gibbs 190, 446
v. Moore 202
Whittle v. Webster 587
Whitton v. Smith 541
Whitwell v. Harris 380
Wickham v. Freeman 627
Wickson v. Monarch &c. Mfg Co. 152
Wiggin v. Wiggin 702
v. Keizer 382
Wiggins Ferry Co. v. Ohio &c. R. Co. 712
Wigglesworth v. Dallison 569
Wilhelm v. Mertz 71
Wilber v. Follansbee 597
v. Paine 159, 160
Wilborn v. Whitfield 691
Wilbur v. Collin 85
v. Nichols 428
Wilcher v. Robertson 2, 3
Wilcox v. Cate 628
v. Hines 576
v. Montour &c. Co. 210, 342
v. Zane 617, 620
Wilczinski v. Lick 31
Wild v. Serpell 688
Wilde v. Cantillon 203, 228
v. Fox 160
Wildy v. Doe 682
Wiley, Estate of 160, 441
Wiley v. Christ 541
v. Inhabitants &c. 324
Wilgus v. Lewis 212, 214, 564
v. Whitehead 132, 136, 310
Wilkerson v. Farnham 373
Wilkins v. Pensacola City Co. 695
Wilkinson v. Clauson 580, 674
v. Colley 564
v. Hall 650
v. Libbey 417
v. Roves 34

[*References are to Sections.*]

Wilkinson v. Wilkinson 6
Willard v. Harvey 94
Williams v. Ackerman 180, 251
v. Bacon 158, 437
v. Bartholomew 198
v. Bigelow 19, 563
v. Bosanquet 458
v. Brummel 268
v. Burrell 369
v. Canal Co. 642
v. Chicago Exhibition Co. 638
v. Cleaver 47, 49, 59
v. Deriar 197, 256
v. Downing 163
v. Frybarger 427
v. Garrison 689
v. Haywood 430
v. Hollis 2
v. Jones 540
v. Kearny Co. 628
v. Kent 414
v. Kinsman 374
v. Lane 718
v. Mershon 157
v. Robinson 437
v. Rogers 50
v. Sherman 651
v. Vanderbilt 378, 496, 503, 513, 543
v. Wait 702
v. Woodard 116, 442
Williamson v. Crossett 550
v. Jones 637
v. Miller 408
v. Yingling 37
Willard v. Benton 503, 533
v. Earley 474a, 475
v. Tillman 365, 430, 658
v. Warren 557
Willerton v. Shoemaker 255
Willi v. Dryden 458, 462
Willis v. Astor 343
v. Branch 504
Willison v. Watkins 85, 474a, 479, 657, 682, 688, 696
Willoughby v. Atkinson &c. Co. 293, 337
v. Lawrence 465, 495
Wills v. Manufacturers' &c. Co. 495
v. Summers 411, 420, 455
Willson v. Phillips 326
v. Treadwell 579
Willmath v. Pratt 53
v. Palmer 2
Wilmer v. Farris 160
Wilmington &c. Co. v. Allen 486
Wilmington Water-Power Co. v. Evans 37
Wilson v. Cleaveland 688
v. Edmonds 404, 637
v. Finch 577, 578
Wilson v. Gerhardt 447
v. Hunter 102
v. James 687
v. Lunt 462
v. Martin 23
v. Merrill 225
v. Prescott 293, 555
v. Roots 69
v. Scruggs 373
v. Stewart 56
v. Taylor 216
v. Trustees of No. 16 651
v. Weathersby 682
v. Wilson 471
v. Youst 89
Winch v. Birkenhead &c. R. Co. 9
Winchester v. Hess 102
v. Howard 158
Windon v. Stewart 89, 90, 631
Wineman v. Hughson 658
v. Phillips 447, 448
Winfrey v. Work 428
Wing v. Gray 573
Winkler v. Gibson 465
v. Massengill 562
Winn v. State 326, 558
v. Strickland 682, 703, 709
Winnard v. Robbins 682
Winship v. Pitts 633, 638
Winslow v. Merchants' Ins. Co. 710
Winstell v. Hehl 88
Winston v. President &c. 659, 682
Winter v. Stevens 558
Winterbottom v. Ingham 654
Winters v. Cherry 242
Winton v. Cornish 102, 474, 677
Wirt v. Philips 502
Wise v. Falkner 658
v. Ressler 666
Withers v. Atkinson 62
v. Larrabee 239, 254, 548
Withnell v. Petzold 242
Witthaus v. Starin 83
Witman v. Reading 74, 83
v. Watry 549
Witte v. Quinn 104, 356, 359
v. Witte 299
Wittman v. Milwaukee &c. R. Co. 442
Witty v. Matthews 404, 588, 590
Wolcott v. Sullivan 409
Wolf v. Dozer 152
v. Studebaker 140
v. Johnson 703
Wolfe v. Arrott 125, 126, 583
Wolff v. Schaeffer 127
Wolffe v. Wolffe 206, 209
Wollaston v. Hakewill 446
Womack v. McQuarry 102, 675, 677
Wood v. Bogle 418
v. Felton 27, 428
v. Garrison 291

[*References are to Sections.*]

Wood v. Helme 379
v. Hubbell 675
v. Leadbitter 36, 44
v. Manley 44
v. Partridge 439, 661, 667
v. Sharpless 391
v. Turner 704
v. Wilcox 652, 661
Woodbridge v. Richardson 390
Woodbury v. Parshley 45
v. Woodbury 655
Woodcock v. Carlson 493, 502, 519
v. Nuth 543
Woodhull v. Rosenthal 446, 460
Woodland Oil Co. v. Crawford 462
Woodman v. Francis 640
v. Tufts 604
Woodrow v. Michael 194, 296
Woodruff v. Adams 48, 53
v. Baldwin 462, 463
Woods v. Naumkeag &c. Co. 619
Woodstock Iron Co. v. Fullenwider 477
Woodward v. Brown 476
v. Conder 49
v. Cone 513
v. Gates 626, 636
v. Payne 374, 377
v. Seely 37, 45
Woodworth v. Thompson 590
Woolley v. Osborne 373
Woolveridge v. Steward 449, 451, 463
Word v. Drouthett 686
Work v. Brayton 222
Worrall v. Wilson 539
Worthington v. Cooke 668
v. Hewes 450
v. Lee 437
v. Warrington 140
v. Young 373
Wreford v. Kenrick 365
Wrese v. Remme 597
Wright v. Bischer 165
v. Du Bignon 711
v. Everett 483
v. Graves 221, 694
v. Hardy 494
v. Lattin 324, 410, 673
v. Macdonnell 718, 719, 720
v. Mahoney 561
Wright v. Roberts 670
v. Stavert 23, 24
v. Tileston 628, 630
v. Weeks 100
Wunder v. McLean 605
Wyckoff v. Gardner 88
Wyman v. Dorr 10
v. Farrar 67
v. Hook 3, 655
v. Sperbeck 70
Wynn v. Garland 36,37

Y

Yale v. Seely 38, 558
Yarbrough v. Monday 320
Yates v. Backley 375
v. Kinney 202
Yeakle v. Jacob 38
Yeazel v. White 572
Yellow Jack & Co. v. Stevenson 181
Yetter v. King &c. Co. 201
York v. Jones 422
v. Steward 575, 576
Youell v. Kridler 553
Youmans v. Caldwell 568
Young v. Burhans 355, 410, 673
v. Collett 353, 355
v. Consolidated Imp. Co. 718, 719, 720
v. Dake 152
v. Downey 651
v. Hargrave 349
v. Heffernan 702
v. Paul 87
v. Smith 255
v. Young 293, 488
Young Trust Co. v. Wagener 497
Youngblood v. Eubank 716, 721
Younggreen v. Shelton 645

Z

Zeller v. Eckert 474a
Zeysing v. Welbourn 428
Zillig, Matter of 154
Zimmerman v. Marchland 688
Zippar v. Reppy 213
Zorkowski v. Astor 375
Zouch v. Parsons 95
Zule v. Zule 10, 667

THE LAW OF LANDLORD AND TENANT.

CHAPTER I.

CREATION OF THE RELATION.

1. Essentials of a Tenancy, §§ 1-8.
2. Subject-Matter, §§ 9-10.
3. Proof of Tenancy, §§ 11-14.
4. Interesse Termini, §§ 15-17.
5. Similar Contractual Relations, §§ 18-28.
6. Purchaser in Possession, §§ 29-36.
7. Lease or License, §§ 37-45.
8. Cropping Contracts, §§ 46-56.

I. *Essentials of a Tenancy.*

§ 1. A tenancy is created by contract express or implied whereby one person permits another to occupy lands actually or constructively. Without such a contract there can be no relation of landlord and tenant.[1] "In a popular sense a tenant is one who has the temporary use and occupation of lands and tenements which belong to another, the duration and other terms of whose occupation are usually defined by an agreement called a lease, while the parties thereto are placed in the relation of landlord and tenant."[2] Reduced to its simplest terms, the rule has sometimes been stated to be that any permissive occupation of land in subordination of another's title which amounts to an exclusive possession, creates the relation of landlord and tenant between the occupant and the landowner.[3] But not only must a person

[1] Rogers v. Coy, 164 Mass. 391, 41 N. E. 652; Central Mills v. Hart, 124 Mass. 123; Merrill v. Bullock, 105 Mass. 486, 490; Kirchgassner v. Rodick, 170 Mass. 543, 49 N. E. 1015; Cobb v. Arnold, 8 Met. (Mass.) 398.

[2] Bouvier's Law Dict., Rawle's Revision.

[3] Central Mills v. Hart, 124 Mass. 123; Baley v. Deakins, 5 B. Mon. (Ky.) 159; Skinner v. Skinner, 38 Neb. 756, 57 N. W. 534; Hanks v. Price, 32 Gratt. (Va.) 107; McLen-

residing or working on the premises have the legal possession of them to constitute him a tenant, but there must be no other agreement or contract under which such possession can be explained. Some agreement between the parties for a tenancy, whether it be made expressly in words, or arises from their acts and conduct in relation to the land and the absence of express agreement, is essential.[4]

§ 2. Occupation must not be adverse.—One of the first requirements in inferring an agreement for a tenancy is consent on the part of the landowner to the occupation of the premises in regard to which the alleged tenancy is claimed to exist. Consent to occupation of premises does not necessarily imply a contract of tenancy, but the absence of consent does absolutely preclude any inference of such an agreement. The relation of landlord and tenant does not arise where the occupant of land holds adversely to the owner, and the occupant in such a case is not liable for rent.[5] An entry on lands of another without right and not in subordination to the title of the owner is a mere trespass, and no tenancy is created thereby. Neither the occupant nor the owner is entitled to claim the benefits of a tenancy, and neither can be held liable for its obligations.[6] The

nan v. Grant, 8 Wash. 603, 36 Pac. 682.

[4] **Alabama:** Tucker v. Adams, 52 Ala. 254. **California:** Emerson v. Weeks, 58 Cal. 439; Paige v. Akins, 112 Cal. 401, 406, 44 Pac. 666. **Georgia:** Littleton v. Wynn, 31 Ga. 583. **Kentucky:** Moore v. Calvert, 6 Bush (Ky.) 356. **Illinois:** Hill v. Coal Valley Min. Co., 103 Ill. App. 41. **Massachusetts:** Rogers v. Coy, 164 Mass. 391, 41 N. E. 652; Central Mills v. Hart, 124 Mass. 123; Knowles v. Hull, 99 Mass. 562; Emmons v. Scudder, 115 Mass. 367; Edwards v. Hale, 9 Allen (Mass.) 462. **New Hampshire:** Swift v. New Durham Lumber Co., 64 N. H. 53. **Oregon:** Twiss v. Boehmer, 39 Ore. 359, 65 Pac. 18. **Vermont:** Moore v. Harvey, 50 Vt. 297. **Wisconsin:** J. B. Alfree Mfg. Co. v. Henry, 96 Wis. 327, 71 N. W. 370.

[5] **California:** Pico v. Phelan, 77 Cal. 86, 19 Pac. 186. **Georgia:** Williams v. Hollis, 19 Ga. 313; Jackson v. Mowry, 30 Ga. 143; Littleton v. Wynn, 31 Ga. 583; McLendon v. West Point &c. R. Co., 54 Ga. 293; Lathrop v. Standard Oil Co., 83 Ga. 307, 9 S. E. 1041. **Iowa:** Martin v. Knapp, 57 Iowa 336, 10 N. W. 721. **Maine:** Little v. Libby, 2 Me. 242, 248; Goddard v. Hall, 55 Me. 579. **Massachusetts:** Leonard v. Kingman, 136 Mass. 123; Boston v. Binney, 11 Pick. (Mass.) 1; Central Mills v. Hart, 124 Mass. 123. **Michigan:** Ward v. Warner, 8 Mich. 508; Hogsett v. Ellis, 17 Mich. 351; Wilmarth v. Palmer, 34 Mich. 347. **Mississippi:** Scales v. Anderson, 4 Cushm. 94. **Nevada:** Alexander v. Archer, 21 Nev. 22, 24 Pac. 373;

[6] Krug v. Davis, 101 Ind. 75; Petty v. Malier, 15 B. Mon. (Ky.) 591, 606; Douglass v. Geiler, 32 Kan. 499, 4 Pac. 1039; Lakin v. Roberts, 54 Fed. 461; Dalton v. Laudahn, 30 Mich. 349.

nature of such an occupation might be changed to a tenancy where the owner consents to the occupation and the occupant does some act in plain recognition of the owner's title.[7] Where a judgment of eviction was obtained against a tort-feasor who then accepted a lease, he was held to become a tenant by such transaction.[8] After an occupant has acknowledged the title of the owner and still continues to occupy the land by his leave and license, he ceases to be a mere trespasser, and his possession becomes the possession of him whose title he has acknowledged.[9] However, the assent to the holding of the premises must be mutual, and the consent of the occupant to become a tenant is ineffectual to constitute a tenancy when the landowner is ignorant of the occupation.[10] The converse is true that an owner of land cannot make a trespasser thereon his tenant merely by consenting to his continued occupation of the premises.[11] Yet it has been held that one may be the tenant of an unknown landlord by means of an agent with an undisclosed principal.[12]

After the death of a tenant his sons entered into possession and used the premises, and the owner attempted to charge them with rent as tenants. On the authority of two English cases[13] it was held that the defendants being in possession, the law would refer that possession to a rightful rather than to a wrongful title, and there was a course through which that title might be fully derived, viz.: by supposing the defendants to be privy to the term granted to their father. If their possession was referable to some other title it was for them to show it, for this was a matter lying within their own knowledge.[14]

In one case a kind of tenancy was created by operation of law where an action was brought upon an injunction bond to stay the execution of a writ of restitution for the possession of land. The injunction gave the protection of the law to the occupant during its pendency, while the bond secured the other party in the rent during such occupancy. So an occupant whose original entry is lawful, and under a lease or permission of uncertain duration, may be regarded in effect as tenant or *quasi* tenant under rent, during the pendency of the injunction. Although the defendant in the injunction may

[7] Lockwood v. Thunder Bay &c. Co., 42 Mich. 536, 4 N. W. 292.

[8] Ball v. Lively, 1 Dana (Ky.) 60, 65.

[9] Wilcher v. Robertson, 78 Va. 602, 619.

[10] Curtis v. Treat, 21 Me. 525.

[11] Martin v. Knapp, 57 Iowa 336, 10 N. W. 721; Ackerman v. Lyman, 20 Wis. 454.

[12] Charter Oak L. Ins. Co. v. Cummings, 13 Mo. App. 76.

[13] Doe v. Murless, 6 M. & S. 110; Doe v. Williams, 6 B. & C. 41, 13 E. C. L. 31.

[14] Page v. McGlinch, 63 Me. 472.

rightfully take the possession on the dissolution of the injunction, it does not follow that he is absolutely entitled to the crop then growing on the land. Since the duration of the occupancy, as dependent on the injunction, is uncertain, it would seem to be just and reasonable that, although by improvidence or inadvertence, the decree directs immediate restitution and the possession of the land may be rightfully taken, the party turned out, before the crop is gathered, has the right to the emblements.[15]

§ 3. The relation of landlord and tenant cannot be inferred as a matter of law from the mere fact of lawful occupancy.[16] Occupation alone will raise this relation by implication only when the occupancy of the premises has been with the assent of the owner, and without any act or claim, on the part of the occupant, inconsistent with an acknowledgment by the occupant of the owner as his rightful landlord. Moreover, this implication may be rebutted by proof of a contract, or any other fact inconsistent with the existence of such relation.[17] Thus, a contract to purchase and occupation under it, was held sufficient to rebut the implication of the existence of this relation arising from the occupancy.[18] A suit and judgment in ejectment has been held to be conclusive evidence that this relation did not exist during the time mesne profits could be recovered in the ejectment suit.[19] An ejectment suit which fails through want of notice does not work an estoppel, but it has a tendency to show that the plaintiff did not regard or treat the defendant as his tenant, and, therefore, to rebut any implied contract of tenancy between the plaintiff and defendant.[20]

Where the use and occupation of real estate is under such circumstances as to show that there was no expectation of rent by either party, a contract to pay rent will not be implied.[21] In order to maintain assumpsit for the use and occupation of land something in the nature of a demise must be shown, or some evidence given to establish the relation of landlord and tenant. That relation can only grow out

[15] Tinsley v. Tinsley, 15 B. Mon. (Ky.) 454.

[16] Bailey v. Campbell, 82 Ala. 342, 2 So. 646; Wilcher v. Robertson, 78 Va. 602, 619; Central Mills v. Hart, 124 Mass. 123; Porter v. Hubbard, 134 Mass. 233; Emerson v. Weeks, 58 Cal. 439; Hardin v. Pulley, 79 Ala. 381; Swift v. New Durham Lumber Co., 64 N. H. 53, 5 Atl. 903; Tompkins v. Staiger, 52 N. J. L. 350, 19 Atl. 387; Collyer v. Collyer, 113 N. Y. 442, 21 N. E. 114.

[17] Stacy v. Vermont Central R. Co., 32 Vt. 551.

[18] Hough v. Birge, 11 Vt. 190.

[19] Strong v. Garfield, 10 Vt. 502; Birch v. Wright, 1 Term. R. 378.

[20] Chamberlin v. Donahue, 44 Vt. 57.

[21] Collyer v. Collyer, 113 N. Y. 442, 21 N. E. 114.

of a contract, and it has accordingly been held that a contract, express or implied is necessary in order to sustain assumpsit for use and occupation.[22]

Although one person is in occupation of land legal title to which is acknowledged to be in another, such occupation may be explained by showing relations existing between the parties other than that of landlord and tenant.[23] By the terms of a will a father held lands in trust for his minor children. The relation of landlord and tenant between the father thus holding land and his minor children was not inferred. "The relative positions of the parties may be referred to the will. In such case the relation of executor and devisees or of trustee and *cestui que trust*, subsists."[24] Where there is an absence of any intention to enter into the relation of landlord and tenant, mere occupation by one other than the owner does not create a tenancy. Thus, no tenancy exists between the owner of the fee and a sub-lessee who occupies his premises;[25] nor is a husband the tenant of his wife by reason of his cultivating a farm which was her separate property, in case there is no agreement between the husband and wife, and such an agreement cannot be inferred.[26] A similar situation arises when land is sold on execution and the execution debtor has continued in possession after title has been transferred to the purchaser; the parties do not become landlord and tenant. There is no implied promise on the part of a judgment debtor, whose land has been sold under execution, to hold as tenant of the purchaser. Assumpsit will not lie against a judgment debtor for the use and occupation of land set off on execution against him, where he contests the regularity of the proceedings, unless an express contract be proved. No express contract of tenancy is pretended, and no fact appears from which such tenancy may be implied.[27] It is necessary to prove a direct contract in order to constitute the relation of landlord and tenant and for an execution defendant to remain in occupation after a sale of the land is no proof whatever,

[22] Central Mills v. Hart, 124 Mass. 123, per Ames, J., citing Merrill v. Bullock, 105 Mass. 486, 490; Bancroft v. Wardwell, 13 Johns. (N. Y.) 489; Smith v. Stewart, 6 Johns. (N. Y.) 46; Stacy v. Vermont Central R. Co., 32 Vt. 551; Watson v. Brainard, 33 Vt. 88; Chamberlin v. Donahue, 44 Vt. 57.

[23] Bailey v. Campbell, 82 Ala. 342, 2 So. 646.

[24] Hardin v. Pulley, 79 Ala. 381, citing Russell v. Erwin, 38 Ala. 44, where a mother held land for her child and the technical relation of landlord and tenant was held not to be created between the infant and his mother.

[25] Crosby v. Horne & Danz Co., 45 Minn. 249, 47 N. W. 717.

[26] Davis v. Watts, 90 Ind. 372.

[27] Tucker v. Byers, 57 Ark. 215, 21 S. W. 227; Wyman v. Hook, 2 Me. 337.

either positive or circumstantial, to establish such a contract. So it is error to instruct a jury that they may infer an actual agreement for a tenancy from such facts, as there is no proof whatever of the existence of such a contract.[28] However, in regard to the question of adverse holding, a judgment debtor, remaining in possession after a sale, is regarded, in the absence of all evidence to the contrary, as occupying the relation of *quasi* tenant at will to the purchaser. But this is a mere presumption of fact, which may be rebutted by showing that, in fact, he was holding adversely to the right of the purchaser. He is under none of the positive obligations growing out of the relation of tenant by actual contract.[29] He does not occupy the attitude of a tenant, yet the law will not, from the mere fact that he remained in possession, presume that his possession is adverse. The execution defendant, when sued, must show it to have been so.[30]

§ 4. **An award of arbitrators cannot create the relation of landlord and tenant** between two persons who have not assented to such a relationship. This was decided in a case where one person bound himself under a penalty to convey lands at such sum as arbitrators should award, and deposited a deed with the arbitrators to be delivered on the publishing of the award, and agreed in the meantime to become tenant at such rent as the arbitrators should award. This party refused to abide by the bond. Sufficient notice of this was given to the other party. The court were of opinion that the plaintiff might have a good cause of action for the defendant's not performing the award, but found it difficult to see how his utter denial of the plaintiffs' right to become his landlord should operate as an acknowledgment of his being in fact their tenant, or how his refusal should be construed into an acquiescence. "The most that can be made of it is that the defendant entered into a contract to become tenant to the plaintiffs at a future day, for a limited time, and that he would not become tenant as he had agreed to do. Under those circumstances it might be said that he had broken his agreement but not that he had become a tenant under it. The contract was executory but never executed. The relation of landlord and tenant, therefore, was not created in fact."[31] In another case a tenant entered into a written agreement under seal with the wife of his landlord, whereby they submitted certain matters, growing out of the rent of the premises, to arbitration. The award

[28] O'Donnell v. McMurdie, 6 Humph. (Tenn.) 134.

[29] Keaton v. Thomasson, 2 Swan (Tenn.) 138.

[30] Chalfin v. Malone, 9 B. Mon. (Ky.) 496.

[31] Boston v. Binney, 11 Pick. (Mass.) 1, 7, per Putnam, J.

was made and accepted by both parties. The theory was then advanced that by the submission to arbitration of the matters in difference, by the award and acceptance and performance thereof the relation of landlord and tenant was established between the parties. But the court held that the award and acceptance thereof did not amount to an acknowledgment of the wife as landlord, and if they did the tenant had the right to resume his tenancy to the husband, who was the real owner and entitled to the possession and under whom the tenant had received possession in the first instance.[32]

§ 5. It is not necessary to the creation of a tenancy that there should be a formal hiring, letting or leasing;[33] but the agreement may be implied in fact from the conduct of the parties and the attendant circumstances, and if so implied, is as effectual as if made in words, though there may have been no actual lease, written or verbal, and no formal agreement.[34] The relation of landlord and tenant may and very often does arise by implication from occupation of premises in subordination of another's title under circumstances indicating an intention to enter into the relation.[35] Where one contemplates entering into possession of the lands of another to occupy for use, and is informed that he can do so on terms stated or for a reasonable compensation, entry and occupation form a good acceptance of the terms proposed and the tenant becomes bound to pay the sum named or such price as the use is reasonably worth.[36]

The same principle applies when there is actual possession and occupation under a lease which is invalid for want of proper acknowledgment or for failure to comply with the statute of frauds and the relation of landlord and tenant arises in spite of the defects in the lease.[37]

[32] Luttrell v. Caruthers, 5 Ill. App. 544.

[33] Insurance Co. of Penn. v. O'Connell, 34 Ill. App. 357; Eastman v. Perkins, 111 Mass. 30.

[34] Rainey v. Capps, 22 Ala. 288; Baley v. Deakins, 5 B. Mon. (Ky.) 159.

[35] Candler v. Mitchell, 119 Mich. 464, 78 N. W. 551; Conwell v. Mann, 100 N. Car. 234, 6 S. E. 782; Chamberlin v. Donahue, 44 Vt. 57; Bacon v. Bowdoin, 22 Pick. (Mass.) 401; Kabley v. Worcester Gas Light Co., 102 Mass. 392.

[36] Dickson v. Moffat, 5 Colo. 114. The relation of landlord and tenant arises where one by consent of the landlord goes into possession of leased land as the successor in interest of the tenant, and after thus occupying the land at the stipulated rent in the lease continues to occupy after the expiration of the lease. Weaver v. Southern Oregon Co., 31 Ore. 14, 48 Pac. 167.

[37] Alabama: Hays v. Goree, 4 Stew. & P. (Ala.) 170; Nelson v. Webb, 54 Ala. 436; Crawford v. Jones, 54 Ala. 459; Martin v. Blanchett, 77 Ala.

A short memorandum added to a receipt has been held to be a complete lease, though entirely informal in wording. It expressed the consent of the owner that the other party should have immediate possession of the premises and should continue to occupy them, at a specified rent and for a definite term of time. Although brief and informal it had the essential elements of a present demise.[38]

Where A. puts B. in possession of land, saying at the time, "This is a home for you. Go and live in it," and B. enters under such authority, B. becomes the tenant of A. and is estopped even after thirty years' possession, to deny the title of A. or his assigns.[39]

An instrument whereby one lets to another certain real property for a specified rent, to commence at a future day, is a lease rather than an agreement for a lease, although the words are "agree to let." If there is a present demise for a term to commence in future the instrument is a lease and not an agreement for a lease.[40] Whether an instrument is to be construed as a present demise or an executory contract for a lease to be given hereafter depends upon the intention of the parties as gathered from the whole instrument. Where the owner agrees in writing to let certain land to another at a stipulated rent and in conclusion says he will make a lease of the premises for three, with a privilege of five years from date, the writing is not a present lease, but an agreement for a lease to be thereafter given.[41]

§ 6. Reservation of rent by the landlord is not essential to the creation of a tenancy;[42] the demise may be gratuitous or for a lump

288. **Connecticut:** Allen v. Holkins, 1 Day 17. **Kentucky:** Drubaker v. Poage, 1 T. B. Mon. 123, 126. **Tennessee:** Duke v. Harper, 6 Yerg. 279, 284; Shepherd v. Cummings, 1 Cold. 354; Noel v. McCrory, 7 Cold. 623, 627; Hammond v. Dean, 8 Baxt. 193.

[38] Eastman v. Perkins, 111 Mass. 30; Weed v. Crocker, 13 Gray (Mass.) 219.

[39] Conwell v. Mann, 100 N. Car. 234, 6 S. E. 782.

[40] Weed v. Crocker, 13 Gray (Mass.) 219; Bacon v. Bowdoin, 22 Pick. (Mass.) 401; Fiske v. Framingham Mfg. Co., 14 Pick. (Mass.) 491; Kabley v. Worcester Gas Light Co., 102 Mass. 392; Shaw v. Farnsworth, 108 Mass. 357; Dix v. Atkins, 130 Mass. 171; Kimball v. Cross, 136 Mass. 300; Duncklee v. Webber, 151 Mass. 408, 24 N. E. 1082.

[41] McGrath v. Boston, 103 Mass. 369; Hinckley v. Guyon, 172 Mass. 412, 52 N. E. 523.

[42] Amter v. Conlon, 22 Colo. 150, 43 Pac. 1002; Osborne v. Humphrey, 7 Conn. 335, 340; Hooton v. Holt, 139 Mass. 54, 29 N. E. 221; Cheever v. Pearson, 16 Pick. (Mass.) 266, 271; McKissack v. Bullington, 37 Miss. 535; Hunt v. Comstock, 15 Wend. (N. Y.) 665, 667; Failing v. Schenck, 3 Hill (N. Y.) 344; Mahoney v. Farley, 17 Wkly. Dig. (N. Y.) 277; Foster v. Penry, 76 N. Car. 131; Mitchell v. Common-

sum,[43] or the obligation to pay rent may be implied from the circumstances.[44] A verbal agreement under which the lessee was to have a right to remain in possession of the premises during life, without charge, would, if proved, at least show that he was a tenant at will up to the time when such holding was terminated in some manner.[45] A written acknowledgment of a person who is in the occupation of land, that he holds it as tenant of another, does not raise a presumption of law that he promises to pay rent, nor transfer the burden of proof on the question of fact whether they understand rent is to be paid. A promise to pay rent in such a case, implied from occupation and tenancy, is an inference of fact. In one case the evidence showed that the acknowledgment of tenancy was made to enable the plaintiff to complete the foreclosure of a mortgage and left it doubtful, at least, whether there was an understanding that rent was to be paid. From the defendant's occupation and acknowledged tenancy the law does not imply a promise to pay rent. The question whether there was such a promise, is a question of fact. Unless the question be raised that the verdict is against the evidence, the decision of this question is for the jury.[46] A definite agreement to pay rent is not essential to create the relation of landlord and tenant; and an action for use and occupation will lie where defendant with plaintiff's consent has entered upon land and uses it for his own profit.[47] Where a demise for life was on the condition that the occupant should pay interest on a mortgage and on purchase money, it was held the parties became landlord and tenant and the interest could be collected by distress.[48]

Rent may be reserved in services as well as in money, as where a tenant at will agreed to keep off trespassers in return for the use of the land. A valid tenancy at will was created by such arrangement.[49]

wealth, 37 Pa. St. 187; Floyd v. Floyd, 4 Rich. L. (S. C.) 23; State v. Page, 1 Speer (S. C.) 408. Compare a remark by Champlin, J., in Shaw v. Hill, 79 Mich. 86: "In a tenancy at will, rent in some manner must be reserved, and must be such as accrues from day to day." And in Simpkins v. Rogers, 15 Ill. 397, the court say: "We are, however, not inclined to hold that there was any tenancy in the case. One of the essential qualities of a lease was wanting, the reservation of rent to the owner. We regard the transaction as a mere permission to enter upon and occupy the land."

[43] Osborne v. Humphrey, 7 Conn. 335, 340.

[44] Wilkinson v. Wilkinson, 62 Mo. App. 249.

[45] Hooton v. Holt, 139 Mass. 54, 29 N. E. 221.

[46] Bank v. Getchell, 59 N. H. 281.

[47] Wilkinson v. Wilkinson, 62 Mo. App. 249.

[48] Reed v. Kitchen, 1 Am. L. Reg. (Pa.) 635.

[49] Shaw v. Hill, 79 Mich. 86, 44 N. W. 422.

§ 7. **The validity of a landlord's title is not material** in determining whether one occupying his premises stands in the relation of tenant to him. The relation of landlord and tenant does not rest upon the landlord's title but upon the agreement between the parties followed by the possession of the premises by the tenant under such agreement.[50] Where the grantor in a trust deed joins with the creditors secured in a request to the trustee to permit a certain person to occupy the premises, he thereby places the trustee in possession, and the trustee becomes the landlord of such person. It is competent for a mortgagor to place the mortgagee in possession, or assent to his possession which the mortgagee may defend or assert.[51] The relation of landlord and tenant may exist between two parties, although the landlord is not himself the owner of the premises but is a renter from the owner.[52] When a lessee sub-lets, he becomes lessor to his sub-lessee and is entitled to the same lien on his crop which the statute gives to the lessor. The lessee, for advances made to his tenant, would occupy toward him the relation of lessor with the rights incident to that relation.[53]

But upon no principle of reason or law can the absolute owner of lands, in possession, be made chargeable with rent. Pending the proceedings to condemn land by eminent domain, the relation of landlord and tenant does not exist between the parties to the proceeding. The commissioners making the condemnation did not have the legal title and a tenancy will not be implied under one who has not the legal estate. The landowner did not enter in subordination to the title of any other person and never acknowledged any obligation to another. He was in possession as owner of the fee, and claiming adversely to all the world, and the proceedings for condemnation were an acknowledgment of his title.[54]

[50] Cherokee Strip &c. Ass'n v. Cass &c. Co., 138 Mo. 394, 40 S. W. 107. In this case the original lease was forbidden by statute and void. This was held not to affect the validity of the sub-lease. The court said: "The contract between plaintiff and defendant is a contract to which the Cherokee Nation is not a party and must be governed both as to the manner of its execution and its construction, by the law applicable to contracts entered into by persons competent to contract. The contract between plaintiff and the Cherokee Nation was void because not executed in compliance with the United States statute, while no such objection exists as to the contract between plaintiff and defendant."

[51] Candler v. Mitchell, 119 Mich. 464, 78 N. W. 551.

[52] Strickland v. Stiles, 107 Ga. 308, 33 S. E. 85; Morgan v. Morgan, 65 Ga. 493.

[53] Moore v. Faison, 97 N. Car. 322, 2 S. E. 169.

[54] Cook v. South Park Com'rs, 61 Ill. 115.

§ 8. **The fiduciary relation of a lessee** to one who is entitled to the beneficial enjoyment under the lease does not prevent the creation of a tenancy. So when a lease runs in the name of a trustee, the relation between the landlord and the nominal lessee is strictly a legal relation and does not come within the scope of equity jurisdiction.[55]

II. *Subject Matter.*

§ 9. **The general rule** is that any kind of property, corporeal or incorporeal, which may be transferred by livery or by grant, may be the subject of a demise.[56] Thus the right to fish in certain waters may be transferred for a term of years and the estoppel against denying the landlord's title, which accompanies an ordinary lease of land, operates against the lessee.[57] A riparian owner along a navigable stream who owns the fee of the bed thereof to the center line may lease the right to cut ice forming on his portion of the stream.[58] Such a lease gives the lessee a right to maintain an action against one who has wrongfully interfered with his right to gather the ice.[59] A grant of the privilege to draw the sap from turpentine trees is a suitable interest to be transferred by demise and when completed takes effect as a lease of real estate.[60] So a grant of all timber, grass and berries that may be grown on certain land for a term of years is a valid lease.[61] Franchises and public rights can be transferred by lease provided such a transfer does not interfere with the performance of a duty the owner owes to the public. Thus a railway corporation cannot lease its lines and the right to operate them without authority from the legislature.[62] But with such consent there is no objection to such a lease as there are no difficulties on account of the nature of the interest.[63]

[55] January v. Stephenson, 2 Mo. App. 266.

[56] Bacon's Abr. Leases (A); Shep. Touch. 268.

[57] Watertown v. White, 13 Mass. 477; Eastham v. Anderson, 119 Mass. 526; Commonwealth v. Weatherhead, 110 Mass. 175.

[58] Oliver v. Olmstead, 112 Mich. 483, 70 N. W. 1036.

[59] Lorman v. Benson, 8 Mich. 18, 77 Am. Dec. 435; People's Ice Co. v. Steamer Excelsior, 44 Mich. 229, 38 Am. R. 246; Grand Rapids &c. Co. v. South Grand Rapids &c. Co., 102 Mich. 227, 47 Am. St. 516.

[60] Rooks v. Moore, Busb. L. (N. Car.) 1; Denton v. Strickland, 3 Jones L. (N. Car.) 61.

[61] Freeman v. Underwood, 66 Me. 229.

[62] Beman v. Rufford, 1 Sim. (U. S.) 550, 6 Eng. L. & Eq. 106; Great Northern R. Co. v. Eastern &c. R. Co., 9 Hare 306; Winch v. Birkenhead &c. R. Co., 13 Eng. L. & Eq. 506; Commonwealth v. Smith, 10 Allen (Mass.) 448.

[63] Black v. Delaware &c. Canal Co., 22 N. J. Eq. 130; United States Trust Co. v. Wabash &c. R. Co., 150 U. S. 287, 14 Sup. Ct. 86; Troy &c.

The right to do certain acts on land of another, as to flow it with water, may take effect as an easement. Yet it has been held that a properly executed agreement, giving the owner of a mill-site the right, for a stipulated annual compensation, to flow the adjoining lands of another for an indefinite period, by the erection of a dam upon his own premises, creates a tenancy in such lands.[64] An agreement which gives an exclusive right to mine coal, to use five acres of surface land for buildings, to build railroads upon and flow water upon land, and provides for a royalty for coal mined payable as rent not to fall below a fixed amount each year, is a lease and creates the relation of landlord and tenant. It is none the less a lease because a part of the land is to be removed; it is not a sale of the coal, but a lease of the land.[65]

However, an agreement to furnish steam power by the year or month has been held not to constitute a tenancy entitling the party furnishing it to a notice to quit.[66]

§ 10. **Where chattels are let for a term,** so long as the term continues the lessor or bailor can only bring an action on the case for an injury to them, but where the term is ended by a wrongful sale, the lessor can bring detinue or trover.[67] So if machinery be leased and the lessee severs it from the freehold, it revests instanter in the lessor, who may maintain trover even during the continuance of the term. By the lease or agreement the tenant has the use, not the dominion, of the property demised, and, therefore, when he separated any part of it, his right of using it was at an end for any legal purpose, that right being only to use it in the state it was before.[68] Lord Bacon says that "if one lease for years a stock of live cattle, such lease is good, and the lessee hath only the use and profits of them during the term; but yet," adds the learned author, "the lessor hath not any reversion in them to grant over to another."[69] It seems that the lessor has only a possibility of property in case they outlive the term. An

R. Co. v. Kerr, 17 Barb. (N. Y.) 581, 601; West London R. Co. v. London &c. R. Co., 11 C. B. 254; London &c. R. Co. v. South Eastern R. Co., 8 Exch. 584; Ware v. Grand Junction &c. Co., 2 R. & Myl. 470.

[64] Morrill v. Mackman, 24 Mich. 279.

[65] Lacey v. Newcomb, 95 Iowa 287, 63 N. W. 704.

[66] Dwyer v. Newmann, 2 N. J. L. J. 315.

[67] Swift v. Moseley, 10 Vt. 208; Sanborn v. Colman, 6 N. H. 14; Billings v. Tucker, 6 Gray (Mass.) 368.

[68] Farrant v. Thompson, 5 B. & Ald. 826.

[69] Bacon's Abr. Leases A.

action for injury to sheep, which was committed during the terms for which they had been leased and while the lessee was entitled to possession, must be brought by the lessee.[70] It is well settled that a person having neither the possession nor the right to possession of personal chattels cannot maintain trespass or trover for an injury done to the property.[71] Where cattle were leased for a term of years, to be taken back by the owner, within the term, if he should think them unsafe in the hands of the lessee, it was held that the lessor could not reclaim them from an attaching creditor of the lessee.[72] Where the lessee of a farm received from his lessor cattle and implements of husbandry and agreed to return property of the same value and kind at the end of the lease but not the identical property, the cattle and goods thus delivered belong to the tenant during the term and can be levied on by his creditors.[73] In an agreement for letting at an annual rent, such contract does not lose its character as a renting by the fact that personal property is included in the contract.[74] In one case a lessor leased furniture in the demised premises to his lessee and agreed to sell him the furniture at the end of the term upon performance of all the covenants and undertakings in the lease. This was construed to be a conditional sale and title did not pass to the lessee till the conditions were fulfilled.[75] In the case of a lease of a house with goods, it is usual to make a schedule of the goods, and have a covenant from the lessee to redeliver them at the end of the term, for otherwise the lessor can only have trover or detinue for them. The law will not imply a covenant in regard to things personal.[76] It has been held that if one make a lease of lands and goods, and the lands are recovered against him, he shall hold the goods till the end of the term and the rent shall be apportioned.[77] And apportionment of rent was also allowed where real and personal property was demised by one instrument and the title to the personal property failed.[78]

[70] Triscony v. Orr, 49 Cal. 612.

[71] 2 Hilliard on Torts 502; Edwards on Bailments, § 315; 2 Greenl. Ev., § 616; Story on Bailments, §§ 394, 93; Muggridge v. Eveleth, 9 Met. (Mass.) 233.

[72] Wyman v. Dorr, 3 Me. 183; Putnam v. Wyley, 8 Johns. (N. Y.) 432.

[73] Carpenter v. Griffin, 9 Paige (N. Y.) 310.

[74] Mickle v. Lawrence, 5 Rand. (Va.) 571.

[75] Bean v. Edge, 84 N. Y. 510.

[76] Bull. N. P. 157; 1 Roll. Abr. 519, Cov. (F.) S. P.; Zule v. Zule, 24 Wend. (N. Y.) 76.

[77] Year Book, 12 Hen. VIII, c. II, pl. 5; Richard le Taverner's Case, 1 Dyer 56a.

[78] Newton v. Wilson, 3 Hen. & M. (Va.) 470.

III. *Proof of Tenancy.*

§ 11. The existence of a tenancy or of the relation of landlord and tenant with reference to a particular piece of ground is a fact like that of possession and may, and generally must, be proved or disproved by parol evidence, such as by payment of rent or the admissions or declarations of the parties.[79] Tenancy may be inferred from the acts and conversations of the parties and an express contract need not be proved.[80] Where one in occupation of land belonging to another is told of the terms on which he may continue to occupy and makes no objection thereto, he becomes a tenant and is liable for the stated rent.[81] The acceptance of possession of premises offered on certain known terms and occupation during the period designated creates a tenancy, and the tenant is bound for rent even though he objected to the terms.[82] An expired lease, under which the rent has all been paid, may be offered in evidence to show that the relation of landlord and tenant exists between an owner and occupant of land. The tenancy which was thus proved was from year to year.[83]

"The production of a lease will not of itself show that the relation of landlord and tenant existed between the parties to the lease * * * because there must be further shown by competent evidence, the entry of the lessee under the lease, or a holding of the possession of the premises by the lessee that will be referable to the lease as his authority."[84]

§ 12. The payment of rent is a fact going to the establishment of a tenancy, but it has been held not to be sufficient in or of itself to prove such a relation exists.[85] The relation of landlord and tenant must arise in respect to a specific piece of ground and so it must appear that rent was paid and received in return for the use of the premises in regard to which the alleged tenancy exists. The general rule has been stated to be that proof of payment of rent by an oc-

[79] Hearn v. Gray, 2 Houst. (Del.) 135; Victory v. Stroud, 15 Tex. 373; McDowell v. Hyman, 117 Cal. 67, 48 Pac. 984; Jackson v. Vosburgh, 7 Johns. (N. Y.) 186.

[80] Ladd v. Riggle, 6 Heisk. (Tenn.) 620.

[81] Loring v. Taylor, 50 Mo. App. 80.

[82] Dickson v. Moffat, 5 Colo. 114.

[83] Longfellow v. Longfellow, 54 Me. 240.

[84] Caldwell v. Center, 30 Cal. 539.

[85] Sanford v. Herron, 161 Mo. 176, 61 S. W. 839.

cupant of premises is sufficient *prima facie* proof of the relation of landlord and tenant between him and the owner to whom payment is made.[86] It is certainly true that a tenancy may be proved by parol or circumstantial evidence, as by proof of the payment and receipt of rent[87] and it has been held that a promise to pay rent shows the promisor to be a tenant of the promisee.[88] Occupation of the premises, and payment of rent to the agent of tenants in common are enough to raise the implication of a joint demise.[89] Moreover when the question of a tenancy arises collaterally to the main issue, payment of rent by the alleged tenant to one claiming as owner is sufficient evidence of the relation.[90] An action for rent by a landowner against a trespasser is also sufficient proof of a tenancy as against the landowner. By suing for rent he alleges the existence of such a relation and he cannot subsequently assume an inconsistent position.[91]

While payment and receipt of rent will ordinarily raise a necessary inference of a tenancy, such is not the case where a judgment of eviction has been entered against tenant, and he appeals, and pending the appeal secures his right to continue in possession by giving bond for which privilege he pays rent which is accepted by the landlord. The obligation to pay is created by statute.[92]

Where there is a written lease to begin on the completion of a building, and the lessee takes possession, and pays rent, which payment is indorsed on the lease, it will be conclusively presumed that the lessee occupied the premises under the lease and recognized its binding force. Though there is something unsatisfactory about the manner of the completion, and some changes are needed, these things do not go to the validity of the lease. At most they afforded an opportunity to claim damage. This is especially true in case there is no evidence of any other agreement between the parties in respect to such occupancy and rent.[93]

All charges for the privilege of using real estate are not necessarily paid as rent and do not necessarily tend to show a tenancy. The privilege obtained might be a mere license of an easement. Such was

[86] Voiht v. Resor, 80 Ill. 331; Howe v. Gregory, 2 Ind. App. 477, 28 N. E. 776; Cressler v. Williams, 80 Ind. 366.

[87] Barrett v. Jefferson, 5 Houst. (Del.) 477.

[88] Hill v. Boutell, 3 N. H. 502.

[89] Porter v. Bleiler, 17 Barb. (N. Y.) 149.

[90] Virginia Min. & Imp. Co. v. Hoover, 82 Va. 449, 4 S. E. 689.

[91] Cunningham v. Holton, 55 Me. 33, 57 Me. 420.

[92] Hopkins v. Holland, 84 Md. 84, 35 Atl. 11.

[93] Hammond v. Barton, 93 Wis. 183, 67 N. W. 412.

the case where payments were made for the right to store lumber on the land of another.[94]

§ 13. **Entry and occupation** by one of several joint lessees is the entry and occupation of all as far as the landlord is concerned, whatever may be their relation among themselves. "Where two of four joint lessees enter upon and occupy certain premises under a written agreement made with the owner of the premises, and signed by all of them, and make the entry at the time designated in the agreement for the commencement of the occupancy, and the other two do not make actual entry upon and occupy the premises, the occupancy of the first two was the occupancy of all four, and upon the terms designated in the agreement, and all four are lessees of the landlord, whatever might be their relations *inter se,* and as such lessees they are responsible to the landlord in an action for use and occupation."[95]

The prima facie case of tenancy made out by proving occupancy may, however, be rebutted[96] and the relation of landlord and tenant will not be inferred if the occupation can be otherwise explained.[97] The absence of occupancy by the alleged tenant and of any promise on his part to pay rent will justify a finding that no tenancy exists.[98]

Cleaning a room by a prospective tenant is an equivocal act in regard to proving occupation. It might be an act of possession or it might be simply an act of preparation for further investigation. If the cleaning was done only as an act of preparation for further investigation on the part of the prospective tenant before deciding on the matter, then the fact of the cleaning was of no consequence.[99] A building in process of erection was leased and the defendant caused his name to be painted on a sign before it was completed, and after it was done sent his porter to sweep it out but did no other acts of taking possession. This constituted a taking of possession and he was liable for rent. The rule is that any overt act indicating dominion and the purpose to occupy and not to abandon the premises is sufficient to carry the question of possession to the jury.[100]

[94] Ducey Lumber Co. v. Lane, 58 Mich. 520, 25 N. W. 568.

[95] Goshorn v. Steward, 15 W. Va. 657; Howell v. Behler, 41 W. Va. 610, 24 S. E. 646.

[96] Hogsett v. Ellis, 17 Mich. 351. *Compare* Whaley v. Whaley, 2 Harr. (Del.) 53.

[97] Bailey v. Campbell, 82 Ala. 342, 3 So. 646.

[98] Emerson v. Weeks, 58 Cal. 439, 441.

[99] Lewis v. Havens, 40 Conn. 363.

[100] Pacific Express Co. v. Tyler &c. Co., 72 Mo. App. 151.

§ 14. Province of judge and jury.—On doubtful facts the jury must determine whether the relation exists.[101] Whether or not an implied contract of tenancy exists in any given case is a question of fact for the jury, to be determined by them upon all the circumstances of the case.[102] Where A. said to B., "Go on and cultivate my farm and raise crops and I will do what is right by you," it was for the jury to determine whether a tenancy or employment was intended.[103] In case a landowner is being charged with liability for a defect in premises, it is a question of fact whether an occupant thereof is a tenant holding under such circumstances as to exonerate the owner from liability for the dangerous condition of the building.[104] A finding of the jury that the occupant was in possession of premises as tenant cannot be set aside if supported by the evidence.[105] Evidence of collateral and inconclusive facts, not pertinent to the real issue are inadmissible. Accordingly, where the sole issue is whether defendant had become tenant of plaintiff, it is not competent for defendant to show that before the time of the alleged contract, defendant was in possession of the land under an executory contract of purchase.[106]

Upon agreed facts the question whether a tenancy exists is for the court. It is exclusively within the province of the jury to find all inferences of fact, from facts stated, while the court is precluded from so doing and is confined to the facts stated. But the legal consequences or conclusions from the facts so stated are for the court.[107] The legal character and effect of a transaction and of an instrument introduced as a lease are questions of law, and when jurisdiction depends on the existence of a tenancy, they go to the foundation of the action, and cannot be waived by counsel, by neglect or otherwise, in the conduct of the cause.[108]

IV. *Interesse Termini.*

§ 15. Under the old common law a bare lease did not give any estate in the land, but only gave a right of entry which was called

[101] Swanner v. Swanner, 50 Ala. 66; Duncan v. Beard, 2 N. & McC. (S. C.) 400; Cunningham v. Cambridge Sav. Bank, 138 Mass. 480.

[102] Chamberlin v. Donahue, 44 Vt. 57.

[103] McKenzie v. Sykes, 47 Mich. 294, 11 N. W. 164.

[104] Cunningham v. Cambridge Sav. Bank, 138 Mass. 480.

[105] Hanlon v. Thompson, 167 Mass. 190, 45 N. E. 88.

[106] Hawkins v. James, 69 Miss. 274, 13 So. 813.

[107] Howard v. Carpenter, 22 Md. 10.

[108] Nightingale v. Barens, 47 Wis. 389, 2 N. W. 767; Rothbauer v. State, 22 Wis. 468; Nelson v. Rountree, 23 Wis. 367.

the lessee's interest in the term or *"interesse termini."* When the lessee had actually entered and thereby accepted the grant, the estate became vested in him, but until entry he could not maintain trespass.[109] It is laid down in many of the ancient authorities that a lessee before entry cannot maintain trespass.[110] In one case an owner in fee demised lands for a term of years subject to a proviso that the lessor should not pay a certain debt, and to a restriction that the lessee should not enter into possession before a certain time. Prior to that time the lessee brought trespass against sheriffs who levied on the premises as the property of the lessor. A rule for a nonsuit against the plaintiff was made absolute.[111] The true ground for this decision was said to be that a lessee for years before entry cannot bring trespass. It is pointed out in the same case that an *interesse termini* is sufficient to enable a person to demise to a plaintiff in ejectment whose entry is admitted. So that any technical difficulty as to trespass not lying when a mortgagee of leasehold property brings ejectment before entry would be avoided.[112] But it is a well settled general principle that the assignee of a term cannot maintain trespass in respect to the premises unless he has actually entered into possession of them. All the authorities agree that to entitle a party to maintain trespass, actual entry is necessary. To render him liable on the covenants an assignment in law is sufficient; but to maintain trespass, there must be an actual entry.[113] Still a lessee, even before entry, has sufficient interest in the leased premises to entitle him to bring ejectment to recover possession of them.[114]

An *interesse termini* is created by a demise even though the lessee has no present right to obtain an estate in the land by entering under his lease. Whether the term is to commence immediately or at a future day, the *interesse termini* at once vests in the lessee, upon the execution of the lease.[115] But where an outstanding right would prevent the lessee from ever entering under his lease it seems that he acquires no *interesse termini*. Such a case arose under the following circumstances: An eight-acre lot, part of a larger tract of land, was

[109] Lee v. Lee, 74 N. Car. 70; Larkin v. Avery, 23 Conn. 304, 314.

[110] Co. Litt. 296b, Com. Dig., Trespass (B).

[111] Wheeler v. Montefiore, 2 Q. B. 133, 42 E. C. L. 605.

[112] Doe v. Day, 2 Q. B. 147, 156, 42 E. C. L. 612.

[113] Harrison v. Blackburn, 17 C. B. N. S. 678, 112 E. C. L. 678; Ryan v. Clark, 14 Q. B. 65, 73, 68 E. C. L. 63.

[114] Doe v. Day, 2 Q. B. 147, 156, 42 E. C. L. 612; Ryan v. Clark, 14 Q. B. 65, 73, 68 E. C. L. 63.

[115] Lock v. Furze, 19 C. B. N. S. 96, 103, 115 E. C. L. 94, L. R. 1 C. P. 441.

subject to an outstanding lease. The entire tract was leased for a shorter period than the eight-acre lease had to run, and the lessee went into possession of the rest of the land. It was held he did not even have an *interesse termini* in the eight-acre lot,[116] because a lease which cannot take effect in interest, except by possibility, if it be not an estoppel, shall be void.[117] It is laid down in the language of Lord Chief Baron Gilbert that "if one makes a lease to A. for ten years, and the same day makes a parol lease to B. for ten years of the same lands, this second lease is absolutely void, and can never take effect either as a future *interesse termini*, or as a reversionary interest, though the first lessee should forfeit or otherwise determine his estate."[118] So the lease was void as to a part of land conveyed and rent could not be apportioned. There is no case where an entire rent reserved has been held to be apportionable in which the tenant has not been at some period subject to the entire rent by virtue of the demise. Therefore the lessor was not entitled to distrain for the whole rent or for any part of it.[119]

After a parol lease of land to take effect *in futuro* had been agreed upon, the owner of the land sold a right of way over it to a railway company. This company, acting without knowledge of the lease, and prior to the time when possession under it was to be transferred, contracted for the construction of its road. After the lessee entered into possession he attempted to hold the railway company as a joint trespasser for a disturbance of his possession. This could not be done. There is no law charging one with notice of a parol lease before occupation has been taken under it. Prior to taking possession a tenant under a verbal lease has no estate in the lands, so when the company contracted for the construction of the road, the lessee had no interest in the land.[120]

§ 16. Even though there is an outsanding interesse termini, the owners of the reversion could maintain an action of trespass against a disseisor. As between the owner of the fee and the disseisor, the right of entry accompanies the lawful seisin; the disseisin having ousted and dispossessed the tenant as well as the landlord; and the entry operating to restore the rights of both. The reversioners' seisin undoubtedly gave them a right of entry, carrying with it a right of possession, against all persons except the tenants for years. But the

[116] Neale v. Mackenzie, 1 M. & W. 747.

[117] Comyns's Dig., Estates, G. 13.

[118] Bacon's Abr., Leases (N).

[119] Neale v. Mackenzie, 1 M. & W. 747.

[120] McKinley v. Chicago &c. R. Co., 40 Mo. App. 449.

tenants for years had been dispossessed by the disseisin; and so no possession of theirs could be violated by the reversioners' entry.[121] There are authorities for the doctrine that the owner of the reversion has a right of entry on a tenant for years, without dispossessing him, as to view in respect of waste, to demand rent where a rent is reserved, to repair, or the like.[122] Until the reign of Edward III a lessee for years ousted by a stranger had no remedy by which to recover his estate, but to apply to his lessor to bring a real action to recover back the seisin of the freehold from the trespasser; and then the lessor having obtained the seisin, the tenant's right to have the term again attached, and it became vested in him.[123]

§ 17. **If a lease is so worded as to be a bargain and sale** under the statute of uses, actual entry is unnecessary, and possession is immediately executed in the lessee. Blackstone thus describes the mode of conveyance by lease and release: "A lease, or rather bargain and sale, upon some pecuniary consideration, for one year, made by the tenant of the freehold, to the lessee or bargainee. Now this without any enrollment makes the bargainor stand seized to the use of the bargainee and vests in the bargainee the use of the term for a year; and then the statute immediately annexes the possessions. He therefore being thus in possession is capable of receiving a release of the freehold and reversion."[124]

A valid lease of real property entitles the lessee to the entire charge of it during the term stipulated for without any further act on the part of the lessor and the execution of such a lease is a complete leasing even before entry.[125]

In speaking of a lease where the lessee had not entered into possession it was said: "No such relation (of landlord and tenant) existed. The mere signing of the agreement (lease) does not establish that relation, although it may create a right of action for damages for a breach of the contract or for a specific performance of it. The defendant had never taken possession under this contract."[126] The instrument in this case was clearly a lease and not merely an agreement for one. A regular rent was reserved of more than nominal amount. So the court must have overlooked the fact that this would take effect

[121] Brewer v. Stevens, 13 Allen (Mass.) 346.

[122] Hunt v. Dowman, Cro. Jac. 478; Bro. Ab. Tresp. 97.

[123] Brewer v. Stevens, 13 Allen (Mass.) 346.

[124] 2 Bl. Com. 339.

[125] Chung Yow v. Hop Chong, 11 Ore. 220, 4 Pac. 326.

[126] James v. Kibler, 94 Va. 165, 26 S. E. 417.

as a bargain and sale and the estate would be executed in the lessee by virtue of the Statute of Uses.

The question of entry by the lessee becomes important, however, when there is no express covenant to pay rent and the lessor seeks to recover rent by suit. An action for use and occupation under the statute[127] does not lie where there has not been an actual entry by the lessee.[128]

V. *Similar Contractual Relations.*

§ 18. In general.—In distinguishing tenancy from other contractual relations a lease may be defined to be a contract for the possession and profits of lands and tenements on the one side and a recompense of rent or other income on the other.[129] The relation of landlord and tenant may exist, however, although certain collateral matters are contained in the contract of letting. Illustrations of this are found in leases which give the lessee an option to purchase,[130] or where the lessor binds himself to erect buildings on the premises.[131]

On the other hand, contractual relations may exist between persons with regard to the occupation of land which impose duties and restrictions similar to those of a tenancy, and yet there will not be a tenancy. Thus, an agent using and controling the land of his principal would not ordinarily become his tenant.[132] Contracts for the cultivation of land upon shares, contracts for lodgings, contracts for employment, and license to do certain acts upon land of another may all be made without establishing the technical relation of landlord and tenant. The test in every case is the intention of the parties; but in determining that intention more or less arbitrary rules of construction have grown up which will be discussed and explained in the following pages.

[127] 11 Geo. 2, c. 19, § 4.

[128] Lowe v. Ross, 5 Ex. 553.

[129] Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 50 Pac. 744; Branch v. Doane, 17 Conn. 402; Bruckman v. Dry Goods Co., 91 Mo. App. 454; Sawyer v. Hanson, 24 Me. 542, 545; Bentley v. Adams, 92 Wis. 386, 66 N. W. 505.

[130] See *infra*, §§ 387–388.

[131] See *infra*, §§ 372–381.

[132] Hopkins v. Ratliff, 115 Ind. 213, 17 N. E. 288. The following language of the Kentucky court is worthy of notice in this connection: "Even if one takes possession of land as agent and uses and controls it the relation of landlord and tenant arises." Ward v. Small, 90 Ky. 198, 204, 12 Ky. L. R. 58, 13 S. W. 1070, citing Farrow v. Edmundson, 4 B. Mon. (Ky.) 605, which holds that an agent in occupation of land for his principal cannot deny the latter's title. The principal case can hardly be regarded as representing the law generally.

§ 19. Statutory remedy dependent on technical relation of landlord and tenant.—In New York the cases are numerous in which the summary remedy to regain possession of real estate has been refused because the contract or circumstances under which the owner of premises permitted another to take possession of them, contemplated some condition or consideration apart from rent, or a tenancy at the mere sufferance or will of the owner.[133] The right to take advantage of this remedy depends on the existence of the conventional relation of landlord and tenant, and this conventional relation means the relation created by the convention or agreement of the parties.[134] In one case an owner of premises induced his nephew to live with him and make a home for him on the promise that the nephew should receive the property by devise. The occupation being under such a contract, it was decided that the nephew could not be regarded as a tenant and evicted by means of the summary process provided by statute. "Whatever else may be said of such an agreement," remarks the court, "it is plain that it is not one of leasing premises. It is rather one to provide the petitioner with board and the comforts of a home with his kindred. No such thing as rent was spoken of, nor was it within the intention of the parties. The tenure, so far as it was defined at all, seemed to be one that would, bye and bye, ripen into a fee."[135]

In many other jurisdictions, the right to maintain summary process for the recovery of land is made to depend on the existence of the relation of landlord and tenant between the parties. A person in possession of lands under a contract of purchase is not a tenant, so as to subject him to a warrant of forcible detainer.[136] The statutory process cannot be used to evict a mortgagor who holds over after a breach of condition and a foreclosure of the mortgage.[137] Under the Wisconsin statute it was held that, if there was no lease, and the relation of landlord and tenant did not exist between the parties, a

[133] Dolittle v. Eddy, 7 Barb. (N. Y.) 74; People v. Annis, 45 Barb. (N. Y.) 304; Haywood v. Miller, 3 Hill (N. Y.) 90; Russell v. Russell, 32 How. Pr. (N. Y.) 400; Williams v. Bigelow, 11 How. Pr. (N. Y.) 83; Sims v. Humphrey, 4 Denio (N. Y.) 185; Roach v. Cosine, 9 Wend. (N. Y.) 227.

[134] Benjamin v. Benjamin, 5 N. Y. 383.

[135] Matthews v. Matthews, 49 Hun (N. Y.) 346.

[136] Hay v. Connelly, 1 A. K. Marsh. (Ky.) 393; Jack v. Carneal, 2 A. K. Marsh. (Ky.) 518.

[137] Davis v. Hemenway, 27 Vt. 589; Plato v. Roe, 14 Wis. 453; Ott v. Rape, 24 Wis. 336; Ragan v. Simpson, 27 Wis. 355.

trial justice had no authority conferred by the statute to decide a case in regard to the summary recovery of land.[138]

A purchaser of premises at an execution sale in actual possession agreed to reconvey to the execution debtor at the end of three years if the latter would forego his right of redemption and allow the purchaser to retain possession rent free during such three-year term. For a failure to reconvey according to the terms of this contract, the court held that an action of forcible detainer would lie against the occupant, as he became a tenant at sufferance by his wrongful holding over.[139]

§ 20. A servant or employe occupying a house of his master does not ordinarily become his tenant. This question came up before the court of Exchequer Chamber in an early case upon an indictment for burglary. The prosecutors were partners in their business of bankers, which business was transacted in the lower rooms of the house where the burglary was committed, of the whole of which house they were owners. They were also partners in a brewery concern, which they carried on in some adjoining premises. The upper rooms were inhabited by a man who was servant to the prosecutors in their brewery business at weekly wages, with firing and lodging for himself and his family. The contract as to the lodging was not in general terms that he should be provided with lodgings, but that he should have the particular rooms which he did inhabit; and to that part of the house there was a separate entrance from without. The question before the court was whether this inhabitancy could be considered as the inhabitancy of the prosecutors by their servant or whether the employee by the contract became tenant, and the upper part of the house was his dwelling-house. The judges were of opinion that the employee did not become a tenant. Lord Mansfield referred to the fact that "many servants have houses given them to live in, as porters at park gates," and then disposed of the case by asking, "if a master turns away his servant, does it follow that he cannot evict him till the end of the year?" Lord Ellenborough suggests that this employee could not have maintained trespass against his employers for entering these rooms; and puts the question, "if a man assigns to his coachman the rooms over his stable, does he thereby make him his tenant?"[140]

It may be stated as a general rule that where the employee occupies

[138] Nightingale v. Barens, 47 Wis. 389, 2 N. W. 767.

[139] Steele v. Steele, 2 Tex. App. Cas., § 345.

[140] King v. Stock, 2 Taunt. 339.

premises of his employer for the purpose of better carrying on the employer's business, and without payment of rent, these circumstances are usually decisive that the relation of landlord and tenant does not exist between the parties.[141] When the employer furnishes a house for the employee to occupy during his employment and as part of his compensation, this is also indicative of an intention not to create a tenancy.[142]

In one case a person was employed by the owner of land to superintend the land and look after the business of the owner, and while in such employment he occupied a house which was situated upon the land. His occupancy of the house did not create the relation of landlord and tenant between him and the owner.[143] A party in possession under contract to care for property and with the privilege of purchasing was held not to become a tenant by virtue of such arrangement.[144] It has also been decided that a Roman Catholic priest in charge of a church and parish house was not the tenant of his bishop,[145] and the same conclusion was reached in regard to a protestant minister who lived, rent free, in a parsonage owned by his church.[146] The situation was analogous and warranted an application of the same doctrine in the case of a school teacher occupying the school house where he taught,[147] and in the case of a lock-tender for a canal company, who occupied a house and garden on the company's land.[148] A public officer is not a tenant of the state or municipality for which he works, although he uses the office with which he is supplied in part to transact his private business.[149]

An old wooden building, situated on untaxed land owned by a hospital corporation, was inhabited by a workman, with his family, who

[141] Rex v. Cheshunt, 1 B. & Ald. 473; State v. Curtis, 4 Dev. & B. (N. Car.) 222; Mead v. Pollock, 99 Ill. App. 151; Haywood v. Miller, 3 Hill (N. Y.) 90; Kerrains v. People, 60 N. Y. 221, 19 Am. R. 158, reversing 1 Thomp. & C. 333; McQuade v. Emmons, 38 N. J. L. 397.

[142] Haywood v. Miller, 3 Hill (N. Y.) 90; People v. Annis, 45 Barb. (N. Y.) 304; Doyle v. Gibbs, 6 Lans. (N. Y.) 180; Bowman v. Bradley, 151 Pa. St. 351, 24 Atl. 1062; Doe v. Derry, 9 C. & P. 494, 38 E. C. L. 291.

[143] Davis v. Williams, 130 Ala. 530, 30 So. 488.

[144] Reeder v. Bell, 7 Bush (Ky.) 255.

[145] Chatard v. O'Donovan, 80 Ind. 20.

[146] East Norway Lake Church v. Froislie, 37 Minn. 447, 35 N. W. 260.

[147] School District No. 11 v. Batsche, 106 Mich. 330, 64 N. W. 196; State v. Curtis, 4 Dev. & B. (N. Car.) 222.

[148] Morris Canal &c. Co. v. Mitchell, 31 N. J. L. 99.

[149] Board of Supervisors v. Cowgill, 97 Mich. 448, 56 N. W. 849.

was exclusively employed by the corporation, from whose wages the superintendent of the hospital deducted a certain sum monthly and gave him a receipt therefor as rent, he crediting the corporation with the sum so deducted. On the trial of the issue whether a tax was lawfully assessed on this building it was held that this arrangement did not create a tenancy and the building could not be taxed as property from which the corporation derived an income. "If the occupation was one merely by reason of service," said the court in disposing of this question, "the building being held as incident only to the general purpose for which the land was held, and occupied by the person charged with the care of the buildings on the hospital grounds for reasons of convenience; and the rent was paid and re-received, in the manner stated, as a convenient mode of adjusting the compensation of the person so employed, and not as an income or fruit of an estate granted; we are of opinion that the exemption would still attach to the property. By the ruling of the court below, as we understand it, the question was made to turn upon the single fact of the payment and receipt of rent. This we think was erroneous."[150]

The fact that the employee, with the permission of the proprietor, keeps up and maintains a separate establishment and table, though strengthening the inference afforded by the use of separate apartments, is yet not conclusive of the existence of the relation of landlord and tenant. It may be rebutted by other testimony that such separate establishment was, though separate, not independent of the proprietor's control, but consistent with his right of supervision and control.[151]

While the position of a servant occupying a house belonging to his master is that of a mere licensee, it has been suggested that immediately upon the termination of the employment, a tenancy at will or by sufferance springs up.[152] This is not so. In order to have that effect the occupancy must be sufficiently long to warrant an inference of consent to a different holding. Any considerable delay would be sufficient, but there is no principle which would change the occupant *eo instanti,* from a mere licensee to a tenant. The employer should resume control of his property within a reasonable time or consent would be inferred. Whether this time is a day or a week may depend on circumstances.[153] In one case the consent of the employer that the

[150] Massachusetts Gen. Hospital v. Somerville, 101 Mass. 319, 326, per Wells, J.

[151] Waller v. Morgan, 18 B. Mon. (Ky.) 136, 142.

[152] People v. Annis, 45 Barb. (N. Y.) 304.

[153] Kerrains v. People, 60 N. Y. 221, 19 Am. R. 158, reversing 1 T. & C. 333.

employee might remain until his wife recovered from an illness, was held not to amount to a consent.[154] In the ordinary case, where an employee occupying rooms of his employer is discharged, he is not entitled to the notice to quit which is necessary when a tenant is guilty of holding over.[155]

§ 21. There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in land either in fee, for years, at will, or for any other estate or interest, and if he do so the servant then becomes entitled to the legal incidents of the estate as much as thought it were purchased for any other consideration.[156] The mere fact that an employee occupies one of his employer's rooms without paying rent for it does not necessarily disprove the relation of landlord and tenant. To establish a holding as a servant, the occupancy must be subsidiary and necessary to the service.[157]

In one case arising on an indictment for forcible entry the servant occupied, with his family, a separate and distinct dwelling, several hundred yards from that of the employer and under a special contract by which, for his services as a laborer he was to have furnished him a dwelling place and a monthly allowance of meal and meat, as well as the privilege of cultivating a small strip of land for his own benefit. The court were of opinion that this created the legal relation of landlord and tenant between the parties.[158] The ground on which the decision rests is that the house occupied by the servant was so far away from the master's residence that it was just the same as if it had been on a separate and disconnected lot of land. The real point on which the case should have turned, was the nature of the occupation, which was in pursuance of a contract for employment. The case seems inconsistent with a previous decision in the same jurisdiction[159] and contrary to the general trend of authority.

A contract to employ a laborer for a year at certain wages and to furnish him with a house and pasture privileges at a stipulated rate is not a leasing for a year. Furnishing the house is simply a mode of paying for services. From the time the servant quits work he would

[154] Doyle v. Gibbs, 6 Lans. (N. Y.) 180.

[155] Clark v. Vannort, 78 Md. 216, 27 Atl. 982.

[156] Hughes v. Chatham, 5 Man. & G. 54, 44 E. C. L. 39.

[157] Snedaker v. Powell, 32 Kan. 396, 4 Pac. 869.

[158] State v. Smith, 100 N. Car. 466, 6 S. E. 84.

[159] State v. Curtis, 4 Dev. & B. (N. Car.) 222.

be in no better position than a strict tenant at will who has, by his own act, terminated the tenancy and would, at most, be entitled only to a reasonable time for removing from the house.[160] It has been held, in a case where a servant was to be given the use of land in payment for services, and failed to render the services, that the servant was not entitled to emblements as a tenant at will. The usual rule is that the possession of land on which a crop is growing continues in a tenant at will until the time of taking it arrives. But this rule has no application to the case of a tenant who has himself terminated the tenancy without the fault of the lessor.[161]

§ 22. **An independent contractor who contracts to do certain acts on land belonging to another** does not become a tenant unless he goes into possession. So a contract to grade city lots was held not to give the contractor the rights of a tenant in them.[162] Where the owner of a mine entered into a contract to have certain improvements made in it, and, as payment, to allow the party making them to operate the mine for a year on a stated basis for sharing in the metal produced, this was held to constitute a lease and not an operating contract. The lessee was expressly authorized to use necessary fuel and to cultivate so much of the surface as was necessary to provide provender for the horses.[163]

The circumstance that a tenant stands in the relation of an independent contractor to his landlord and that, too, in connection with the demised premises is not inconsistent with a tenancy. Thus, where a tenant contracted to carry on a boarding house for his landlord, a railroad company, and to supply board for the landlord's employees, the agreement was held to create a tenancy because the tenant was to be in exclusive control and was to pay a fixed rent.[164] The relation of landlord and tenant exists between the parties by virtue of such an arrangement, even though no rent is charged by the railroad lessor. The fact that the company agreed to aid in collecting what might be due from time to time from the boarders by withholding moneys payable to them by the company, did not convert the lessee into a servant of the company or change his relation to the company as tenant to the company's house.[165]

[160] McGee v. Gibson, 1 B. Mon. (Ky.) 105.

[161] Butler v. Rice, 17 Hun (N. Y.) 406.

[162] Post v. Phelan, 3 How. Pr. N. S. (N. Y.) 133.

[163] Pelton v. Minah Con. Min. Co., 11 Mont. 281, 28 Pac. 310.

[164] Lightbody v. Truelsen, 39 Minn. 310, 40 N. W. 67.

[165] Doyle v. Union Pac. R. Co., 147 U. S. 413, 13 Sup. Ct. 333.

A close question arises in regard to contracts for operating a mill where the contractor is not to pay rent, but agrees to manufacture all raw material furnished by the owner at a stipulated price, to employ operatives and to keep the mill in good running order. In one case such an agreement was held to constitute a lease, and the landlord was said to receive rent in a lessened price for the work of manufacture. Some of the provisions had a double aspect, and consistently with them there might have been either an agency or a tenancy, but there were others which admitted of only one construction. The operator was to repair the factory; he was to have possession and control; he could select his own servants and was entitled to use the land around the factory.[166] The opposite view in such case is that there was a mere contract of hiring an independent contractor to operate a mill. Instead of hiring men by the day or month, at fixed wages, to manufacture his logs into shingles, a mill owner employed one man to do the whole work, paying him according to the quantity and quality of the manufactured product. He thereby relieved himself from all the details of the work and at the same time secured speed and faithful work by making the earnings depend on quantity and quality. The provisions of the contract indicate very clearly that the contractor was to have the possession and use of the mill for the single purpose of doing the work of the owner. "That this was strictly a contract for the performance of labor is evident," say the court, "if we consider who was the owner of the shingles during the process of manufacture." The title to the manufactured product during all stages remained in the mill owner.[167] Provided the agreement is put in the form of a lease, however, it does not prevent the parties from entering into the relation of landlord and tenant that rent is reserved to the landlord as a certain part of the manufactured products.[168] So, where a grist mill was let for one-third the toll and the tenant with his family dwelt in the mill house, it was held the relation of landlord and tenant existed between the parties.[169]

§ 23. Tenant or lodger.—It is a general rule, universally recognized by decided cases, that a contract for the letting of lodgings does not create the relation of landlord and tenant between the parties thereto. Although it may be a matter of doubt in special cases whether the parties intend to enter into an agreement for the letting

[166] Fiske v. Framingham Mfg. Co., 14 Pick. (Mass.) 491.

[167] Whitney v. Clifford, 46 Wis. 138, 49 N. W. 835.

[168] Jolly v. Single, 16 Wis. 280; Walls v. Preston, 25 Cal. 59.

[169] Fry v. Jones, 2 Rawle (Pa.) 11.

of lodgings or for an actual demise, once the nature of the agreement is determined, the different results flowing from the two contracts are well recognized and established. "Where one contracts with the keeper of a hotel or boarding house for rooms and board, whether for a week or a year, the technical relation of landlord and tenant is not created between the parties. The lodger acquires no interest in the real estate. If he is turned out of the rooms before the time expires, he cannot maintain ejectment; and while he remains, the hotel keeper cannot get his pay by distraining for rent in arrear."[170] "A lodger was never considered by any one as an occupier of an house. It is not the common understanding of the word; neither the house, nor even any part of it, can be properly said to be in the tenure or occupation of the lodger."[171]

A question as to the nature of the contract arose in regard to the letting of furnished rooms which were in charge of a housekeeper employed by the owner of the building. The rooms were daily cared for and kept in order by this housekeeper; fires were made and fuel furnished, as were, also, fresh water, towels, soap and other things needed in such apartments; the rooms being occupied only for sleeping and lodging. The key to the room in question was kept by the woman in charge. The occupation under such circumstances did not create a tenancy and notice was not necessary to terminate it.[172]

§ 24. An oral contract by the keeper of a boarding house to provide a man and his family for six months with board and with three specified rooms as lodgings, and to light and heat the rooms, has been held to be not within the statute of frauds. This was an ordinary agreement for board and lodgings under which the keeper of the lodging house retained the legal possession, custody and care of the entire house and of every room therein. The fact that the rooms were specified in the agreement gave the lodger no greater legal rights in those rooms than if they had not been so specified. He did not have

[170] Wilson v. Martin, 1 Denio (N. Y.) 602, 604, per Bronson, J. To same effect see White v. Maynard, 111 Mass. 250; Messerly v. Mercer, 45 Mo. App. 327; Wright v. Stavart, 2 E. & E. 721, 105 E. C. L. 720; Smith v. St. Michael, 3 E. & E. 383, 107 E. C. L. 382; Stamper v. Sunderland, L. R. 3 C. P. 388; Reg. v. St. George's Union, L. R. 7 Q. B. 90.

[171] Per Lord Hardwicke in Fludier v. Lombe, Cas. temp. Hardw. 307; approved in Cook v. Humber, 11 C. B. (N. S.) 33, 46; Brewer v. M'Gowen, L. R. 5 C. P. 239; McDowell v. Hyman, 117 Cal. 67, 48 Pac. 984.

[172] Messerly v. Mercer, 45 Mo. App. 327.

any such exclusive possession of the rooms specified as would enable him to maintain any action founded on that possession.[173] A covenant, in a lease of a coffee-house in London, not to lease or underlet the premises or any part thereof, was not broken by permitting a man to lodge for a year in a particular room, "of which he had exclusive possession," unless under a distinct demise of the room so as to enable him to maintain trespass.[174]

On the other hand, there are decisions to the effect that agreements to take certain apartments in a house as lodgings at a yearly rent are within the statute of frauds.[175] But there is nothing in either of these cases to show that the rooms were in a boarding house. And it has been suggested in commenting on them that each appears to have been a case of an agreement which if perfected by entry, would have amounted to an actual demise and would have given the occupant all the possessory rights of a tenant.[176] "Flats are as much separate dwellings as ordinary adjoining houses are. The difference is that flats are under one roof and are divided one from another by a horizontal plane, but ordinary adjoining houses by a perpendicular or vertical plane."[177] An entire floor, or a series of rooms, or even a single room, may doubtless be let for lodgings, so separated from the rest of the house as to become in fact and in law the separate tenement of the lessee.[178]

[173] White v. Maynard, 111 Mass. 250. The Illinois court discussed such a case in the following language: "It is very doubtful whether the relation of landlord and tenant existed. The arrangement has more the elements of a simple contract than a tenancy. What estate did she have, according to her own testimony? She does not deny defendant's statement, that the distinct understanding was, 'His house was to be his house.' Both agree defendant was to have exclusive use of a part of the house, and it seems to us the true meaning of the agreement is, she was to have the privilege of certain rooms for keeping boarders, besides defendant's family, and by no fair construction could the contract create any estate in her, either at will or for any definite period. For any breach she could have an adequate remedy in an action on the contract." Cochrane v. Tuttle, 75 Ill. 361.

[174] Doe v. Laming, 4 Camp. 73; Greenslade v. Tapscott, 1 C. M. & R. 55, 4 Tyrwh. 566.

[175] Inman v. Stamp, 1 Stark. 10; Edge v. Strafford, 1 Tyrwh. 293, 1 C. & J. 391.

[176] Wright v. Stavert, 2 E. & E. 721, 105 E. C. L. 720. In the words of Judge Gray, in White v. Maynard, 111 Mass. 250, 254.

[177] McDowell v. Hyman, 117 Cal. 67, 71, quoting from Stamper v. Sunderland, L. R. 3 C. P. 388, 400.

[178] Newman v. Anderton, 2 B. & P. N. R. 224; Fenn v. Grafton, 2 Bing. N. C. 617, 3 Scott 56; Monks v. Dykes, 4 M. & W. 567; Swain v. Mizner, 8 Gray (Mass.) 182; Shumway v. Collins, 6 Gray (Mass.) 227; White v. Maynard, 111 Mass. 250; Porter v. Merrill, 124 Mass. 534.

In such a case it is not conclusive against a tenancy that the landlord agrees to provide a private table and to render other services. The written contract in one case purported to be a lease, for a precise time and at a definite weekly rate of certain specific rooms so separated from all other rooms in the same house as to become the separate tenements of the lessee. The fact that, besides leasing the rooms, the lessor undertakes to serve a private table, and to furnish certain specific accommodations, and imposes certain restrictions as to the manner of use, does not change the essential character of the instrument.[179] Where the form of the contract was that of a lease it was said that such an agreement would be extraordinary indeed, in form, if intended as the common and usual contract for board and lodgings. It gave different rights from those belonging to an ordinary boarder and lodger. It entitled the tenant to exclusive possession and would have justified him in the use of force to exclude any one whom he might choose to deem an intruder. This instrument divested the proprietor of the legal custody and control of the rooms.[180]

§ 25. Mortgagor in possession.—In determining the exact status of a mortgagor who is allowed to remain in possession of the mortgaged premises prior to a breach of the condition of the mortgage, it has been found convenient and natural to liken him to a tenant at will to the mortgagee. However, the actual situation is that the mortgagor is entitled to destroy the estate granted to the mortgagee by performing the condition of the mortgage, and that by failure of the mortgagor to perform the condition prescribed, an indefeasible legal estate vests in the mortgagee, subject only to a right of redemption in equity. Such rights and liabilities are foreign to the relation of landlord and tenant. So that it was aptly remarked by Lord Mansfield that "*A mortgagor is not properly a tenant at will to the mortgagee* for he is not to pay him rent. He is so only *quodam modo* . . . Where the court or counsel call a mortgagor a tenant at will, it is barely a comparison. He is *like* a tenant at will."[181] This was said in regard to mortgages where the legal title vested in the mortgagee and the mortgagor had merely a right to defeat it by performance according to the tenor of the instrument. With greater reason it follows that the same is true of a mortgage which merely gives the mortgagee a lien on the property as security

[179] Porter v. Merrill, 124 Mass. 534.

[180] Oliver v. Moore, 131 N. Y. 589, 42 St. Rep. 949, affirming 53 Hun 472, 25 St. Rep. 37, 6 N. Y. S. 413.

[181] Moss v. Gallimore, 1 Douglas 279, 282; Birch v. Wright, 1 Term. R. 378, 383; Vance v. Johnson, 10 Humph. (Tenn.) 213, 220.

for his debt; in that case, also, the possession of a mortgagor is not in the capacity of tenant to his mortgagee. "The relation of landlord and tenant may exist between mortgagee and mortgagor, or one claiming under the latter, but this relation is not presumed to exist between such parties and does not grow out of the relations of mortgagor and mortgagee. If between such parties the relation of landlord and tenant does exist, it must be proved."[182] In case a mortgagor was not a tenant during his previous occupation of the premises he does not become one by holding over after the mortgage has been foreclosed and the property sold.[183] It is permissible, however, for a mortgagor to agree to become the tenant of any purchaser at foreclosure sale, and likewise it can be stipulated that any purchaser shall become the landlord of the mortgagor; in such cases as soon as the other party assents a tenancy is created.[184] Where the mortgagor has put a tenant into possession after the execution of the mortgage and the mortgagee enters on default, the acceptance of rent from such tenant by the mortgagee will give rise to an estoppel and create a tenancy from year to year.[185] Upon the entry of a mortgagee for condition broken he has the right to treat a lessee of the mortgagor, whose lease is subsequent to the mortgage, as a trespasser. But the acceptance of rent by a mortgagee, after entry, from the tenant of the mortgagor creates the relation of landlord and tenant by the doctrine of estoppel. The tenancy thus created will not be for the whole term of the original lease but from year to year merely.[186]

The question whether a mortgagor can be regarded as a tenant of his mortgagee often arises in regard to the mode of evicting him from the mortgaged premises. It has been held that summary proceedings under a statute apply only to landlord and tenant, and cannot be sustained against a mortgagor who holds over after a sale of the property.

§ 26. Contracts for mortgage or for letting.—In many cases where the real nature of a transaction is a mortgage, the actual con-

[182] Morse v. Stafford, 95 Me. 31, 49 Atl. 45.

[183] Sawyer v. Hanson, 24 Me. 542; McMillan v. Love, 72 N. Car. 18.

[184] Brewster v. McNab, 36 S. Car. 274, 15 S. E. 233; Griffith v. Brackman, 97 Tenn. 387, 37 S. W. 273.

[185] Gartside v. Outley, 58 Ill. 210, citing Doe v. Bucknell, 8 C. & P. 566; and Thunder v. Belcher, 3 East 449. *Contra*, Souders v. Vansickle, 8 N. J. L. 313, where the decision rested on a statute abolishing attornment.

[186] Gartside v. Outley, 58 Ill. 210; Doe v. Bucknell, 8 C. & P. 566; Thunder v. Belcher, 3 East 449.

tract is disguised by collateral agreements. Thus where an absolute deed and a contract of defeasance or to reconvey were executed, and the consideration was a loan of money, the fact that the grantee at the same time gave the grantor a lease of the premises did not prevent the transaction from constituting a mortgage.[187] After a mortgagee had commenced a suit of foreclosure, he received an absolute conveyance of the mortgaged premises from the mortgagor and at the same time gave back a lease of the premises in which it was stipulated that the lessor should at the expiration of the lease sell the premises to the lessee, in case he should tender a certain sum—which was the amount of the mortgage—and demand a deed, the transaction made the deed a mortgage and the instrument *called* a lease was not such at all but a contract of defeasance.[188] So in another case a lessee purchased part of the demised premises but the purchase money was in part advanced by a third person and the title deed was taken in his name. The relation of landlord and tenant did not arise between the holder of the legal title and the occupant. The relation between the purchaser and the person advancing the money was similar to that of mortgagor and mortgagee and the former tenant did not continue as tenant to the transferee of the legal title.[189] But where a landowner agreed in consideration of a cash payment to let to another a parcel of land, and to prepare the soil and sow it with grain, authorizing the other to enter and harvest the crop, this was held to be a lease and not a mortgage.[190]

The maintenance of a suit in equity by an occupant of premises against the owner of the fee to have the latter declared a mortgagee rebuts any presumption of a tenancy between the parties. There was a positive denial of the absolute rights claimed by the holder of the legal title and an assertion that his deed of title was a mortgage only, which the claimant was ready to redeem. So no ground was furnished on which to raise a legal inference that the claimant held the land under the title of his opponent and with his concurrence and permission. Such are not the facts and circumstances which usually attend a permissive holding, and this is the best test by which to try a legal presumption. They rather appear to have been inconsistent with the supposed tenancy. The equity proceeding

[187] Plato v. Roe, 14 Wis. 453.

[188] Ragan v. Simpson, 27 Wis. 355; Nightingale v. Barens, 47 Wis. 389, 2 N. W. 767; Davis v. Hemenway, 27 Vt. 589; Roach v. Cosine, 9 Wend. (N. Y.) 227.

[189] Mims v. Chandler, 21 S. Car. 480, 493.

[190] Stadden v. Hazzard, 34 Mich. 76.

had assumed for the claimant the attitude of a mortgagor offering to redeem the mortgaged premises; and he maintained himself in it until the close of the controversy. So it was impossible, in the face of this fact, to infer the relation of landlord and tenant between the parties during that period. The law sometimes implies contracts but never where there is an express contract, or facts exist wholly inconsistent with the contract to be implied.[191]

§ 27. **A mortgagee in possession is not a tenant of his mortgagor, and the latter cannot recover rent after redeeming.** Though a mortgagee has taken possession of the mortgaged premises, the mortgagor, after redeeming, cannot maintain assumpsit against the mortgagee for rent during the time he was in possession. If the mortgagee in his account of the mortgage debt credits nothing for the rent during the time he was in possession and the mortgagor pays the whole debt without deduction, the proper remedy is for the mortgagor to maintain an action for money had and received, to recover back the amount overpaid.[192] But this is not inconsistent with the established rule that a mortgagee in possession is accountable for profits which go in reduction of the mortgage debt.[193] In case a valid lease is made by the mortgagor and the mortgagee acquires possession as assignee of such lease, he then becomes a tenant of the mortgagor. But if the mortgagor puts the mortgagee in actual possession and occupation of the premises, and relinquishes all right whatever to them, and his tenant stands by and consents, he can hardly be heard after this to say that the term still continues and the mortgagee holds as tenant. Neither can an assignee of the mortgagor set up such a claim. The mortgagee goes into possession as mortgagee and not as tenant, by a title paramount to that of the mortgagor. There is no pretense that he took an assignment of the term or an underlease of the premises.[194]

§ 28. **Tenancy between joint owners.**—The general rule in regard to the rights of possession by owners of undivided interests in real estate, is that no one of them has the right to keep the others out of any part of the common estate. Consequently one joint owner cannot bring trespass or ejectment against a co-owner. Not only is this

[191] Stockett v. Watkins, 2 Gill & J. (Md.) 326, 341.

[192] Wood v. Felton, 9 Pick. (Mass.) 171.

[193] Wood v. Felton, 9 Pick. (Mass.) 171; Ackerman v. Lyman 20 Wis. 454; Jones on Mortgages, 6th ed., § 1114 et seq.

[194] People v. Culver, 21 How. Pr. (N. Y.) 108.

the rule, but such an owner is further precluded from charging one in possession of the entire premises as tenant and holding him for rent. "The relation of landlord and tenant does not exist between one tenant in common and the other tenants in common where the one occupies the common estate in his own right and without contract, express or implied, with his co-tenants."[195] Mere occupancy of the entire tenement by one co-tenant does not make him liable for rent to the other.[196] The relation of landlord and tenant may, however, be created between co-tenants by an actual agreement to that effect between them,[197] and when the relation of landlord and tenant is thus created, the tenant co-owner, if he remain in exclusive possession after the term for which his co-tenant's share was let to him, will be held to do so in his character of tenant, and the same rules will apply as in the case of any other tenant holding over.[198] Thus an actual agreement to pay rent was implied between co-tenants where there had been a previous renting and an arrangement for partition was delayed so that one continued in occupation of the entire estate.[199]

VI. *Purchaser in Possession.*

§ 29. The occupation of land under a contract for purchase does not make the occupant a tenant of the grantor during the time allowed for the completion of the purchase even though the contract for sale is not carried out. Therefore, no promise to pay rent for the use of the premises during such period will be implied, and the statutory process for a landlord to recover possession cannot be maintained.[200] "While the defendant occupied under a valid contract

[195] Bird v. Earle, 15 Fla. 447, 453.

[196] Chapin v. Foss, 75 Ill. 280; Boley v. Barutio, 24 Ill. App. 515; Huffman v. Pollard, 6 Ky. L. R. 519.

[197] Shouse v. Krusor, 24 Mo. App. 279; Hubbard v. Quisenberry, 32 Mo. App. 459.

[198] O'Connor v. Delaney, 53 Minn. 247, 54 N. W. 1108; Chapin v. Foss, 75 Ill. 280.

[199] Leitch v. Boyington, 84 Ill. 179.

[200] **Alabama:** Tucker v. Adams, 52 Ala. 254. **Arkansas:** Walters v. Meyer, 39 Ark. 560; Mason v. Delancy, 44 Ark. 444. **California:** Blum v. Robertson, 24 Cal. 127, 145. **Connecticut:** Vandenheuvel v. Storrs, 3 Conn. 203. **Georgia:** Barnes v. Shinholster, 14 Ga. 131; Griffith v. Collins, 116 Ga. 420, 42 S. E. 743. **Indiana:** Newby v. Vestal, 6 Ind. 412; Miles v. Elkin, 10 Ind. 329; Kratemayer v. Brink, 17 Ind. 509; Fall v. Hazelrigg, 45 Ind. 576. **Kansas:** Garvin v. Jennerson, 20 Kan. 371. **Kentucky:** Richmond &c. Tp. Co. v. Rogers, 7 Bush 532. **Maine:** Lapham v. Norton, 71 Me. 83. **Maryland:** Hoffar v. Dement, 5 Gill 132. **Massachusetts:** Dunham v. Townsend, 110 Mass. 440. **Missouri:** Glascock v. Robards, 14 Mo. 350. **New Jersey:** Den v. Westbrook, 15 N. J. L. 371; Brewer v.

for the sale of the property to him, he could not be considered as a tenant; the parties could not convert the contract for purchase into a tenancy, nor while the former was pending infer another of a different nature."[201] The relation of landlord and tenant subsists by virtue of an agreement, express or implied. The relation of vendor and vendee is wholly different in its incidents and in the rights and liabilities of the parties. If the vendor has parted with the legal title, the vendee could not by any possibility be treated as his tenant. If he has not parted with the legal title, treating the vendee as his tenant, liable for rent, would operate as a destruction of the contract of purchase and the substitution of a different contract the parties did not make. Nor can it be said that the vendor, because of the vendee's default in payment of the purchase money, has an election to rescind the contract of purchase and treat the vendee as a tenant. It requires the concurring minds of both parties to rescind as well as to make a contract.[202] The vendor has three remedies,—he may maintain ejectment, sue at law for the purchase money, or enforce his lien for the purchase money in equity.[203]

Where an occupant of land had agreed to purchase it and had paid the purchase money, it was declared to be manifestly unjust to allow the owner to recover rent for it in the event of his failure to execute a conveyance.[204] But in the event of the recovery back of the purchase money because of the destruction of the premises by fire, the vendor was allowed to recover rent for the time the vendee was in occupation.[205]

Craig, 18 N. J. L. 214. **New York:** Jackson v. Kingsley, 17 Johns. 158; Kellogg v. Kellogg, 6 Barb. 116; Burkhart v. Tucker, 27 Misc. 724, 59 N. Y. 711; Moulton v. Norton, 5 Barb. 286; People v. Bigelow, 11 How. Pr. 84; Kenada v. Gardner, 3 Barb. 589; Livingston v. Tanner, 14 N. Y. 64; Oakley v. Schoonmaker, 15 Wend. 226. **North Carolina:** Riley v. Jordan, 75 N. Car. 180; McCombs v. Wallace, 66 N. Car. 481. **Pennsylvania:** Hill v. Hill, 43 Pa. St. 528. **Tennessee:** Chilton v. Niblett, 3 Humph. 404; Gudger v. Barnes, 4 Heisk. 570. **Texas:** Brown v. Engel, 2 Tex. App. Cas., § 103. **Wisconsin:** Nightingale v. Baren, 47 Wis. 389, 2 N. W. 767; Diggle v. Boulden, 48 Wis. 477, 485, 4 N. W. 678; McCormick v. Herndon, 86 Wis. 449, 56 N. W. 1097. **England:** Kirtland v. Pounsett, 2 Taunt. 145.

[201] Howard v. Shaw, 8 M. & W. 118–122, per Abinger, C. B.

[202] Tucker v. Adams, 52 Ala. 254.

[203] Haley v. Bennett, 5 Port. (Ala.) 452; Duval v. McLoskey, 1 Ala. 708.

[204] Little v. Pearson, 7 Pick. (Mass.) 301.

[205] Gould v. Thompson, 4 Met. (Mass.) 224. Here the court dealt with a case where the vendee had paid the purchase money without getting a conveyance, had occupied the premises for four days when they burned, and had then recovered back the purchase money. It

When one purchases land or makes an agreement to do so, and enters into possession in pursuance of the agreement, his entry and possession are not as tenant, but as owner. If the defendant shows he is in under a contract to purchase he rebuts the idea of a tenancy, and a different agreement cannot be inferred from that the parties have deliberately entered into. The fact that the agreement to purchase is by parol can make no difference. The agreement is proved not for the purpose of being enforced, but only to rebut the idea of a tenancy.[206] A purchaser entered under a parol agreement for purchase and occupied ten years, making extensive improvements, but the contract had not been carried out. He was not liable to the owner in use and occupation during this period. There was no agreement to pay rent, and from the facts it could be inferred that the parties did not contemplate the payment of rent. There seems to have been no demand on the purchaser to complete his purchase.[207]

While it seems to be well settled that a person is not liable for rent, where he has taken the possession and occupied the premises under a contract of purchase, such rule only prevails where the contract is not absolutely null and void. If the grantor has no power to make an executory contract for the sale of the premises, or to convey any title thereto, the entire transaction is absolutely and unconditionally null and void. "The parties to the pretended contract are to be charged with a knowledge of the law and, consequently, it is to be presumed that the vendee took the possession and occupied the premises with full knowledge that the entire transaction was illegal and void." So the court were clearly of opinion that the vendee was liable for the use and occupation of the premises.[208]

§ 30. In the absence of agreement a purchaser's right to possession is not greater than that of a tenant at will. In describing the interest of an intending purchaser in possession under an agreement for a sale it is not unusual to speak of him as a tenant at will of the vendor.[209] No demise is created by such a contract, and the possession is

was held that he was liable to pay rent for the four days' occupation.

[206] Mason v. Delancy, 44 Ark. 444; Carpenter v. United States, 17 Wall. (U. S.) 489. On similar facts in Moshier v. Reding, 12 Me. 478, 482, the court held that there was a tenancy between vendor and vendee, relying on the negative reasons that neither express words of demise nor payment of rent was necessary to create the relation of landlord and tenant.

[207] Bishop v. Clark, 82 Me. 532, 20 Atl. 88.

[208] Mattox v. Hightshue, 39 Ind. 95.

[209] McCombs v. Wallace, 66 N. Car. 481; Towne v. Butterfield, 97 Mass. 105; Meadows v. Hopkins, Meigs (Tenn.) 181; Chilton v. Niblett, 3

held only by permission of the owner. There is no title by which the purchaser can hold against the owner for any fixed or definite length of time. He is, therefore, a mere tenant at will,[210] in contradistinction from one who has a fixed right of possession or term in the land. But it has been explained that though such a purchaser's right is not greater than that of a tenant at will, and though he is therefore often called a tenant at will, yet he is not to be regarded as a lessee for all purposes, and that, if the negotiation for the purchase of the land fails, he is not necessarily to be held liable on an implied assumpsit for use and occupation, or liable to the special summary process provided by statute for the recovery of land which is held over by a lessee after the term of his lease.[211] To designate a purchaser in possession a tenant at will is true in a restricted sense only. A purchaser is a tenant at will just as a mortgagor after condition broken is a tenant at will of the mortgagee. The mortgagor is not a tenant within the meaning of the unlawful detainer act, however, and neither is a purchaser who has been placed in possession before a transfer of the legal title.[212]

From the time of default in the contract for sale, the relation of the parties becomes that of landlord and tenant at will or at sufferance;[213] and it has been held that, after such default, an implied promise on the part of the occupant to pay rent will arise: "But what is the relation of the parties," asks Lord Abinger, "when the contract of sale has gone off? The defendant remains in possession with the consent of the landlord, but without any title to or contract to purchase the land itself. Under those circumstances, he is a tenant at will; and if the occupation is beneficial to him, that is sufficient to imply a contract to pay a reasonable sum by way of compensation for such occupation."[214] If the vendee refuses to comply with the contract, the vendor may treat him as a tenant at will, and the vendee thereby becomes liable to the vendor for the reasonable value of the

Humph. (Tenn.) 404; James v. Patterson, 1 Swan (Tenn.) 309; Doe v. Chamberlaine, 5 M. & W. 14; Doe v. Miller, 5 C. & P. 595.

[210] Foley v. Wyeth, 2 Allen (Mass.) 131, 134, per Merrick, J. There is an early dictum that a vendee in possession with a bond for title had an estate at will or by license. Proprietors of No. 6 v. McFarland, 12 Mass. 324.

[211] Lyon v. Cunningham, 136 Mass. 532; Dakin v. Allen, 8 Cush. (Mass.) 33; Larned v. Clarke, 8 Cush. (Mass.) 29; Dunham v. Townsend, 110 Mass. 440; Kiernan v. Linnehan, 151 Mass. 543, 24 N. E. 907.

[212] Mason v. Delancy, 44 Ark. 444.

[213] Uhl v. Pence, 11 Neb. 316, 9 N. W. 41.

[214] Howard v. Shaw, 8 M. & W. 118.

use of the premises for the time during which he continues in possession after he abandons the agreement.[215]

Moreover, it is valid and enforcible to regulate the rights of a purchaser to possession prior to the transfer of the legal title, and where it is contemplated that the deed may not be called for until after the expiration of months or even years, this is a natural and wise precaution. In a case where this question arose it was held the agreement not only regulated the terms of the sale, but also fixed the rights of the parties as to possession during the continuance of the agreement, and that the language was sufficiently clear and precise to give the right of possession to the vendee. In construing the sealed instrument by which this right was conferred, Hammond, J., speaking for the court, said: "It is not simply an executory promise to give possession, but it is a present grant to the plaintiff of the possession, to continue during the existence of the agreement. The right given is not an estate at will, but a much greater estate, and until it is lost by the default of the plaintiff, or by the expiration or annulment of the agreement by lapse of reasonable time or otherwise, she will continue to hold it. . . . By the fair interpretation of the agreement, the plaintiff was entitled to reap the profits of the income of the estate either by personal occupation, or by leasing the same to another."[216]

§ 31. Modifying circumstances.—When a purchaser goes into occupation of land before the sale is completed by a transfer of the legal title, the generally accepted principle is that such occupant does not stand in the relation of a tenant to the vendor. The principle is equally applicable where the prospective purchaser has been tenant of the land just previous to the time when the contract for sale is to be carried out;[217] and where the vendor makes a valid transfer of his title to a third party. The vendee does not thereby become a tenant to the person acquiring the legal title by such transfer.[218] Moreover, it does not alter the relation of the parties for them to call the purchase money rent.[219] If the agreement contemplated an absolute sale, the

[215] Sievers v. Brown, 34 Ore. 454, 56 Pac. 171; Smith v. Wooding, 20 Ala. 324; Osgood v. Dewey, 13 Johns. (N. Y.) 240; Dwight v. Cutler, 3 Mich. 566, 64 Am. Dec. 105; Hogsett v. Ellis, 17 Mich. 351.

[216] Fitch v. Windram, 184 Mass. 68, 67 N. E. 965.

[217] Arey v. Imson, 3 Alb. L. Jour. (N. Y.) 375. Compare Moore v. Smith, 56 N. J. L. 446, 29 Atl. 159, where a vendee under such circumstances was called a tenant at sufferance.

[218] Johnson v. Hauser, 82 N. Car. 375.

[219] Quertermous v. Hatfield, 54 Ark. 16, 14 S. W. 1096; Watson v.

fact that the first installment of purchase money was called rent by the parties would not impart a different condition into the contract and change the relation of vendor and vendee into that of landlord and tenant. Calling the purchase money rent would not make it such.[220] The fact that a note recited that it was given for rent would not preclude the parties from proving that it was not in fact given for that purpose.[221] However, if the money is paid as *rent* the relation of landlord and tenant will arise even though the amounts paid are to be credited on a purchase note on a certain contingency,[222] or are called interest on a bond securing the purchase price which is to be paid by the tenant.[223]

It is admissible to show, on behalf of a person attaching for rent, that originally there was a contract for the sale of the premises, but that before other rights accrued this was modified by an agreement that the vendee, in default of paying the purchase money, should pay rent.[224] After default by a vendee of land to pay the purchase money, the vendor may, by contract, become landlord of the vendee so as to avail himself of the landlord's lien given by statute, and the rent may still go as a credit upon the purchase price agreed to be paid for the land.[225] Such a change in the relationship could not be effected to the detriment of third persons; as where a landlord asserting a lien comes into competition with a mortgagee of the tenant's crop. The landlord would be postponed if, at the time the mortgagee's rights attached, he stood in the relation of vendor to the occupant who subsequently became his tenant.[226]

§ 32. That a vendee in possession is entitled to emblements was the conclusion reached by the New York Court of Appeals in an elaborately considered case. The decision of the Supreme Court below was reversed by this holding. The action was in the nature of replevin to recover a crop of oats planted by the vendee while in possession, and subsequently harvested by the vendor. As a ground for sustaining a non-suit the Supreme Court said: "The contract for

Pugh, 51 Ark. 218, 10 S. W. 493; Blitch v. Edwards, 96 Ga. 606, 24 S. E. 147; Sackett v. Barnum, 22 Wend. (N. Y.) 605.

[220] Quertermous v. Hatfield, 54 Ark. 16, 14 S. W. 1096.

[221] Watson v. Pugh, 51 Ark. 218, 10 S. W. 493.

[222] Nobles v. McCarty, 61 Miss. 456.

[223] White v. Livingston, 10 Cush. (Mass.) 259.

[224] Spears v. Robinson, 71 Miss. 774, 15 So. 111; Thornton v. Strauss, 79 Ala. 164.

[225] Jones v. Jones, 117 N. Car. 254, 23 S. E. 214.

[226] Wilczinski v. Lick, 68 Miss. 596, 10 So. 73.

the sale of the farm being by parol, was void by the statute. There was no contract for the letting of the farm and the relation of landlord and tenant did not exist. . . . There are some dicta to the effect that an entry upon premises, under a parol contract to purchase, and an occupancy will establish the relation of landlord and tenant and that a recovery for use and occupation can be had, and there are some cases in which the action has been maintained. It will, however, be found on examining the cases, that the occupancy has been continued after the parties had abandoned the contract to purchase, or there have been circumstances from which an inference could be fairly drawn that the parties had agreed that rent should be paid." The oats while growing were a part of the realty; the remedy of the party disseised is to recover the possession and then the mesne profits. In this case, however, the vendee had no legal title. His remedy was in a court of equity for a specific performance.[227] The ground on which this decision was reversed was that the vendee in possession was a tenant at will, and therefore entitled to the oats as emblements. A promise to pay rent could not be implied in such a case, because the vendee entered under a different contract, but, nevertheless, he was a tenant at will. One of the arguments in favor of this conclusion was that a vendee in such a position has the right to ingress and egress to remove his effects.[228] Expressions to be found in the authorities to the effect that one entering under a contract of purchase does not stand in the relation of tenant to the vendor, have reference to the question whether an undertaking to pay rent can be implied. In a further statement of the reasons for the decision, Rapallo, J., speaking for himself and two other members of the court, said: "But when a purchaser of a farm enters upon it under an express agreement of the vendor that he may occupy and work it until the vendor is prepared to convey, and the agreement to sell is merely by parol, and the question arises with reference to the rights of such an occupant, in case of a refusal by the vendor to perform, and a termination by him of the occupancy, without any default on the part of the occupant, there is strong reason for according to such occupant the rights of a tenant at will. The permission to occupy unaccompanied by any contract of sale would clearly create a tenancy at will. The effect of the invalidity of the contract of sale is to reduce the right of the vendee to that of a mere licensee, and to

[227] Harris v. Frink, 2 Lans. (N. Y.) 35.

[228] Love v. Edmonston, 1 Ired. L. (N. Car.) 152; Jones v. Jones, 2 Rich. L. (S. Car.) 542; Carson v. Baker, 4 Dev. (N. Car.) 220; Lowry v. Tew, 3 Barb. Ch. (N. Y.) 407, 414.

enable the vendor to revoke the license at his pleasure. When he exercises that right there is no injustice in placing him in the same position as if the contract of sale which he repudiates had not been made."[229]

§ 33. **Where a vendor of land continues in possession,** either by an agreement in the contract of sale or collateral thereto, his right usually takes effect as a reservation, and in that case the relation of landlord and tenant does not exist between the parties.[230] However, the parties may, if they wish, deliver the possession of the premises to the grantee and have him lease them back to the grantor and, if that is done, the relation of landlord and tenant would exist between them; and unlawful detainer would lie against the grantor in case he refused to deliver up the possession according to his agreement. The same arrangement could be made in a mortgage, and the existence of a tenancy would in no way impair the grantor's right of redemption.[231] After a delivery of possession to a vendee, the premises were, in one case, returned to the vendor under the mistaken belief that a suit for specific performance to compel a conveyance could not be maintained. When the equity suit was finally decided against the vendor it was held that a sub-vendee of the premises could maintain an action for use and occupation against the vendor for such time as he had occupied after the execution of the contract for sale. Baron Graham said in the course of his concurring opinion: "Although in raising an implied assumpsit, however, we may or may not be doing what was not in the contemplation of the parties at the moment, that should not be the only consideration with us in determining whether this species of action can be maintained or not." The action of use and occupation being the only remedy available against the vendor, the court were inclined to a liberal construction for the purpose of holding the vendor liable.[232]

After the period for which the vendor was to occupy has elapsed, he becomes a tenant at will or at sufferance.[233]

[229] Harris v. Frink, 49 N. Y. 24, 10 Am. R. 318, reversing 2 Lans. 35.

[230] Goldsberry v. Bishop, 2 Duv. (Ky.) 143; Hoffman v. Clark, 63 Mich. 175, 29 N. W. 695; Sims v. Humphrey, 4 Denio (N. Y.) 185; McCombs v. Wallace, 66 N. Car. 481.

[231] Sexton v. Hull, 45 Mo. App. 339. *Compare* Prichard v. Tabor, 104 Ga. 64, 30 S. E. 415.

[232] Hull v. Vaughan, 6 Price 157.

[233] Hyatt v. Wood, 4 Johns. (N. Y.) 150; Cadwallader v. Lovece, 10 Tex. Civ. App. 1, 29 S. W. 666, 917. *Compare* Jackson v. Aldrich, 13 Johns. (N. Y.) 106, holding a second conveyance cut off the right of possession of the original vendor, who held as tenant at will.

§ 34. The character of an occupancy may be determined by a condition subsequent; so that the happening of a future event will determine whether the occupant of land holds in the capacity of a tenant or as a purchaser.[234] An election may be given one party to choose whether the relationship shall be that of landlord and tenant or of vendor and vendee.[235] On a contract for the sale of lands, the parties may, by express stipulation, agree that on default being made in the payment of the purchase money, the contract shall be treated as a lease, the option being reserved to the purchaser in the first instance, and passing to the vendor on his failure to elect. When an election is made to treat it as a lease, it relates back to the time when the contract was made, and creates the relation of landlord and tenant from that day with all its incidents.[236]

On the other hand, where land has been leased for a year with an option to lessee to purchase at any time, the lease is terminated as soon as the tenant exercises his option to buy, and he can then enforce specific performance.[237] Under a lease containing an option to purchase, the relation of lessor and lessee and the liability of the lessee for rent continues until a tender or offer to pay the purchase money is made.[238] Where a lease gave the tenant an option to purchase a part of the land occupied at the end of the tenancy, price and boundary to be agreed upon later, it was held that the relation of landlord and tenant existed and title was not vested in lessee.[239]

The existence of an option in one party to a contract does not in-

[234] **Arkansas:** Block v. Smith, 61 Ark. 266, 32 S. W. 1070. **Mississippi:** Bacon v. Howell, 60 Miss. 362; Vick v. Ayres, 56 Miss. 670; Stinson v. Dousman, 20 How. (U. S.) 461. **Florida:** Blanchard v. Raines, 20 Fla. 467. **Georgia:** Barnes v. Shinholster, 14 Ga. 131. **North Carolina:** Hughes v. Mason, 84 N. Car. 472, holding the contingency had not happened. In Green v. Dietrich, 114 Ill. 636, a person was in possession of land under a contract to buy and agreed to pay reasonable rent in case the vendor could not make a good title. The vendee was held not to be a tenant, so that the doctrine of estoppel could not prevent him from buying in an outstanding title to defeat that of the landlord. It would seem that the contingency had happened here which made the occupant a tenant and not a purchaser. *Compare* Hodgen v. Guttery, 58 Ill. 431.

[235] Wilkinson v. Ropes, 74 Ala. 140; Collins v. Whigham, 58 Ala. 438; Dunn v. Tillery, 79 N. Car. 497.

[236] Drum v. Harrison, 83 Ala. 388, 3 So. 769; Collins v. Whigham, 58 Ala. 438.

[237] Newell's Appeal, 100 Pa. St. 513; Knerr v. Bradley, 105 Pa. St. 190.

[238] Courne v. Hewes, 124 Cal. 244, 56 Pac. 1032.

[239] Collier v. Sharpe, 4 Ky. L. R. 351. *Compare* Howard v. Hill, 4 Ky. L. R. 719.

crease the rights of the other party. Thus, where a purchaser of land had an option to hold it as tenant but indicated his election to buy by tendering the purchase price, no refusal by the owner could place the vendee in the attitude of a tenant. In the absence of anything to show such an election, the occupant would continue to hold as purchaser.[240] Still a tenant's right to buy the premises at the end of a term would not change the relation of the parties during its continuance, and the landlord could oust the tenant for non-payment of rent.[241]

§ 35. **Proof of change in relationship.**—The point was made in one case that in order to change his relation to a tenant, the vendee must have used the actual ceremony of going out of possession as purchaser, and returning as lessee. But the court thought that this was unnecessary. If the vendee unconditionally surrendered his contract and his rights under it, and agreed to hold under a new contract of lease, that brought the case under the landlord and tenant act.[242] By executing the rent obligation, the vendees acknowledged the vendor's right to possession and thereby became his tenants, with all the rights of landlord and tenant subsisting between them. This had the same legal effect as if the vendor had first evicted them and then leased the premises to them; and his right to lease to them was as clear as if they had never contracted to purchase.[243] Where the vendee enters under a bond for title and has executed notes for the purchase money which are held by the vendor, the surrender of bond and notes, by the holders to the maker and obligor respectively, has been repeatedly declared to be such a renunciation as would annul the contract of purchase.[244] In order that a vendee may, by parol agreement, rescind a contract of purchase and become the tenant of the vendor, the rule is that the vendor must show an unconditional surrender and that the acts and conduct relied upon as evidence of abandonment must be "positive, unequivocal and inconsistent with the contract." It is the province of the trial judge to instruct the jury as to what would constitute a renunciation of the contract and

[240] Griffith v. Collins, 116 Ga. 420, 42 S. E. 743.

[241] Clifford v. Gressinger, 96 Ga. 789, 22 S. E. 399.

[242] Riley v. Jordan, 75 N. Car. 180.

[243] Thornton v. Strauss, 79 Ala. 164.

[244] Faw v. Whittington, 72 N. Car. 321; McDougald v. Graham, 75 N. Car. 310; Falls v. Carpenter, 1 Dev. & Bat. Eq. (N. Car.) 237; Holden v. Purefoy, 108 N. Car. 163, 12 S. E. 848; Fortune v. Watkins, 94 N. Car. 304; Taylor v. Taylor, 112 N. Car. 27, 16 S. E. 924.

error for him to leave the jury without a definition of what amounts to an abandonment.[245]

VII. *Lease or License.*

§ 36. A license in the sense it is used here is an authority to do an act or a series of acts on the land of another without possessing an estate therein,[246] and is to be distinguished from a government permit issuing from municipal, state or national sources. Chief Justice Parker of the Massachusetts Supreme Court gave the following definition of such a contract: "A license is technically an authority given to do some act or series of acts on the land of another, without passing any estate in the land, such as a license to hunt in another's land, or to cut down a certain number of trees. These are held to be revocable while executory, unless a certain term is fixed, but irrevocable when executed. Such licenses to do a particular act but passing no estate, may be pleaded without deed. But licenses which in their nature amount to granting an estate for ever so short a time are not good without deed, and are considered as leases and must always be pleaded as such. The distinction is obvious. Licenses to do a particular act do not in any degree trench upon the policy of the law which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act which would otherwise be a trespass. But a permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent is an important interest which ought not to pass without writing and is the very object provided for by our statute."[247] Only certain kinds of parol leases are valid; easements, being incorporeal hereditaments, must always be granted by deed; but the distinguishing characteristic of a license of the kind under consideration is, that it may al-

[245] Taylor v. Taylor, 112 N. Car. 27, 16 S. E. 924; Faw v. Whittington, 72 N. Car. 321; Holden v. Purefoy, 108 N. Car. 163, 12 S. E. 848.

[246] Arkansas: Wynn v. Garland, 19 Ark. 23. Colorado: Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 50 Pac. 744. Massachusetts: Cook v. Stearns, 11 Mass. 533, 537; Cheever v. Pearson, 16 Pick. (Mass.) 266, 273; Hamblett v. Bennett, 6 Allen (Mass.) 140. Illinois: Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937; Holladay v. Chicago Arc Light &c. Co., 55 Ill. App. 463. Oregon: Christensen v. Pacific Coast &c. Co., 26 Ore. 302, 38 Pac. 127; Stinson v. Hardy, 27 Ore. 584, 41 Pac. 116. United States: Morgan v. United States, 14 Ct. Cl. (U. S.) 319.

[247] Cook v. Stearns, 11 Mass. 533. To same effect see Davis v. Townsend, 10 Barb. (N. Y.) 333.

ways be made by parol.[248] If a license once granted could not be recalled, it would be in effect a grant of an easement, and so an easement could be created by parol, which is contrary to law. Therefore in many cases there has been an express recognition of the doctrine that a license is no grant and that it is in its nature necessarily revocable, and of the further doctrine that, in order to confer an incorporeal right, such as an easement, an instrument under seal is essential.[249] A claim for an easement must be founded upon grant by deed or writing or upon prescription which supposes one; for it is a permanent interest in another's land, with a right at all times to enter and enjoy it.[250]

§ 37. A mere license, while it remains executory, is revocable at the pleasure of the licensor, is indivisible and non-assignable.[251] An executory license confers such rights that from their very nature it must be revocable at the pleasure of the licensor.[252] A mere license, unaccompanied with any vested interest in the real estate, created by deed or other writing, and independent of any title acquired by grant, prescription or adverse possession and claim for a period of the Statute of Limitations, must be deemed to be, in its own nature, countermandable, and essentially revocable at the will of the owner of the fee."[253] Not only is the rule well established that such a license is not assignable but the law also holds it to be revoked by the death of either party to the original agreement.[254] A

[248] Cook v. Stearns, 11 Mass. 533, 537; Claflin v. Carpenter, 4 Met. (Mass.) 580, 583; Wynn v. Garland, 19 Ark 23.

[249] Wood v. Leadbitter, 13 M. & W. 838; Fentiman v. Smith, 4 East 107; Rex v. Horndon, 4 M. & S. 565; Hewlins v. Shippam, 5 B. & C. 222.

[250] Pierrepont v. Barnard, 6 N. Y. 279; Kent's Comm. 452.

[251] Stinson v. Hardy, 27 Ore. 584, 41 Pac. 116; Holladay v. Chicago Arc Light &c. Co., 55 Ill. App. 463.

[252] **Arkansas:** Wynn v. Garland, 19 Ark. 23. **California:** Potter v. Mercer, 53 Cal. 667. **Delaware:** Jackson &c. Co. v. Philadelphia &c. R. Co., 4 Del. Ch. 180. **Illinois:** Wilmington Water-Power Co. v. Evans, 166 Ill. 548, 46 N. E. 1083. **Indiana:** Williamson v. Yingling, 93 Ind. 42; Lake Erie & W. R. Co. v. Kennedy, 132 Ind. 274, 31 N. E. 943. **Massachusetts:** Giles v. Simonds, 15 Gray (Mass.) 441; Drake v. Wells, 11 Allen (Mass.) 141. **New York:** Crosdale v. Lanigan, 129 N. Y. 604, 29 N. E. 824.

[253] Desloge v. Pearce, 38 Mo. 588; Woodward v. Seely, 11 Ill. 157; Kamphouse v. Gaffner, 78 Ill. 453; Cook v. Stearns, 11 Mass. 533; Morse v. Copeland, 2 Gray (Mass.) 302; Hetfield v. Central R. Co., 5 Dutch. (N. J. L.) 571; Eggleston v. New York &c. R. Co., 35 Barb. (N. Y.) 162; Houston v. Laffee, 46 N. H. 505; Foster v. Browning, 4 R. I. 47.

[254] Carleton v. Redington, 21 N. H. 291; Cowles v. Kidder, 24 N. H. 364.

parol license to be exercised upon the land of another is a mere personal privilege founded on personal trust and confidence and therefore it cannot be transferred to another.[255] A conveyance of premises operates as a revocation of a parol license to a third person to do certain acts thereon, which had been previously given by the grantor.[256] Transferring the land to another, or even leasing it without any reservation, would of itself be a countermand of the license.[257] Although the licensee has entered and expended money, a parol license to enter upon the lands of another is revocable, unless the license is connected with and necessarily incident to, the possession and enjoyment of property conveyed by a valid grant. The correct principle is that where there is a license by parol, coupled with a parol grant or pretended grant of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not incident to a valid grant, and it is therefore revocable.[258]

§ 38. A parol license to cut and carry away standing timber, when fully executed before revocation, constitutes a good defense to an action of trover brought by the person giving the license, to recover the value of the timber. By being executed the license becomes irrevocable.[259] A parol license to cut and carry away wood, when no time is limited, must be acted upon within a reasonable time, and must be considered as applying to the wood as substantially in the state of growth in which it then was.[260] By such an oral agreement no title to the land passes, and no property in the trees is acquired until they are severed from the realty. The refusal of the vendor to permit the vendee to enter upon the land for the purpose of cutting the trees is merely a breach of an executory contract, the remedy

[255] Curtis v. La Grande &c. Water Co., 20 Ore. 34.

[256] People v. Goodwin, 5 N. Y. 568; Whitaker v. Cawthorne, 3 Dev. L. (N. Car.) 389.

[257] Carter v. Harlan, 6 Md. 20; Cook v. Stearns, 11 Mass. 533, 536.

[258] Richmond &c. R. Co. v. Durham &c. R. Co., 104 N. Car. 658, 10 S. E. 659; Dillon v. Crook, 11 Bush (Ky.) 321.

[259] Spalding v. Archibald, 52 Mich. 365, 17 N. W. 940; Yale v. Seely, 15 Vt. 221; Claflin v. Carpenter, 4 Metc. (Mass.) 580; Hill v. Hill, 113 Mass. 103; Hill v. Cutting, 113 Mass. 107; Erskine v. Plummer, 7 Me. 447, 22 Am. Dec. 216; Owens v. Lewis, 46 Ind. 488, 15 Am. Rep. 295; Pierrepont v. Barnard, 6 N. Y. 279; Bennett v. Scutt, 18 Barb. (N. Y.) 347; Greeley v. Stilson, 27 Mich. 152; Sovereign v. Ortmann, 47 Mich. 181, 10 N. W. 191.

[260] Gilmore v. Wilbur, 12 Pick. (Mass.) 120; Atwood v. Cobb, 16 Pick. (Mass.) 229.

for which is an action for damages.[261] But where a written acknowledgment of payment of money for the purchase of standing timber definitely described the lot on which the timber stood and continued as follows: "I further agree to let to said S. for eight years to cut the timber off said land," it was held that this constituted a lease to the purchaser of the timber.[262]

The grant of a perpetual right to enter on a tract of land and cut timber for the purpose of keeping in repair the fences of another tract belonging to the grantee, is within the statute of frauds and must be in writing. A parol grant of such a right is but a license, which is determined by a sale of the land.[263]

§ 39. A conveyance for a limited period of an interest in land subordinate to the grantor's ownership in fee is a lease. "It may be said in general terms that where the conveyance of an estate in land, subordinate to that of the grantor, to the grantee, upon a valid consideration, and for a definite term is made, the instrument making the conveyance is a lease. Less than this might under some circumstances constitute a lease; more could not be required."[264] Mr. Justice Cooley, giving a definition in broader terms, said: "When something beyond a mere temporary use of land is promised; where the promise apparently is not founded on personal confidence, but has reference to the ownership and occupancy of other lands and is

[261] Drake v. Wells, 11 Allen (Mass.) 141; Giles v. Simonds, 15 Gray (Mass.) 441; White v. Foster, 102 Mass. 375; Hill v. Hill, 113 Mass. 103; Hill v. Cutting, 113 Mass. 107.

[262] Moring v. Ward, 5 Jones L. (N. Car.) 272. In Crane v. Patton, 57 Ark. 340, a contract imposing a duty to cut and remove certain timber from land in return for the use of the land was held to be a lease because it passed the right to possession of the land. And in Aveline v. Ridenbaugh, 2 Idaho 168, wood stored on certain premises was sold with a privilege to the vendee to store the wood for a year free and to enter and remove it at any time during that period. A majority of the court held that this created a tenancy. "The peculiar terms of the sale . . . mean that the plaintiffs may store this wood upon defendant's premises during the year, and may at any and all times enter thereon to remove the same cord by cord, or in larger quantities, as their business may require. This makes the premises of defendant the storehouse for plaintiff's stock in trade. This is clearly subletting." One judge dissented and thought the privilege a mere license. This case seems to be a typical one of a sale of a chattel on real estate and a license to remove it.

[263] Yeakle v. Jacob, 33 Pa. St. 376.

[264] New York &c. R. Co. v. Randall, 102 Ind. 453, 457, 26 N. E. 122, per Niblack, J.

[265] Morrill v. Mackman, 24 Mich. 279, 283.

made to facilitate the use of those lands in a particular manner and for an indefinite period . . . the interest is an easement or a leasehold and not a mere license."[265]

The right to build a road across land of another, no location being specified and no duration for its continuance being stated, is not a lease. It would be an easement which could only be granted by deed. When taking effect as a license created by a simple instrument in writing, it would not be binding on a grantee of the land, even though the licensee expended money on the faith of it.[266]

"It would seem somewhat strange, at first thought, to say that a parol lease of the whole land for the winter would have been good, and yet that a parol agreement for a right of way would not. And if the two rights were from their nature equally the proper subject of a lease, such a position could not be maintained. The question would then relate only to the statute of frauds. But there is another obstacle to the validity of this agreement entirely independent of the statute of frauds and growing out of the nature of the right bargained for. It was a right of way for a specified time. This was an incorporeal hereditament, which by the common law, could be created only by deed."[267]

§ 40. A permissive occupation, under a contract, express or implied, conferring a legal possession, is indispensable to the creation of a tenancy.[268] A licensee, however, need not be in possession and ordinarily does not have possession transferred to him. So in a case where the outside wall of a house was let for advertising purposes, the advertiser was a licensee only, although the contract was put in the form of a lease and the privilege was to continue for a definite term. The advertiser was not given possession of the wall, but was merely entitled to do a series of acts in affixing bill boards upon it.[269] Whether a contract be a lease or a license will be determined, not by what the parties to it may choose to call it nor from the language, but from the legal effect of its provisions. An instrument is not a demise or lease, although it contain the usual words of demise, if its

[265] Nowlin Lumber Co. v. Wilson, 119 Mich. 406, 78 N. W. 338; Duinneen v. Rich, 22 Wis. 550; Cayuga Railway Co. v. Niles, 13 Hun (N. Y.) 170.

[266] Duinneen v. Rich, 22 Wis. 550. But see Sampson v. Burnside, 13 N. H. 264, where this distinction was not recognized.

[267] Central Mills v. Hart, 124 Mass. 123; Kirchgassner v. Rodick, 170 Mass. 543, 49 N. E. 1015; Rogers v. Coy, 164 Mass. 391, 41 N. E. 652.

[268] Goldman v. New York Adv. Co., 29 Misc. 133, 60 N. Y. 275. *Compare* R. J. Gunning Co. v. Cusack, 50 Ill. App. 290.

contents show that such was not the intention of the parties. So the grant of a right to string wires through an area-way under a sidewalk took effect as a license and not as a lease, and rent could not be claimed for such use. There was no exclusive possession given, or intended to be given, to the lessee or licensee of the area space within which the wires were strung. Every test points to the conclusion that it was a mere license and not a lease.[270] The same principle was applied where one railway line occupied a large terminal station in conjunction with many other roads.[271] So where a spur track was used by a railroad and the adjoining land was occupied and used by the owner, the joint occupation and use by the railway company was held to be in the capacity of a licensee and not of a tenant.[272] Permission to maintain a portable office and derrick on premises in connection with wharfage privileges failed to constitute a lease for the same reason, and the occupant could not be removed by the summary proceeding provided by statute and applicable to tenants alone.[273]

"But a tenancy does not necessarily imply a right to complete and exclusive possession; it may on the other hand be created with implied or express reservation of a right to possession on the part of the landlord for all purposes not inconsistent with the privileges granted the tenant."[274] Where the owner of a pond leased, demised and let the sole right to cut ice therefrom, reserving to himself the right to cut ice needed for his own use, this was held to create a tenancy and not to be a mere license. It was the purpose of the indenture to transfer the sole and exclusive right to cut and use, or sell, all such ice, except what the lessor needed for his private use. The grantee had an interest greater than a mere revocable license and could bring an action against one who interfered with his rights; he had a valuable right and if a stranger unlawfully encroached upon it, he might maintain a proper action therefor.[275]

[270] Holladay v. Chicago Arc Light &c. Co., 55 Ill. App. 463. In the case of Edmunds v. Electric Light &c. Co., 76 Mo. App. 610, there was an agreement allowing defendant to erect poles and string wires over plaintiff's land for $5 per month, same to be removed on thirty days' notice. The holding of the court that this was a lease can only be supported on the theory that the defendant had possession by virtue of the wires strung along the land. One judge dissented and thought defendant a licensee.

[271] Union Depot Co. v. Chicago &c. R. Co., 113 Mo. 213, 226, 20 S. W. 792.

[272] Central Mills v. Hart, 124 Mass. 123.

[273] Daniels v. Cushman, 3 T. & C. (N. Y.) 125, affirming 1 Hun 73.

[274] Morrill v. Mackman, 24 Mich. 279, 284, per Cooley, J.

[275] Richards v. Gauffret, 145 Mass. 486, 14 N. E. 535.

§ 41. Grant of mining rights.—Where the acts of digging and so forth, are of such a character that they necessitate an actual occupation of the licenser's land, the license must be in writing to be valid, as the transaction is really a lease of the premises to that extent. Thus the right to mine certain land must be created by a lease. The case would be no different than if the piece of ground had been demised for cultivation or for any other purpose.[276] A lease may not only confer upon the lessee the right to occupy and cultivate and to remove the products of cultivation, but it may confer on him the power to occupy and remove a portion of that which constitutes the land itself. Familiar and common examples of such leases are those authorizing the lessee to quarry and remove stone, to open mines and remove minerals, or to sink wells for petroleum and natural gas. The power to execute leases for such purposes, and the fact that the instrument by which such interest in land is granted may be in all essential particulars a lease will not be questioned.[277] A grant of an exclusive right to drill for oil and gas for a definite time is more than a mere license; it is a lease of the land.[278] Where possession is transferred to the parties working the mines, the transaction is held to amount to a lease;[279] but a grant to miners to enter and work mines and remove minerals was held to be a license rather than a lease, because they were not in possession.[280] The right to dig and carry away ore from the mine of another, is an incorporeal hereditament or easement; and any contract for the sale of such right must be in writing. A verbal contract, conferring such right, will nevertheless operate as a verbal license and, while unrevoked, will protect the person to whom it is given from an action of trespass and vest in him the property in the ore that is actually dug under it.[281]

§ 42. Payment of consideration as a test.—A permissive occupation of land for an indefinite term and without a contract for recompense is in construction of law a tenancy at will rather than a license. A license is an authority to do a particular act or series of acts on the land of another without possessing an estate therein. Permission

[276] Ganter v. Atkinson, 35 Wis. 48; Hammond v. Winchester, 82 Ala. 470, 2 So. 892.

[277] Knight v. Indiana Coal Co., 47 Ind. 105, 17 Am. R. 692; Heywood v. Fulmer, 158 Ind. 658, 32 N. E. 574.

[278] Harris v. Ohio Oil Co., 57 Ohio St. 629, 50 N. E. 1129.

[279] Kirk v. Mattler, 140 Mo. 23, 41 S. W. 252.

[280] Hobart v. Murray, 54 Mo. App. 249; Lunsford v. La Motte Lead Co., 54 Mo. 426; Lockwood v. Lunsford, 56 Mo. 68; Boone v. Stover, 66 Mo. 430.

[281] Riddle v. Brown, 20 Ala. 412; Desloge v. Pearce, 38 Mo. 588.

to occupy and enjoy premises rent free for an indefinite period is properly a tenancy at will and not a license.[282] Where the use of demised premises is restricted so that the letting approaches a mere license, the payment of consideration and an arrangement for a fixed term tend to prove the transaction to be a lease.[283] The reservation of rent is not, however, essential to the creation of a tenancy and a holding for a definite term is also unnecessary, so that the cases which decide that the absence of these two circumstances render what would otherwise be a demise a mere license, seem to depart from the prevailing view in this respect.[284] Even in a jurisdiction where this doctrine is law, the right to erect and maintain a building on land of another would amount to such an interest in real estate that it could only be transferred by an instrument in writing.[285]

§ 43. **Restricted and intermittent use.**—Where a theater was let for four nights, the owner to light it and have control of a certain portion of the box receipts, there was not a tenancy but a mere license.[286] So an authority to an unincorporated charitable society to use the basement of a church for its meetings and for fairs and parties was held to be a mere license. The use the society was to make of the hall was not general and exclusive, but limited to its own special objects.[287] In holding that a contract for the use of a dance hall four afternoons did not create a tenancy, Morton, C. J., said: "The use of the hall by the plaintiff was not to be continuous, but only occasional, and for a few hours on four separate days. He was

[282] Morgan v. United States, 14 Ct. Cl. (U. S.) 319; Cheever v. Pearson, 16 Pick. (Mass.) 266, 271. *Contra*, Lake Erie &c. R. Co. v. Kennedy, 132 Ind. 274, 31 N. E. 943.

[283] Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 209, 50 Pac. 744.

[284] One of the leading cases reaching this conclusion is Branch v. Doane, 17 Conn. 402, where one building a mill on another's land by his consent and occupying it continuously for six years was held not to be a tenant of the landowner. Storrs, J., said on page 411: "If, therefore, the words, whatever they may be, which confer authority to another to take possession of land, are not accompanied with language or stipulations which evince such a contract between the parties, they would amount to a mere license." In accordance with this doctrine, it was held that no tenancy was created by a permit given by a quartermaster for the erection and maintenance of a house upon land belonging to a military post (Keeling v. Kuhn, 19 Kan. 441); and the same was held in regard to a town grant of an exclusive privilege to build a market house (Brookhaven v. Baggett, 61 Miss. 383).

[285] Collins Co. v. Marcy, 25 Conn. 239.

[286] Oxford v. Leathe, 165 Mass. 254, 43 N. E. 92.

[287] Hamblett v. Bennett, 6 Allen (Mass.) 140, 145.

not to have the exclusive occupation and control of it; the key was never delivered to him, but remained with the defendant, who, on the afternoons it was occupied under the contract, opened, lighted, and closed it. We think the defendant would remain all the time in the legal possession of the land; that the plaintiff was to occupy it merely as licensee, and would acquire under the contract no interest in the land."[288]

§ 44. A theater ticket is only a license to enter the part of the theater specified in it; and if before the holder has entered, the licenser, with no more force than is necessary for the purpose, prevents him from entering, he cannot maintain an action of tort for the exclusion. The ticket is a license legally revocable, and after it has been revoked, an attempt to enter is unwarranted, and necessary force to prevent an entry may rightfully be used.[289] It does not alter the law that the ticket-holder has entered the theater and is subsequently ordered out. Upon the licensee's refusal to leave the hall to which his ticket gave him admittance, the proprietor has a lawful right to remove him. For such removal an action of trespass cannot be maintained. The licensee might have a remedy in another form of action for breach of the contract; but that cannot affect the decision in an action of trespass.[290]

That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed is a well-established proposition. In all the authorities and text books on the subject a *deed* is always stated or assumed to be indispensably necessary.[291] In the leading English case of *Wood* v. *Leadbitter,*[292] the question before the court was whether a ticket admitting to a grandstand at a race course could be revoked. The right conferred by the ticket was for the holder to go and remain, where, if he went and remained, he would, but for the ticket, be a trespasser. This was a right affecting land as obviously and extensively as a right of way over the land, so that on general principles it would be perfectly clear that no such right could be created otherwise than by deed. However, it was argued that the ticket was a license, and that such license was, under the cir-

[288] Johnson v. Wilkinson, 139 Mass. 3, 4, 29 N. E. 62.

[289] McCrea v. Marsh, 12 Gray (Mass.) 211.

[290] Burton v. Scherpf, 1 Allen (Mass.) 133.

[291] Hewlins v. Shippam, 5 B. & C. 221; Bryan v. Whistler, 8 B. & C. 288; Cocker v. Cowper, 1 C. M. & R. 418; Wallis v. Harrison, 4 M. & W. 538.

[292] Wood v. Leadbitter, 13 M. & W. 838.

cumstances, irrevocable, and authorities were cited by counsel to support this argument. Baron Alderson reviewed all the authorities and found the only one to support this contention to be the case of *Taylor* v. *Waters*.[293] Opposed to it there are many cases which all state in the most distinct manner that every license is and must be in its nature revocable, so long as it is a mere license.[294] Where, indeed, it is connected with a grant, there it may, by ceasing to be a naked license, become irrevocable; but then it is obvious that the grant must exist independently of the license. Such was the case where hay on the vendor's close was sold and the conditions of the sale were that the purchaser of the hay might leave it on the close till Lady-day, and might, in the meantime, come on the close, from time to time, as often as he should see fit to remove it. This was a case not of a mere license, but of a license coupled with an interest. The case was analogous to that of a man taking goods and putting them on his land, in which case the owner is justified in going on the land and removing them.[295]

§ 45. **In cases where dams are built and lands flowed,** if more than a temporary use is intended, it is not technically a license, but takes effect as a lease or easement.[296] Although there are early decisions to the effect that a parol license to build a dam on another's land is not within the statute of frauds because it is a mere grant of a privilege to be exercised upon land, and not of an interest in the land itself,[297] the true rule seems to be that the right to erect and maintain a dam on the land of another must be regarded as such an interest in real estate as cannot pass by parol.[298] But where the right to flow adjoining land for mill purposes was conferred by statute on payment of damages, a parol agreement to waive a claim for such damages was held to be valid and irrevocable.[299] However, it has been held that when an authority of this kind has been acted upon and

[293] 7 Taunt. 378.

[294] Rex v. Horndon-on-the-Hill, 4 M. & S. 562.

[295] Wood v. Manley, 11 A. & E. 34, 3 Per. & D. 5; Vin. Abr. Trespass (H.), a 2, pl. 12; Patrick v. Colerick, 3 M. & W. 483.

[296] Smith v. Simons, 1 Root (Conn.) 318; Woodward v. Seely, 11 Ill. 157; Mumford v. Whitney, 15 Wend. (N. Y.) 380; Brown v. Woodworth, 5 Barb. (N. Y.) 550; Trammell v. Trammell, 11 Rich. (S. Car.) 471.

[297] Woodbury v. Parshley, 7 N. H. 237; Clement v. Durgin, 5 Me. 9; Sampson v. Burnside, 13 N. H. 264; Hall v. Chaffee, 13 Vt. 150.

[298] Moulton v. Faught, 41 Me. 298; Pitman v. Poor, 38 Me. 237; Thompson v. Gregory, 4 Johns. (N. Y.) 81; Cocker v. Cowper, 1 C. M. & R. 418; Carter v. Harlan, 6 Md. 20.

[299] Clement v. Durgin, 5 Me. 9.

money expended in the erection of the dam, the contract may be enforced in equity on the ground that it is taken out of the statute of frauds by part performance.[300] In another case it was said that the license could not be revoked without tendering his expenses to the licensee.[301]

8. *Cropping Contracts.*

§ 46. The term "cropping contract" is used here to indicate any agreement between a landowner and a laborer in regard to the cultivation of land which does not rise to the dignity of a lease. "There is an obvious distinction between a cropper and a tenant. One has a possession of the premises, exclusive of the landlord; the other has not. The one has a right for a fixed time, the other has only a right to go on the land to plant, work, and gather the crop. The possession of the land is with the owner as against the cropper. This is not so of the tenant."[302]

A cropper has no estate in the land; that remains with the landlord. Consequently, although he has in some sense the possession of the crops, it is only the possession of a servant and is in law that of the landlord. The landlord must divide off to the cropper his share. In short, he is a laborer receiving pay in a share of the crop.[303]

"In construing contracts for the cultivation of land at halves it is impossible to lay down a general rule applicable to all cases, because the precise nature of the interest or title between the contracting parties must depend upon the contract itself, and very slight provisions in the contract may very materially affect the legal relations of the parties. . . . In some cases, the owner of the land gives up the entire possession, in which event it is a contract in the nature of a lease with rent payable in kind; in other cases, he continues to occupy the premises in common with the other party, or reserves to himself that right, and so a tenancy in common to that extent is created, and each is entitled to the joint possession of the crops, or the possession of the one is the possession of the other until division; or he may retain the sole possession of the land, and the other party may have merely the right to perform the labor and receive half the

[300] Meetze v. Charlotte &c. R. Co., 23 S. Car. 1.

[301] Woodbury v. Parshley, 7 N. H. 237.

[302] Appling v. Odom, 46 Ga. 583, 584, per McCay, J., quoted in Hackney v. State, 101 Ga. 512, 28 S. E. 1007.

[303] McNeeley v. Hart, 10 Ired. L. (N. Car.) 63; Brozier v. Ansley, 11 Ired. L. (N. Car.) 12; State v. Burwell, 63 N. Car. 661; State v. Austin, 123 N. Car. 749, 31 S. E. 731.

crops as compensation, or the two parties may become tenants in common of the growing crops, while no tenancy in common, as such, exists in the land."[304]

In speaking of the rights of a cropper under a cropping contract, which was held to make him a tenant in common, Judge Bennet, speaking for the Vermont court, said: "It doubtless gave him an interest in the land. He was not to occupy as the mere servant of the owner, neither did he occupy upon hire and to receive a given portion of the crops as a compensation. He had something more than a mere license to enter and cultivate the soil. He had a right to occupy; and the owner could not exclude him while in the performance of his duties; but it may be difficult to define the precise nature and character of his interest."[305]

§ 47. Whether an agreement for the occupation of farming lands is a lease or a cropping contract depends on the intention of the parties as gathered from the attendant circumstances,[306] or from the words of the agreement when it has been reduced to writing. In the latter case it is a question of interpretation for the court;[307] in the former it is a question of fact for the jury to decide from the evidence.[308] When the jury have found a tenancy on such facts it is conclusive,[309] and not subject to reconsideration by the court except on the ground of misconduct or that the verdict is against the evidence.

The use of the word "lease" in a contract is evidence that the parties meant what the word implies, but the guide to construction being the intention of the parties, the whole contract must be examined.[310] It is not conclusive what a contract may be named or called by the parties. The real intention as expressed in the writing must con-

[304] Warner v. Abbey, 112 Mass. 355, per Endicott, J. See also, Orcutt v. Moore, 134 Mass. 48; Moser v. Lower, 48 Mo. App. 85.

[305] Aiken v. Smith, 21 Vt. 172, 179.

[306] Walls v. Preston, 25 Cal. 59; Alwood v. Ruckman, 21 Ill. 200, 201; Hansen v. Dennison, 7 Ill. App. 73; Moser v. Lower, 48 Mo. App. 85; Kamerick v. Castleman, 23 Mo. App. 481; Somers v. Joyce, 40 Conn. 592; Johnson v. Hoffman, 53 Mo. 504. In Birmingham v. Rogers, 46 Ark. 254, it was held that the parties would be regarded as landlord and tenant unless the intention to make them tenants in common were unmistakable.

[307] Bailey v. Ferguson, 39 Ill. App. 91; Johnson v. Hoffman, 53 Mo. 504.

[308] Williams v. Cleaver, 4 Houst. (Del.) 453.

[309] Foley v. Southwestern Land Co., 94 Wis. 329, 68 N. W. 994.

[310] Ferris v. Hoglan, 121 Ala. 240, 25 So. 834; Griswold v. Cook, 46 Conn. 198; Moser v. Lower, 48 Mo. App. 85.

trol. And contracts of this character must be so construed as to give force and effect to the intention of the parties.[211] Yet the words "demise and to farm let" may be used in an instrument as evidence of the intention of the parties to enter into the relation of landlord and tenant rather than to make an agreement for the cultivation of land for a share of the crop.[212] Thus there was a tenancy with a crop rent reserved when the agreement expressly provided that the owner "rented and hired, and suffered the lessee to possess and enjoy the farm and gave him the quiet and uninterrupted possession."[213] That nothing is said about leasing or letting the premises is evidence that no tenancy was created. If nothing is said about paying anything as rent, or as a yearly rent for the possession and enjoyment of premises for that length of time, if the language is merely that of an agreement to till a crop on shares and divide it, this would constitute the parties tenants in common of the crop while growing and when matured.[214]

§ 48. There has been a tendency in certain cases to impute a fixed intention to the landowner not to create a tenancy by a contract for cultivation on the shares. This applied particularly to agreements covering a single year only. The foundation of it is the supposed benefits to the landlord from such an interpretation, which makes him a tenant in common in the crop.[215] The matter was disposed of in a Connecticut case in the following language: "Letting land on shares is a phrase well understood among farmers. It means that both parties shall share equally in the products of the soil to

[211] McNeal v. Rider, 79 Minn. 153, 81 N. W. 830.

[212] Somers v. Joyce, 40 Conn. 592; Steel v. Frick, 56 Pa. St. 172.

[213] Stewart v. Doughty, 9 Johns. (N. Y.) 108.

[214] Currey v. Davis, 1 Houst. (Del.) 598.

[215] Hare v. Celey, Cro. Eliz. 143; Smyth v. Tankersley, 20 Ala. 212; Ponder v. Rhea, 32 Ark. 435; Thompson v. Mawhinney, 17 Ala. 362; De Mott v. Hagerman, 8 Cow. (N. Y.) 220; Curtner v. Lyndon, 128 Cal. 35, 60 Pac. 462; Guest v. Opdyke, 31 N. J. Law 552, 554; Gray v. Reynolds, 67 N. J. Law 169, 50 Atl. 670; Bradish v. Schenck, 8 Johns. (N. Y.) 151; Adams v. McKesson, 53 Pa. St. 81; Bishop v. Doty, 1 Vt. 37; Frost v. Kellogg, 23 Vt. 308; Leland v. Sprague, 28 Vt. 746. Freeman on Co-Tenancy and Partition, 2d ed., § 100, where it is assumed that the object is to vest in each party a portion of the crop. The learned author proceeds: "Such being the object, it ought to require very clear language to vest in one the ownership of the whole crop, leaving the other with a mere chose in action and in many circumstances without any substantial remedy for an invasion of his equitable right."

compensate the one for his labor, and the other for the use of his land. In such cases, after the crops are harvested and before a division is made, each party is the owner of an undivided moiety of the same, and is a tenant in common with the other unless the contract contains some special provision taking the case out of the general rule."[216] Although it was laid down in an early English case[217] that an agreement for cultivating a single crop on the shares did not create a tenancy, the length of the term does not seem to be the determining factor. In many of the cases where this doctrine has been invoked and applied the actual intention of the parties, as gathered from the surrounding circumstances, was not to enter into the relation of landlord and tenant.[218] There is no valid objection to a tenancy for one year with rent payable in crops produced, nor is the fact that the agreement is for a single year conclusive as to the intention of the parties.

In one case there was held to be no tenancy, although the letting for crop rent was to continue for five years, and the reason for the decision was based upon the intention of the parties. "It is quite apparent," says the court, "that it was not the intention of the parties that this contract should constitute a lease of the land. It is not styled a lease, nor executed as such; but is simply called an agreement. There are no technical words in it appropriate to a lease, unless it be the words *"agree to let."* There are no words reserving any portion of the produce as rent,—but simply that he (the cropper) is

[216] Connell v. Richmond, 55 Conn. 401, 402, 11 Atl. 852, per Parker, J.

[217] The case of Hare v. Celey, Cro. Eliz. 143, was trespass by Hare and others for spoiling the crop in their close. Hare was seized in fee and let to the others to sow at halves on these terms, that he should find one-half the seed, and the others the other half, and should manure the land; and that Hare should have one moiety of the grain and the others the other half. "The court held it no lease of the land, but otherwise if it be for two or three crops; and therefore, as to the breaking of the close, Hare only was to bring the action; and as to the spoiling of the corn, they ought to join being tenants in common." In Woodruff v. Adams, 5 Blackf. (Ind.) 317, 318, 35 Am. Dec. 122, Dewey, J., criticized this case as follows: "'. . . the court said that had the letting been for two or three crops, the rule as to the right of the owner to sustain an action for breach of the close would have been different.' We do not perceive the reason for this distinction. The possession of the tenant for the purpose of raising one crop is as complete for the time being as if his right extended to the production of two or three crops."

[218] Walker v. Fitts, 24 Pick. (Mass.) 191; Guest v. Opdyke, 31 N. J. Law 552; Foote v. Colvin, 3 Johns. (N. Y.) 216; Caswell v. Districh, 15 Wend. (N. Y.) 379; Putnam v. Wise, 1 Hill (N. Y.) 234.

to take the farm after the usual custom and the produce to be equally divided between the parties. The construction is to be of the whole instrument, and although the contract might contain apt words to make a lease, yet they might be overcome by a contrary intent appearing on its face."[819]

§ 49. If one be hired to work land, receiving for his compensation part of the produce, he is a cropper and not a tenant. He has no interest in the land, but receives his share as the price of his labor. The possession is still in the owner of the land, who alone can maintain trespass; nor can he distrain, for he does not maintain the relation of landlord and tenant.[820] Under such circumstances it is the duty and privilege of the landowner to divide off to the cropper his share of the crop, and until he does so title to the whole remains in him.[821] It is often difficult to determine whether the relation of the parties is that of landlord and tenant or that of owner-employer and cropper-employe. It cannot be both, and where the occupier is to have exclusive possession and is to deliver certain portions of the crop as *rent*, the parties stand in the relation of landlord and tenant.[822] On the other hand, one working for a share of the crop under the direction of the owner has been held to be a laborer within the meaning of a master and servant law.[823] For it is possible for a landowner to hire a laborer to cultivate his land and agree to pay him a portion of the crop as wages.[824] So an agreement by which one party is to furnish the land and stock and feed, the other party is to do the work, and the crop grown is to be divided equally between them, constitutes a contract of hiring, and does not create the relation of landlord

[819] Aiken v. Smith, 21 Vt. 172, 180, per Bennett, J.

[820] Fry v. Jones, 2 Rawle (Pa.) 11, 12, in the words of Rogers, J.; Adams v. McKesson, 53 Pa. St. 81; Williams v. Cleaver, 4 Houst. (Del.) 453; Harrison v. Ricks, 71 N. Car. 7, 10.

[821] McNeeley v. Hart, 10 Ired. L. (N. Car.) 63; Brazier v. Ansley, 11 Ired. L. (N. Car.) 12; Harrison v. Ricks, 71 N. Car. 7, 10.

[822] Neal v. Brandon, 70 Ark. 79, 66 S. W. 200.

[823] Huff v. Watkins, 15 S. Car. 82, 85; Richey v. Du Pre, 20 S. Car. 6, 10.

[824] Ferris v. Hoglan, 121 Ala. 240, 25 So. 834; Hammock v. Creekmore, 48 Ark. 264, 3 S. W. 180; Tinsley v. Craige, 54 Ark. 346, 15 S. W. 897, 16 S. W. 570; Woodward v. Conder, 33 Mo. App. 147. In Shaw v. Mayer, 95 Cal. 301, a landowner agreed to furnish 140 acres "more or less" and a cropper agreed to plant it with wheat and pay one-fifth of the crop as rental. The cropper only planted nineteen acres and a volunteer crop sprang up on the balance. Held, the cropper was neither a tenant nor tenant in common and could only claim the amount he had planted.

and tenant.[325] Such an agreement may take effect as a contract of employment, although the laborer occupies a house on the premises, and in that case he would hold possession as the servant of the owner without any of the rights of a tenant.[326] In one case a lessee of land contracted with the owner to have the latter cultivate the land and receive as wages a portion of the crop. Where such an agreement had been actually carried into effect, the lessee became the owner of his share of the crop, and creditors of the landlord could not levy on it for his debts.[327]

§ 50. The character of the cropper's occupation is an important factor in determining the nature of the contract. Provisions in a contract in regard to the kind of crop to be raised on certain fields, the mode of cultivation, the making and repayment of advancements tend to show a joint enterprise, and not a tenancy.[328] When the agreement spoke of "services" and the landowner agreed to supply house, teams, and give one-half the crops in pay for such services, there was no tenancy.[329] However, the joint ownership by the landlord of stock and provisions on a farm does not seem to limit the character of the tenant's occupation where the contract is to extend over a series of years. In such cases a tenancy is created.[330] And it has been held that the occupant would be a tenant even though the landowner supplies a horse for use in cultivation,[331] or utensils, horses and feed for both horses and the tenant.[332]

There are obvious reasons for holding that farm contracts for cultivation on the shares shall not be construed as creating a partnership between the parties. Such agreements are usually very informal in their character, often resting in parol. In the absence of evidence

[325] Hunt v. Matthews, 132 Ala. 286, 31 So. 613.

[326] Chase v. McDonnell, 24 Ill. 236; Parrish v. Commonwealth, 81 Va. 1.

[327] Ralph v. Lockwood, 61 Cal. 155.

[328] Almand v. Scott, 80 Ga. 95, 4 S. E. 892; Bryant v. Pugh, 86 Ga. 525, 12 S. E. 927; Hancock v. Boggus, 111 Ga. 884, 36 S. E. 970; Bailey v. Ferguson, 39 Ill. App. 91; Unglish v. Marvin, 128 N. Y. 380, 28 N. E. 634, affirming 55 Hun 45, 28 State Rep. 68, 8 N. Y. 283; Caswell v. Ditrich, 15 Wend. (N. Y.) 379; Putnam v. Wise, 1 Hill (N. Y.) 234; Moore v. Spruill, 13 Ired. L. (N. Car.) 55; State v. Burwell, 63 N. Car. 661; Curtis v. Cash, 84 N. Car. 41.

[329] Hudgins v. Wood, 72 N. Car. 256.

[330] Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087; Wentworth v. Portsmouth &c. R., 55 N. H. 540. *Compare* Smith v. Meech, 26 Vt. 233. But see Baughman v. Reed, 75 Cal. 319, 17 Pac. 222.

[331] Hatchell v. Kimbrough, 4 Jones L. (N. Car.) 163.

[332] Harrison v. Ricks, 71 N. Car. 7; Schlicht v. Callicott, 76 Miss. 487, 24 So. 869.

clearly manifesting a contrary purpose, it will not be presumed that the parties to such an agreement intend to assume the important and intricate responsibilities of partners, or to incur the dangers frequently incident to that relation. The parties to such agreements rarely contemplate anything more than a tenancy of the land.[333] While the custom of renting farms upon shares is general, the courts have seldom held that such agreements create partnerships between the owner of the land and the tenant. A large majority of the cases construe them as creating tenancies only.[334] Even where the landowner was to pay one-half the charges for running the farm, exclusive of labor, no partnership was created; it was merely a letting on shares.[335]

§ 51. **Where the person producing the crop is in exclusive possession and control of the land,** this usually constitutes him a tenant,[336] even though such occupation does not begin till after the owner has manured and ploughed the ground.[337] If the premises are absolutely surrendered under the contract, and no control retained over them or over the services of the person cultivating the crop, the contract is for rent and not for service.[338]

In case the parties to a contract for cultivation on the shares are in joint occupation of the land covered by the contract, they become tenants in common of the crops produced, and do not stand in the relation of landlord and tenant to each other.[339] This disposes of those cases where a cropper cultivates a single field belonging to a farm which is in the possession of the owner.[340] A naked right to enter upon the field to raise a single crop on shares, the owner remaining in general possession of the farm, does not amount to a lease

[333] Shrum v. Simpson, 155 Ind. 160, 57 N. E. 708.

[334] Chase v. Barrett, 4 Paige (N. Y.) 148; Quackenbush v. Sawyer, 54 Cal. 439; Chapman v. Eames, 67 Me. 452; Warner v. Abbey, 112 Mass. 355; Dixon v. Niccolls, 39 Ill. 372; Alwood v. Ruckman, 21 Ill. 200; Putnam v. Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309.

[335] Williams v. Rogers, 110 Mich. 418, 68 N. W. 240. *Compare* Spencer v. World's Columbian Exposition, 58 Ill. App. 637.

[336] Wadley v. Williams, 75 Ga. 272; Frame v. Badger, 79 Ill. 441; Cornell v. Dean, 105 Mass. 435.

[337] Darling v. Kelly, 113 Mass. 29.

[338] Mondschein v. State, 55 Ark. 389, 392, 18 S. W. 383.

[339] Herskell v. Bushnell, 37 Conn. 36; Creel v. Kirkham, 47 Ill. 344; Delaney v. Root, 99 Mass. 546; Walker v. Fitts, 24 Pick. (Mass.) 191; Guest v. Opdyke, 31 N. J. Law 552; Edgar v. Jewell, 34 N. J. Law 259; Denton v. Strickland, 3 Jones L. (N. Car.) 61.

[340] Foote v. Colvin, 3 Johns. (N. Y.) 216; Moser v. Lower, 48 Mo. App. 85.

of the land.[841] So where the landowner and the cropper were each to furnish one-half the labor, the latter obtained no estate in the land, because he did have exclusive possession.[842]

§ 52. The relation of landlord and tenant may exist although rent is to be paid in a part of the crop.[843] Except for the purpose of determining what sort of a contract the parties intended to enter into, it is immaterial whether rent is to be paid in cash or in kind. Where technical words suitable to the creation of the relation of landlord and tenant are used, that relationship arises in spite of the reservation of rent in part of the crops.[844] If the parties intended to make a lease and the instrument executed by them was a lease, its effect as such was not destroyed by their having contracted for the payment to the lessor of a portion of the specific crops to be produced as rent for the premises.[845] For "rent is a certain profit either in money, provisions, chattels or labor issuing out of lands and tenements in retribution or return for their use."[846] And it is valid to create a tenancy by providing for payment of rent, partly in kind and partly in cash.[847]

§ 53. Tenancy carries with it the idea of legal ownership by the tenant of the products of the soil.[848] When it is established that a

[841] Warner v. Hoisington, 42 Vt. 94.

[842] McLaughlin v. Kennedy, 49 N. J. Law 519, 10 Atl. 391.

[843] **California:** Walls v. Preston, 25 Cal. 59; Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087; Clarke v. Cobb, 121 Cal. 595, 54 Pac. 74. **Illinois:** Alwood v. Ruckman, 21 Ill. 200; Dixon v. Niccolls, 39 Ill. 372; Hansen v. Dennison, 7 Ill. App. 73. **Iowa:** Blake v. Coats, 3 G. Greene 548. **Kentucky:** Redman v. Bedford, 3 Ky. L. R. 511. **Maine:** Dockham v. Parker, 9 Me. 137. **Maryland:** Hoskins v. Rhodes, 1 Gill & J. 266. **Mississippi:** Doty v. Heth, 52 Mis. 530. **Missouri:** Kamerick v. Castleman, 23 Mo. App. 481. **New Hampshire:** Moulton v. Robinson, 27 N. H. 550, followed in Hatch v. Hart, 40 N. H. 93. **New Jersey:** Mundy v. Warner, 61 N. J. Law 395, 39 Atl. 697. **Texas:** Texas &c. R. Co. v. Bayliss, 62 Tex. 570; Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S. W. 881. **Wisconsin:** Strain v. Gardner, 61 Wis. 174, 21 N. W. 35; Foley v. Southwestern Land Co., 94 Wis. 329, 68 N. W. 994. **Vermont:** McLellan v. Whitney, 65 Vt. 510, 27 Atl. 117; Reynolds v. Chynoweth, 68 Vt. 104, 34 Atl. 36.

[844] Foley v. Southwestern Land Co., 94 Wis. 329, 68 N. W. 994; Rowlands v. Voechting, 115 Wis. 352, 91 N. W. 990.

[845] Walls v. Preston, 25 Cal. 59; Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087.

[846] Merrit v. Fisher, 19 Iowa 354, 356, per Dillon, J., citing Co. Litt. 144, 3 Kent. Com. 460.

[847] Symonds v. Hall, 37 Me. 354.

[848] Smyth v. Tankersley, 20 Ala. 212; Doty v. Heth, 52 Miss. 530;

certain contract is a lease, and that the relation of landlord and tenant exists between the parties, there must be some appropriate words in the contract to indicate that the crops are to be held in co-tenancy, or such will not be the conclusion reached. If there is nothing in the language to indicate that intention, then the products to be delivered to the landlord after harvest, by the tenant, will be deemed the property of the tenant until that time, and treated as rent to be then paid.[349] "A tenant has an estate in the land for the term, and consequently he has a right of property in the crops. If he pays a share of the crop for rent, it is he that divides off to the landlord his share, and until such division the right of property and of possession of the whole is his."[350] In a Wisconsin case the court say: "It is doubtless true . . . that the fact that the relationship of landlord and tenant exists is not conclusive on the question of the ownership of, or rights in, the products of the farm. . . . It must be admitted, however, that the general rule supported by the great weight of authority is that where the relation of landlord and tenant exists, even though the rent is to be paid in kind, the title to the crops is in the tenant until division is made, unless specific provision has been made by the parties, in their contract, to the contrary."[351] However, there is no necessary inconsistency between the relation of co-tenancy as to the crops and tenancy as to the land. There is certainly no rule of law so absolute in its nature as to prevent the occupant of land, under

Taylor v. Coney, 101 Ga. 655, 28 S. E. 974; Shaffer v. Stevens, 143 Ind. 295, 42 N. E. 620; Currey v. Davis, 1 Houst. (Del.) 598; Symonds v. Hall, 37 Me. 354; Bailey v. Fillebrown, 9 Me. 12; Turner v. Bachelder, 17 Me. 257; Garland v. Hilborn, 23 Me. 442; Butterfield v. Baker, 5 Pick. (Mass.) 522.

[349] California: Clarke v. Cobb, 121 Cal. 595, 54 Pac. 74. Illinois: Alwood v. Ruckman, 21 Ill. 200; Dixon v. Niccolls, 39 Ill. 372; Sargent v. Courrier, 66 Ill. 245; Hansen v. Dennison, 7 Ill. App. 73. Indiana: Woodruff v. Adams, 5 Blackf. (Ind.) 317, 35 Am. Dec. 122; Frout v. Hardin, 56 Ind. 165. Iowa: Townsend v. Isenberger, 45 Iowa 670. Maine: Dockham v. Parker, 9 Me. 137; Richards v. Wardwell, 82 Me. 343, 19 Atl. 863. Massachusetts: Warner v. Abbey, 112 Mass. 355; Darling v. Kelly, 113 Mass. 29. New York: Stewart v. Doughty, 9 Johns. (N. Y.) 108. North Carolina: Deaver v. Rice, 4 Dev. & B. L. (N. Car.) 431, 34 Am. Dec. 388; Hatchell v. Kimbrough, 4 Jones L. (N. Car.) 163; Harrison v. Ricks, 71 N. Car. 7. Pennsylvania: Rinehart v. Olwine, 5 Watts & S. (Pa.) 157; Ream v. Harnish, 45 Pa. St. 376. South Carolina: De Vore v. Kemp, 3 Hill 259. Vermont: Hurd v. Darling, 16 Vt. 377, s. c. 14 Vt. 214; McLellan v. Whitney, 65 Vt. 510, 27 Atl. 117.

[350] Harrison v. Ricks, 71 N. Car. 7, 10, per Rodman, J.

[351] Rowlands v. Voechting, 115 Wis. 352, 91 N. W. 990, per Winslow, J.

a contract which constitutes him a tenant in common with the owner of the crops, from having as entire control over the premises during the term, if the parties so agree, as a tenant covenanting to pay a money rent would have,—it in other words, from being a tenant of the land under a lease, and at the same time a tenant in common of the crop or of some part of it.[352] The general principle has been recognized in many cases that it is competent for either party to provide for the vesting of title in the crops in himself till division is made.[353] An express stipulation that title to the crop rent shall remain in the landlord is valid.[354] So under a lease of a farm and stock of cattle, with stipulation that the rent should consist of a specified part of the products, *except the hay,* which should go wholly to the use of the lessor, the hay belongs exclusively to him, though never delivered.[355] And hay raised by a lessee subject to the condition that it shall be used on the farm, cannot be attached or taken on execution by creditors of the lessee.[356] It cannot be supposed that it was intended to be subjected to his debts and carried away from the farm. The provision requiring the hay to be spent upon the farm is conformable to the rules of good husbandry.[357] If there is a provision for a division of the specific crops with a reservation by the landlord of an undivided share, the parties become tenants in common.[358] Where a specific kind of produce is to be set off entire to the landlord, it seems that the cropper has no title to it.[359] In an English case it was held that notwithstanding a covenant to expend the hay upon the land, the tenant had a right to sell it unconditionally, and would merely be liable to his landlord for breach of covenant. The idea of the exclusive right of the tenant to the crops, in spite of stipulations in the lease, still holds its ground in that country. Yet by statute there a sheriff is forbidden to carry off the premises any produce, which, by the covenants of the lease, is to be consumed upon the premises.[360]

[352] Walls v. Preston, 25 Cal. 59, 66; Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087; Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027.

[353] Ponder v. Rhea, 32 Ark. 435; Howell v. Foster, 65 Cal. 169, 3 Pac. 647; Griswold v. Cook, 46 Conn. 198; Angell v. Egger, 6 N. Dak. 391, 71 N. W. 547; Lanyon v. Woodward, 55 Wis. 652, 13 N. W. 863. This proposition is stated as exiomatic by Freeman Cob. & Par. 2d ed., § 100.

[354] Potter v. Cunningham, 34 Me. 192; Coe v. Wilson, 46 Me. 314; Leland v. Sprague, 28 Vt. 746; Smith v. Atkins, 18 Vt. 461; Willmarth v. Pratt, 56 Vt. 474.

[355] Potter v. Cunningham, 34 Me. 192.

[356] Coe v. Wilson, 46 Me. 314.

[357] Lewis v. Lyman, 22 Pick. (Mass.) 437.

[358] Tignor v. Toney, 13 Tex. Civ. App. 518, 35 S. W. 881.

[359] Kelley v. Weston, 20 Me. 232.

[360] Ridgway v. Stafford, 4 Eng. L. & Eq. 453, 20 L. J. N. S. Ex. 226.

§ 54. Co-tenancy in both land and crops.—Thus far our consideration has been directed to the inquiry whether an agreement for the cultivation of land in return for a portion of the crop created the relation of landlord and tenant between the parties or took effect as a contract of employment. An intermediate view between these two extremes is that such a general agreement for cultivation on shares creates a co-tenancy in the land, and consequently the parties become tenants in common of the crops produced.[361] "Letting on shares," it was explained in one case, "is a phrase well understood among farmers. It means that both parties shall share equally in the products of the land, to compensate the one for his labor and the other for the use of his land. In such cases, after the crops are harvested and before a division is made, each party is the owner of an undivided moiety of the same, and is a tenant in common with the other, unless the contract contains some special provision taking the case out of the general rule."[362] Mr. Freeman, in his treatise on "Co-Tenancy and Partition," favors this view, and thinks that in those "decisions holding that crops raised on the shares belong, until division, solely to one of the contracting parties, too much importance was given to words to which the parties attach no special importance. . . . The prime object of contract is to vest each party with a share of the crops to be raised . . . such being the object it ought to require very clear language to vest in one the ownership of the whole crop, leaving the other with a mere chose in action."[363] After a division of the crop has been made by the tenants in common, the landlord has an absolute title to the share set off to him. Such a division does not necessarily

[361] **California:** Bernal v. Hovious, 17 Cal. 541; Knox v. Marshall, 19 Cal. 617; Baughman v. Reed, 75 Cal. 319, 17 Pac. 222. **Connecticut:** Connell v. Richmond, 55 Conn. 401, 11 Atl. 852. **Minnesota:** McNeal v. Rider, 79 Minn. 153, 81 N. W. 830. **Missouri:** Johnson v. Hoffman, 53 Mo. 504; Kamerick v. Castleman, 23 Mo. App. 481. **New Hampshire:** Moulton v. Robinson, 27 N. H. 550, followed in Hatch v. Hart, 40 N. H. 93; Daniels v. Brown, 34 N. H. 454. **New York:** Putnam v. Wise, 1 Hill (N. Y.) 234; Taylor v. Bradley, 39 N. Y. 129. **Oregon:** Cooper v. McGrew, 8 Ore. 327; Messinger v. Union Warehouse Co., 39 Ore. 546, 65 Pac. 808. **Virginia:** Lowe v. Miller, 3 Gratt. (Va.) 205. In Iowa it was held by three judges, two dissenting and one concurring in the result on another ground, that a landlord had title to a crop rent reserved, and could make a valid mortgage of it. Riddle v. Dow, 98 Iowa 7, 66 N. W. 1066. The tenant has title to the other half, however. Stickney v. Stickney, 77 Iowa 699, 42 N. W. 518.

[362] Connell v. Richmond, 55 Conn. 401, 402, 11 Atl. 852, per Park, C. J.; Richmond v. Connell, 55 Conn. 403, 11 Atl. 853.

[363] Freeman on Co-Tenancy and Partition (2d ed.), § 100.

mean a delivery of one share to the landlord. After the landowner, at a request of the tenant, had selected his share, which was separate from the rest, there could be no further question that a division of the property had been effected.[364]

§ 55. **The doctrine that an agreement for a crop rent takes effect as a reservation** has been advanced and seems to be the settled law in New Hampshire. In accordance with this view, whenever upon a lease of land, either for one crop or one year, or for several years, the owner of the land is to receive a part of the productions of the land in lieu of rent, the contract operates and takes effect by way of reservation. The share reserved is always the property of the owner of the land, without severance or delivery, though both of these may be stipulated for. To accomplish this result it is wholly unnecessary to resort to the idea that such a contract of hire is not a lease, or to restrict it to contracts for a single year. The true construction of the agreement would be that the lessor excepts or reserves his share, out of the general grant of the profits, implied upon the letting to hire; and instead of a general grant of the property, he substitutes a grant of a special and qualified interest, a right to use the same in one particular way for the common benefit of both parties. So an agreement that hay shall be fed upon a farm takes effect as a reservation. According to the true construction of such a contract, the property in the hay never passes to the tenants; but, on the contrary, the hay was reserved to be spent on the farm.[365] An objection to such a doctrine has been made on the ground that it would be repugnant to the grant to have the contract for rent take effect as a reservation.[366]

[364] Rohrer v. Babcock, 126 Cal. 222, 58 Pac. 537; Crocker v. Cunningham, 122 Cal. 547, 55 Pac. 404.

[365] Brown v. Lincoln, 47 N. H. 468; Ladd v. Robinson, 27 N. H. 550; Hatch v. Hart, 40 N. H. 93; Carr v. Dodge, 40 N. H. 403.

[366] Ross v. Swaringen, 9 Ired. L. (N. Car.) 481. The court say: "For, in speaking of rents, Lord Coke says: 'The lessor cannot reserve parcel of the annual profits as the vesture or herbage of the land or the like, for that would be repugnant to the grant. Co. Litt. 142.' It would be an exception of a part of the thing already granted and inconsistent with the grant. Therefore such contracts as the present are necessarily construed neither as exceptions or reservations but as covenants or agreements of the lessee to give, *as rent*, as many bushels of corn as the half of the crop may amount to or deliver, *as rent*, the one-half of the corn that may be made upon the land. It is simply a payment of rent, agreed to be made in corn instead of money; but it does not change the property in the crop while growing or when gathered until it is delivered to the lessor."

But Judge Bell, of the New Hampshire court, overrules this objection by saying: "There can be no good reason why a grantor should not be at liberty to except out of his grant any part of it which he chooses not to include in his conveyance, or to reserve to himself any part of the income which he has not agreed to sell, and which the purchaser has agreed he should retain. The questions which arise in cases of this kind are merely questions of construction, and of the intention of the grantor in the language he uses."[867] An agreement for title to the crop to vest in the lessor until a cash rent was paid has also been supported without recording on the ground that it took effect as a reservation.[868]

§ 56. In some jurisdictions the matter of letting on shares has been regulated by statute. In Alabama if the landowner merely supplies the land and fertilizer, and the cropper is to supply labor and teams, there is a tenancy and the tenant owns the crop.[869] But where the landowner furnishes the teams and the cropper merely supplies his labor, the contract is one of hiring and the relation of landlord and tenant does not exist.[870] Under such circumstances the cropper has no title to the crop and cannot bring trespass in regard to it.[871]

In Georgia it is provided by statute that title to the crop, subject to the interest of the cropper therein, remains in the owner of the land.[872] But the cropper still has possession of the crop so that he would not be guilty of larceny in converting it to his own use. The taking which is necessary to complete the offense of larceny must be a trespass against the owner's possession. The conversion by a crop-

[867] Moulton v. Robinson, 27 N. H. 550, 552, citing Touch. 79, and the following passage from Bracton, li. 2 fol. 32 b and 249, cited by Coke (Co. Litt. 47 a), "Poterit enim quis rem dare et partem rei retinere, vel partem de pertinentiis, et illa pars quam retinit semper cum eo est et semper fuit."

[868] Fox v. McKinney, 9 Ore. 493.

[869] Kilpatrick v. Harper, 119 Ala. 452, 24 So. 715, citing Ala. Code 1896, 2711, 2712. Of similar import see, Wilson v. Stewart, 69 Ala. 302, decided under code of 1876, § 3474. Prior to the latter enactment a letting on the shares did not create a tenancy. Shields v. Kimbrough, 64 Ala. 504.

[870] Ragsdale v. Kinney, 119 Ala. 454, 24 So. 443, citing Ala. Code of 1896, 2712.

[871] Jordan v. Lindsay, 132 Ala. 567, 31 So. 484. *Contra*, Gardner v. Head, 108 Ala. 619, 18 So. 551, decided under the code of 1886, § 365, holding the parties were tenants in common under such circumstances.

[872] Civ. Code Ga. § 3131; Bryant v. Pugh, 86 Ga. 525, 12 S. E. 927; Taylor v. Coney, 101 Ga. 655, 28 S. E. 974.

per of a portion of the crop to his own use is neither larceny or indictable trespass under the code.[273]

In North Carolina the code provides that "any and all crops raised on land," whether by a tenant or cropper (in the absence of an agreement to the contrary), shall be deemed and held to be vested in possession of the landlord or his assigns at all times until the rent for said land shall be paid to the lessor or his assigns, and until said party or his assigns shall be paid for all advances. So it has become immaterial whether the producer of a crop is a cropper or a tenant.[274]

[273] Lane v. State, 113 Ga. 1040, 39 S. E. 463.

[274] State v. Surles, 74 N. Car. 330; State v. Austin, 123 N. Car. 749, 31 S. E. 731, citing Code of N. Car., § 1754.

CHAPTER II.

THE INSTRUMENT OF DEMISE.

1. Formal Parts, §§ 57–70.
2. Execution and Delivery, §§ 71–83.
3. Parties to Leases, §§ 84–97.
4. Description of Premises, §§ 98–110.
5. Duration of Term, §§ 111–119.
6. Illegal Leases, §§ 120–124.
7. Leases Obtained by Fraud, §§ 125–129.
8. Collateral Parol Agreement, §§ 130–137.
9. Agreements to Lease, §§ 137a–146.
10. Statute of Frauds, §§ 147–162.
11. Recording, §§ 163–167.

I. *Formal Parts.*

§ 57. The instrument in writing creating the relation of landlord and tenant is termed a lease. "*A lease* when we mean thereby the instrument, is in legal language, an indenture of lease or a deed; and therefore Bacon and Cruise, and other authors treat of leases under the running or general title of deeds. But in common parlance, where it is said a man has a lease of property, nothing more is meant than that he has a term of estate for years in the premises, which may be by deed or a writing not under seal. The former is of itself a lease; the latter, only written evidence of one; and this distinction will be found in several of the cases when the question has been whether the instrument did or did not require a stamp."[1] There are two common forms in which leases are made—called indentures and deeds-poll. An indenture is supposed to be executed by all the contracting parties—there being as many copies as there are parties to the contract. Formerly each copy was indented or cut so that they might tally with one another. The copy given to the tenant is the original and that kept by the landlord the counterpart; but, as a practical matter, they are all originals. A deed-poll is a single instrument without duplicate copies and is executed by the grantor or lessor alone. An indenture has been defined to be a formal written instrument made between two or more persons in different interests, as opposed to a deed-poll which is one made by a single person, or by several having similar interests.[2]

[1] Mayberry v. Johnson, 15 N. J. L. 116, 121, per Hornblower, C. J. Compare Allen v. Lambden, 2 Md. 279.

[2] Bouvier's Law Dict. Rawle's Rev.

In construing a covenant in a lease by indenture, the words of the covenant are to be taken, however set down in the instrument, as the words of the party to whom they properly belong, or if they properly belong to both, as the words of both; the words of an indenture, being the words of either party, are not to be taken most strongly against the one or beneficially for the other, as the words of a deed-poll are.[3] Notwithstanding this rule of construction, the lessor is to be regarded as the grantor in a deed of indenture; so that where the lessor and lessee each sign one part of the indenture and then exchange copies without signing the copy received, the part entitled to be recorded is that signed and acknowledged by the lessor.[4] When for any reason the counterpart delivered to the lessee was not properly signed by a person duly authorized, it would seem that the lessor's signature to the part retained by him would answer every purpose. But the objection was made and sustained that that part would be invalid to charge the lessor for want of a proper delivery to the lessee.[5]

In Missouri it seems that leases by deed-poll have been abolished by statute. A writing prepared by one of the parties and sent to the other, but for any reason left unsigned by such other party, is not an agreement made in writing signed by the parties thereto as demanded by the statute in that state. It cannot be proved that a tenant agreed to take the premises for a period of years except by a writing signed by him evidencing such agreement.[6]

§ 58. Lease distinguished from other instruments.—Though a conveyance may be technically in the form of a lease, yet if it is apparent that it was never the intention of the parties to create the substantial relation of landlord and tenant between them, the instruments, whatever you please to call them will, in effect, create a fee. Thus where they run to the lessee, to his heirs and assigns, as long as wood grows and water runs, reserving as rent one barley corn, to all substantial purposes, the leases, if you call them such, convey the fee. In form they were only leases. But no rights or duties which ordinarily exist between landlord and tenant were created by them. They were permanent in their character; the lessee was not bound to keep in repair or surrender up the premises; and no rent was reserved for the non-payment of which an ejectment could be maintained.

[3] Beckwith v. Howard, 6 R. I. 1.

[4] Dudley v. Sumner, 5 Mass. 438, 474.

[5] Chesebrough v. Pingree, 72 Mich. 438, 40 N. W. 747.

[6] Combs v. Midland Trans. Co., 58 Mo. App. 112.

The whole deed must be construed together, and most strongly against the grantor where there is room for construction.[7] On the other hand where a granting clause reads that one "hath granted, bargained, sold, released and confirmed," this is not conclusive against an instrument's being a lease; because the entire instrument must be examined to determine this question. If an annual rent is reserved, and a covenant to pay the same and ordinary clauses for re-entry and distress are inserted, the instrument is a lease and the relation of landlord and tenant is created.[8] In construing another instrument the court decided that an estate less than a freehold was intended to be conveyed when the granting words were those applicable to an estate for years; the interest was to take effect in futuro; and the lessees were to pay taxes for one year and were to waive notice to quit.[9] Long continuance of an interest will not of itself, convert what would otherwise be a demise into an estate in fee. The lease is a perpetual one where the lessor demises for such time as the lessee shall pay the rent and fulfill other stipulations, and the lessee binds himself to pay the rent and comply with the stipulations without limitation as to time. It necessarily follows that the lease continues until put an end to by the mutual agreement of the parties to it or till the lessor may elect to claim a forfeiture, but the instrument is nevertheless a lease.[10] An owner of real estate may convey the fee, receiving the consideration in form of a perpetual annual rent, with forfeiture upon non-payment, and he may impose by deed a flowage servitude for a mill pond for such time and upon such conditions as are satisfactory to him. If the locus is a piece of unimproved land and there is no expectation that the grantee will make any other use of it than to impose upon it such burden of water as he may wish to store, a conveyance in the form of a demise by deed sealed, witnessed, acknowledged, and recorded, will take effect as a grant of an easement appendant to the mill. The grant would be to the present mill owner, and to such other persons as may own it; the grantor covenanting for himself and his heirs and assigns that the grantee and those acquiring title from him shall quietly enjoy the easement for such time as they shall observe the con-

[7] Propagation Society v. Sharon, 28 Vt. 603; Stevens v. Dewing, 2 Vt. 112; Arms v. Burt, 1 Vt. 303. Of all the states in which the common law prevails as to words of inheritance, Vermont seems to be the only state in which an estate in fee can be created without the use of the word *heirs*. 1 Jones R. P., § 575.

[8] Tyler v. Heidorn, 46 Barb. (N. Y.) 439.

[9] Barney v. Keith, 4 Wend. (N. Y.) 502.

[10] Folts v. Huntley, 7 Wend. (N. Y.) 210.

dition of the grant. The grant to a mill owner of the specific right to flow land for a time having no more definite term of continuance than the grantee's necessities offends no rule of law or of public safety.[11]

§ 59. **Technical requirements of form.**—No particular words are necessary to create a lease;[12] and it is not necessary that the word "lease" be used.[13] Any written instrument expressing the agreement of the parties, signed by one and accepted and acted on by the other, will be obligatory upon both.[14] Whatever words are sufficient to explain the intent of the parties that the one shall divest himself of the property and the other come into it for a definite time, whether they run in the form of a license, covenant, or agreement, will in construction of law amount to a lease as well as if the most pertinent words were used.[15] An instrument in the form of a receipt acknowledging the payment of money as rent for a house has been held to be a lease. In the case reaching this conclusion a receipted bill headed "A. B. bought of C. D." bore at the foot this signed memorandum, "Left hay and oats in stable on O street, where A. B. takes possession. Rent to begin Oct. 1, 1870, for one year at $150." It was held that this memorandum was a lease.[16]

So an indorsement of payment on the back of a title bond reciting that this amount was to go as rent in case the occupant did not elect to take title at the end of a specified period, was held to be a lease. The instrument was modified at the time of its execution by this indorsement. This modification utterly destroyed the obligatory character of the bond as such, and practically converted it into a lease. Where a lease is given containing no express provision respecting its duration, but providing for the payment of a sum in gross, which

[11] Tuttle v. Harry, 56 Conn. 194, 14 Atl. 209.

[12] Alcorn v. Morgan, 77 Ind. 184; Maverick v. Lewis, 3 McCord (S. Car.) 211; Upper Appomattox Co. v. Hamilton, 83 Va. 319, 2 S. E. 195; Weaver v. Wood, 9 Pa. St. 220; Folden v. State, 13 Neb. 328, 14 N. W. 412.

[13] Bussman v. Ganster, 72 Pa. St. 285; Moore v. Miller, 8 Pa. St. 272; West Chicago St. R. Co. v. Morrison &c. Co., 160 Ill. 288, 43 N. E. 393.

[14] Alcorn v. Morgan, 77 Ind. 184.

[15] Munson v. Wray, 7 Blackf. (Ind.) 403, 404; Watson v. O'Hern, 6 Watts (Pa.) 362; State v. Page, 1 Speer (S. Car.) 408; Upper Appomattox Co. v. Hamilton, 83 Va. 319, 2 S. E. 195; Branch v. Doane, 17 Conn. 402; Moshier v. Reding, 12 Me. 478; Peck v. Hiler, 24 Barb. (N. Y.) 178; Boone v. Stover, 66 Mo. 430; Horner v. Leeds, 25 N. J. Law 106, 112; Williams v. Cleaver, 4 Houst. (Del.) 453; Gibbons v. Dayton, 4 Hun (N. Y.) 451.

[16] Eastman v. Perkins, 111 Mass. 30; Alcorn v. Morgan, 77 Ind. 184.

shall be credited upon rent at a given rate per month, in the absence of any other evidence of intention, it may be fairly inferred that the parties intended to create a tenancy for the term for which the sum named would pay at the stipulated rate per month.[17] In an indictment for forgery of a signature to a lease it was urged that the fabricated writing was invalid as a lease within the meaning of the statute. But the court replied that "the instrument was clearly a lease, which is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years or at will. Though no formal words are requisite to a lease at common law, the usual words of operation in it are 'demise, grant and to farm let.' "[18]

A grant of a franchise by the state for a term of years is not, however, a lease. By virtue of an act for building bridges, a contract was made by public commissioners for the erection of a bridge and the grant of a right to take tolls for a fixed period. This was not a lease although the operative words were words proper to create a term. It was simply a contract on the part of the commissioners, acting as trustees for the state that the second party, as a consideration for building the bridges, should have the tolls for a certain number of years.[19] So the vote of a town authorizing the selectmen "to let the town wharf as heretofore" did not constitute a lease. The town could make grants of real estate by corporate vote; and *a fortiori,* if they could grant the fee they could pass any subordinate interest in the estate. But this vote did not purport to pass any interest in the *locus in quo,* and could not by any reasonable construction be construed to amount to a lease. No consideration was fixed, and no grantee or lessee named. No person, therefore, by the force of this act of the town, without an execution of the authority contained in it, could pretend to claim any interest in the estate.[20]

An agreement by subscribers to pay an annual bonus to a landowner to induce him to let a building for less than its actual rental value is not a lease and does not make the subscribers tenants of the landowner so that they would be bound by privity of estate to pay the bonus to his assignee. The contract created no relation resembling that of landlord and tenant between the parties. The subscribers

[17] Barrett v. Johnson, 2 Ind. App. 25, 27 N. E. 983.

[18] Folden v. State, 13 Neb. 328, 14 N. W. 412, citing 1 Brown & Hadley's Com. Am. Ed. 744.

[19] Proprietors &c. v. State, 22 N. J. Law 593, affirming 21 N. J. Law 384.

[20] Inhabitants of Hingham v. Sprague, 15 Pick. (Mass.) 102.

acquired no right or interest in the premises. The money agreed to be paid was not payable as rent.[21]

§ 60. **Date of a lease.**—It is not essential to the validity of a lease that it should contain a statement of the date when it was executed. As long ago as the time of Lord Coke it was said: "And the date of a deed is not of the substance of a deed; for if it hath no date or hath a false or impossible date, as the thirtieth day of February, yet the deed is good for there are but three things of the essence and substance of a deed, that is to say writing in paper or parchment, sealing, and delivery."[22] A deed does not take effect from its date but from its delivery, and while the presumption is that it was delivered on the day of its date, it is always competent to show that the date inserted in the deed was not the date of its delivery.[23] Furthermore it may be shown that a mistake was made in writing the date of execution in the instrument.[24]

In a lease for a year, the term will commence from the day of the date if not otherwise expressed. The date of the written instrument is to be regarded as the date of the commencement of the term of the lease; no other time being indicated by the agreement. This construction is in strict analogy to what is the uniform construction given to notes and other instruments for the payment of money or other thing, bearing a specific date and payable within a specific period.[25]

When there was a verbal letting and no time was set for the commencement of the term, it was held that the tenancy began when the tenant went into possession.[26]

§ 61. **Lease executed on Sunday.**—The statutes forbidding the transaction of secular business upon the Lord's Day render a lease executed on Sunday void. Just what the rights of the parties are when a tenant occupies and pays rent under a Sunday lease is a matter of some dispute. In one case a person executed a lease and entered

[21] Sanborn v. First Nat. Bank, 9 Colo. App. 245, 47 Pac. 660.

[22] Goddard's Case, 2 Coke 5.

[23] Blake v. Fash, 44 Ill. 302; Green v. Robinson, Wright (Ohio) 436; Jones on Real Property, §§ 1238, 1239.

[24] Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230.

[25] Keyes v. Dearborn, 12 N. H. 52. A lease from blank day of blank A. D. 1856 "for and during and until the full end and term of eighteen months," would expire as soon as eighteen months from the last day of the year 1856. Huffman v. McDaniel, 1 Ore. 259.

[26] Eberlein v. Abel, 10 Ill. App. 626; Feyreisen v. Sanchez, 70 Ill. App. 105.

into possession of the premises on Sunday, continuing to occupy and pay rent according to the terms of the lease. The trial court thought that by continuing in possession and paying rent he ratified the lease and made it a valid contract. But upon appeal it was held that this decision of the court was clearly wrong.[27] The lease was absolutely void and was incapable of ratification.[28] The parties could not ratify an illegal contract, though they might make a new one with reference to the same subject on a subsequent week-day.[29] "But any arrangement or agreement between the parties on any subsequent day, whether direct and express, or implied from their dealings with each other's property, would be a new and independent transaction. It is not quite accurate to speak of the ratification by a party of something the law forbids, and which is made void, not from any want of his full consent but in spite of it."[30] This does not mean that the relation of landlord and tenant cannot be established in a case of this kind for it may be presumed from the conduct of the parties in reference to each other and in respect to the lands which are the subject of the rent. "Every other relation in life may be presumed from circumstances, and conduct of the parties, and we are unable to perceive," said the Alabama court, "any good reason why that of landlord and tenant should form an exception to the rule." Although the agreement made on Sunday is void for immorality, yet it may be looked to as a circumstance, with others, to account for the subsequent conduct of the parties with reference to the possession of the premises.[31]

When the tenant enters into occupation of the premises on a secular day, he will be liable for rent in an action of use and occupation[32] on proof of the value of such occupation.[33]

§ 62. **Alteration of lease.**—The effect of an alteration in a lease depends on the materiality of the change and the purpose for which it is made. Thus if a lessee increases his estate by fraudulently altering his lease in a material part subsequent to its execution, he thereby destroys all his future rights under the lease, either to retain posses-

[27] Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787.

[28] Thomas v. Hatch, 53 Wis. 296, 10 N. W. 393; Troewert v. Decker, 51 Wis. 46, 8 N. W. 26; Melchoir v. McCarty, 31 Wis. 252.

[29] Harrison v. Colton, 31 Iowa 16.

[30] Day v. McAllister, 15 Gray (Mass.) 433, 434. To same effect see Pope v. Linn, 50 Me. 83; Plaisted v. Palmer, 63 Me. 576; Vinz v. Beatty, 61 Wis. 645, 21 N. W. 787.

[31] Rainey v. Capps, 22 Ala. 288, 291.

[32] Stebbins v. Peck, 8 Gray (Mass.) 553.

[33] Ainsworth v. Williams, 111 Wis. 17, 86 N. W. 551.

sion of the premises or to preclude the lessor from entering upon them.[34] A grantee who alters a deed in a material respect cannot avail himself of such deed in evidence.[35] But alterations consisting of changes in dates referring to the time when the lease was executed which do not effect the right of the lessee to occupy the premises do not invalidate the lease. Thus, where a term was to commence at a specified future period, and alteration in the alleged date of execution would not change the rights of the parties and would not preclude the party making such alteration from claiming under the lease.[36]

§ 63. Reservations and exceptions.—It is valid and not unusual for a lessor to reserve certain rights in the land demised, such as the right to drain over it from his own adjoining land.[37] The difference between a reservation and an exception has been stated by Lord Coke as follows: "There is a diversity between a reservation and an exception. The exception is ever of part of the thing granted, and of a thing *in esse* while a reservation is always of a thing not *in esse* but newly created or reserved out of the land or tenement demised," and he adds "that sometime the word reserved hath the force of saving or excepting."[38] It is valid and enforcible to except from the operation of the general granting clause of a lease such portions of the premises as the minerals upon them,[39] or the trees growing thereon.[40] Such an exception is construed against the lessor and in favor of the lessee,[41] but the incidental privileges necessary to the enjoyment of the thing excepted pass with the exception.[42] The instrument is to be construed, as far as possible, beneficially for the lessee so as to enable him to use the premises for the purpose intended. But it must also be construed with a just reference to the exception, in favor of the lessor.[43] The only restriction on the practice of excepting a part of the premises covered by the general granting clause of a lease is that you cannot except the very thing specifically granted

[34] Chesley v. Frost, 1 N. H. 145; Withers v. Atkinson, 1 Watts (Pa.) 236; Lewis v. Payn, 8 Cow. (N. Y.) 71.

[35] Lee v. Lee, 83 Iowa 565, 50 N. W. 33.

[36] Chadwick v. Marsden, L. R. 2 Exch. 285.

[37] Co. Litt. 47a.

[38] Carhart v. French, Hill & D. Supp. (N. Y.) 17; Hamilton v. Graham, L. R. 2 H. L. Sc. 166; Ramsay v. Blair, L. R. 1 App. Cas. 701.

[39] Legh v. Heald, 1 B. Ad. 622; Bullen v. Denning, 5 B. & C. 842, 11 E. C. L. 705.

[41] Cardigan v. Armitage, 2 B. & C. 197, 9 E. C. L. 93; Bullen v. Denning, 5 B. & C. 842, 11 E. C. L. 705.

[42] Shep. Touch. 100.

in terms; you cannot destroy your grant. But where a general grant is followed by a detailed description of the parts included in it, an exception of one of these parts is valid because the enumeration was surplusage.[44] So a further description of a close by stating the number of acres or poles it contains, does not invalidate an exception of a part of it, if it was the evident intention of the parties that the part mentioned as excepted should not pass to the lessee.[45] In a lease of premises under the description of "the glebe farm," an exception was made of thirty-seven acres which were not specified. The court decided that the contract was not void for uncertainty but that the right of selection belonged to the lessor. However, he could not exercise this right oppressively so as to interfere with the beneficial use of the rest of the farm.[46]

In the United States exceptions of public roads or of lots designated by number or of a specified number of acres out of a larger tract covered by the granting clause have been held good.[47] By such an exception the lessor continues to retain the legal title and has a right to bring trespass or forcible detainer against a stranger who interferes with his right of possession.[48] However, a clause in a lease of a hotel, giving the lessor a right to name and occupy a room and obtain board there was held to be a mere covenant on the part of the lessee and not a reservation of a specific portion of the premises from the operation of the lease.[49] The reservation of a chamber in a farm house by a lessor gave him no right in the yard other than that of passage-way to and from it for himself. The right of passing with a horse and wagon was denied him.[50] A provision in an oil lease that no wells were to be drilled within a certain distance of a house was held not to be an exception but merely to be a limitation upon the right of the lessee to bore wells.[51] It was urged that the same construction should be put upon a lease which excepted ten acres described by metes and bounds, but the court refused to sanc-

[44] Dexter v. Manley, 4 Cush. (Mass.) 14.

[45] Leigh v. Shaw, 3 Dyer 264b, n.

[46] Cochrane v. McCleary, Ir. R., 4 C. L. 165; Ellis v. Lord Primate, 16 Ir. Ch. 184.

[47] Jenkins v. Green, 27 Beav. 437.

[48] Munn v. Wonall, 53 N. Y. 44; Roberts v. Robertson, 53 Vt. 690, 38 Am. R. 710; Spillman v. Brown, 45 Fed. 291; Low v. Settle, 32 W. Va. 600, 9 S. E. 922; Greenleaf v. Birth, 6 Pet. (U. S.) 302.

[49] Jordan v. Staples, 57 Me. 352; Bowers v. Cherokee Bob, 45 Cal. 495.

[50] Polack v. Shafer, 46 Cal. 270.

[51] Fort v. Brown, 46 Barb. (N. Y.) 366.

[52] Westmoreland &c. Co. v. DeWitt, 130 Pa. St. 235, 18 Atl. 724.

tion it, holding that this clause took effect as an exception and title to the tract described remained in the lessor.[52]

It does not invalidate an otherwise valid exception in a lease that the reason stated for making it fails. Thus certain lots were excepted because they were subject to outstanding leases, and the exception took effect according to its terms although the outstanding leases were not in writing and therefore incapable of enforcement.[53] A lease of the hunting privilege on land is not rendered invalid by the reservation of a right of pasturage to the lessor; the exercise of these two privileges not being necessarily inconsistent with one another.[54]

§ 64. Stipulation for attorney's fee.—The general right of individuals of suitable age and capacity to enter into any stipulation they see fit to undertake enables persons to contract to pay attorney's fees which are incurred by reason of their own default. Such agreements are not against public policy. So a stipulation in a lease for the payment of attorney's fees in case the employment of one becomes necessary by reason of the default of the lessee is valid. Under such a provision the lessor could recover a reasonable attorney's fee in an action for rent.[55] In Indiana it is provided by statute that any and all agreements to pay attorney's fees, depending upon any condition therein set forth and made part of any written evidence of indebtedness are illegal and void.[56] After this act had been passed, an attempt was made to collect attorney's fees under a lease reading: "And the said party of the second part agrees to pay attorney's fees and other costs pertaining to this lease, or the enforcement of its provisions." It was asserted that this promise was conditional and not absolute and hence forbidden. But the court replied that an implied condition that the lease may be brought into litigation is not sufficient to bring the contract within the inhibition of the statute. To be controlled by the statute two things are clearly and unequivocally required. First. The agreement to pay attorney's fees must depend on a condition. Second. The condition must be set forth in the instrument. The foregoing stipulation to pay attorney's fees was held to be unconditional and therefore valid.[57] The lessor must succeed in his action in order to justify his conduct in bringing it and if

[52] Spillman v. Brown, 45 Fed. 291.

[53] Hargrove v. Miller, Busb. L. (N. Car.) 68.

[54] Kellogg v. King, 114 Cal. 378, 46 Pac. 166.

[55] Richard v. Bestor, 90 Ala. 352, 8 So. 30; Fox v. McKee, 31 La. Ann. 67.

[56] Burns' Rev. Stat., § 7532.

[57] Talbott v. English, 156 Ind. 299, 59 N. E. 857.

the suit be for rent he must show that some rent was due over and above all counter-claims. A clause of this character would not entitle the lessor to an allowance for attorney's fees when, by reason of a set-off, nothing was due him on the rent.[58] Moreover a provision for fees will not be extended by construction and where the lease was cancelled during the term, it would apply only to the collection of such rent as became due prior to the cancellation.[59]

§ 65. **Consideration.**—When a demise is made by an instrument under seal, the question of consideration for the grant becomes immaterial, as the court will not inquire into the lack of consideration in a sealed instrument.[60] When the demise is in writing but not under seal, the grant of the leasehold estate to the lessee is an abundant consideration for his undertaking to pay rent.[61] On the other hand the payment of rent is sufficient consideration for the demise, and so is the payment of something as the equivalent of rent. Thus a lease of the mortgaged premises was executed by a mortgagor to a mortgagee and it was urged that the lease was void as without consideration. This was clearly without weight. The lease was a formal one by the owner of the land or of an interest in it, who was entitled to possession, and was made in consideration of what was, or was equivalent to an agreement to pay rent by the mortgagee.[62] So a lease executed in consideration of the payment of one dollar and the erection of valuable machinery is sufficiently supported.[63] A lease given in consideration that lessee should build bridges and roads and keep off trespassers is supported by ample consideration.[64]

An early Illinois statute authorizing the plea of want of consideration in actions on notes and "other instruments in writing" was held not to include leases because such instruments were well known at the time the statute was passed and it would have been included by name if it had been the intention of the legislature to include it.[65]

The circumstance that a lease under seal purports to be in consideration of an annual rent does not preclude the lessor from showing that it was given and accepted in satisfaction of a previously existing claim for damages under a bond. There is nothing absurd or re-

[58] Taylor v. Lehman, 17 Ind. App. 585, 46 N. E. 84, 47 N. E. 230.

[59] Fox v. McKee, 31 La. Ann. 67.

[60] Drew v. Buck, 12 Hun (N. Y.) 267.

[61] Hill v. Woodman, 14 Me. 38.

[62] Chadbourn v. Rahilly, 34 Minn. 346, 25 N. W. 633.

[63] Herrington v. Wood, 6 Ohio Cir. Ct. 326.

[64] Gilpin v. Adams, 14 Colo. 512, 24 Pac. 566.

[65] Dunbar v. Bonesteel, 4 Ill. 32.

pugnant in such an agreement or understanding and to aver it is not to set up anything inconsistent with the deed.[66]

§ 66. **The true construction of written leases is to be declared by the court and not submitted to the finding of the jury.**[67] This is in conformity with the general rule that, where no facts are in dispute, written instruments shall be construed by the court, and rests upon the ground that the court is better adapted for dealing with questions of construction. So it is the province of the court to inform the jury of the true import of a written lease.[68] But when there is conflicting testimony regarding a parol lease, it should be left to the jury to determine what the terms of the lease are.[69] So in a case where a lease had been destroyed and the contents were proved by parol evidence, it was held to be for the jury to determine from the evidence what were the terms of the lease and to determine under proper instructions from the court what was their legal effect.[70]

§ 67. **The lease must be construed as a whole,** and such a construction placed upon it as will render all its clauses harmonious and consistent. Every covenant is to be expounded with regard to its context. In conformity with this rule and in support of the apparent intent of the parties, covenants in large and general terms have been frequently narrowed and restrained.[71] "Where the demise is in writing, the writing itself is primarily to be considered in ascertaining the intention of the parties, and all its different provisions are to be read and construed together, so as, if possible, to make a sensible and consistent whole."[72] In certain cases it is necessary that a lease be read in the light of the previous agreement out of which it arose, in order, if practicable, to give effect to the actual understanding and agreement

[66] McIntyre v. City of Kingston, 4 U. C. Q. B. 471.

[67] Durr v. Chase, 161 Mass. 40, 36 N. E. 741; Emery v. Owings, 6 Gill (Md.) 191; Folsom v. Cook, 115 Pa. St. 539, 9 Atl. 93; Stoddard v. Waters, 30 Ark. 156; Brown v. Schiappacasse, 115 Mich. 47, 72 N. W. 1096; Morris v. Kettle, 57 N. J. Law 218, 30 Atl. 879.

[68] Great Pond &c. Co. v. Buzzell, 39 Me. 173.

[69] State v. Forsythe, 89 Mo. 667, 1 S. W. 834.

[70] Millan v. Kephart, 18 Gratt. (Va.) 1.

[71] Iggulden v. May, 7 East 237; Harlow v. Lake Superior Iron Co., 36 Mich. 105; Barrett v. Johnson, 2 Ind. App. 25, 27 N. E. 983; Cage v. Paxlins, 1 Leon. 116; Broughton v. Conway, Moore 58.

[72] Street v. Chicago Wharfing &c. Co., 157 Ill. 605, 41 N. E. 1108, affirming 54 Ill. App. 569, per Baker, J.

of the parties.[73] Words and sentences should be construed to make sense and reason.[74] Thus a lease of land and water-power at a mill pond, near which the landlord operated a tannery and fulling mill, contained the clause "meaning to reserve water at all times to work the bark mill, etc., *as now used.*" The last three words were construed to limit the reservation to water then actually in use and not to the amount of water for which the mill had a capacity at that time.[75] Where in a lease of a mill there was a reservation of a lien "on all goods, chattels and *other property,*" the expression "other property" was construed to refer to such other chattels personal as should be brought upon the land and did not include a building and fixtures therein.[76]

§ 68. **Custom of the country.**—Contracts creating the relation of landlord and tenant should not be treated differently, in respect to their construction, from other contracts, and the meaning and effect of a lease is to be gathered from the language used. The plain meaning of such language cannot be changed by evidence of the custom of the country. It would be impossible to administer justice according to the real intention of the parties by endeavoring to make custom on the subject the rule for interpreting their contract, because witnesses disagree as to what the custom is.[77] The general rule is that the plain, ordinary and popular sense or meaning of the words or terms, used by the parties, shall be taken in preference to their strict, grammatical and etymological meaning, unless the subject matter of the contract has acquired, by the usage of trade, or the like, a peculiar sense, different from its popular meaning; and in such case, the peculiar sense of such language shall, in that particular case, prevail.[78] A farmer's custom that the lessee in consideration of clearing land, shall have the right to sell the cut timber, is good, and when clearly established, prevails where the contract is silent. The contract in the case where this

[73] Reading Iron Works, 150 Pa. St. 369, 24 Atl. 617.

[74] Norris v. Showerman, 2 Doug. (Mich.) 16.

[75] Wyman v. Farrar, 35 Me. 64.

[76] First Nat. Bank &c. v. Adam, 138 Ill. 483, 28 N. E. 955, reversing 34 Ill. App. 159. Where covenant in lease to put in an elevator did not contain an express provision that the lessor should "maintain" it, but the agent of lessor said that the expression used meant the same thing; that the elevator would be operated, and thereby induced lessee to accept the lease, it was held that the lease should be interpreted to mean that the elevator would be operated by the lessor. Schmohl v. Fiddick, 34 Ill. App. 190.

[77] Iddings v. Nagle, 2 W. & S. (Pa.) 22.

[78] Robertson v. French, 4 East 130, 136, 5 Vin. Abr. 510.

conclusion was reached contained no agreement that the lessee was to account for any of the timber. On the contrary, he was bound to clear the land, and might have burnt the fallen timber and thus have complied with his contract. Furthermore, the evidence as to the custom was uncontradicted.[79]

§ 69. Inconsistent and contradictory clauses.—Where a lease is on a printed form filled in with writing and the written provisions are inconsistent with the printed part, it is the usual rule of construction that such as are written will control those that are printed on the presumption that the latter were left by inadvertence.[80] But if they can all be retained and interpreted together, none are to be rejected. In accordance with the latter rule a printed exemption from liability for fire and unavoidable accidents was held to limit a written covenant to repair, such limitation being consistent with the written provision.[81] A written provision giving the lessee an option to renew is not inconsistent with a printed covenant on his part to yield up possession at the end of the term. The provision of such a printed clause and of that in writing may each be given effect. If such action under the written clause as would operate to extend the lease is not taken, the printed clause takes effect at once, otherwise it would take effect at the end of the renewal term.[82] Where there are two printed clauses to the same effect, the erasure of one does not, however, raise the presumption that the other was left in by inadvertence. So, in case a lease was on a printed form, and the covenant not to sub-let had been erased, but a subsequent clause giving the lessor a right to re-enter in case lessee sub-let without consent was left unchanged, it was held that the erasure of the covenant did not raise an inference that the condition was intended to be of no effect.[83]

§ 69a. By the term "relet," when used in an alternative provision for the purchase of improvements, the parties mean a new letting for a fixed and definite term, such as was the term created by the lease. An agreement at the expiration of the lease which creates a tenancy at will, terminable at any time by the lessor by a month's notice, cannot be re-

[79] Duncan v. Blake, 9 Lea (Tenn.) 534.

[80] Ball v. Wyeth, 8 Allen (Mass.) 275; Seaver v. Thompson, 189 Ill. 158, 59 N. E. 553, 91 Ill. App. 500.

[81] Ball v. Wyeth, 8 Allen (Mass.) 275.

[82] Seaver v. Thompson, 189 Ill. 158, 59 N. E. 553, affirming 91 Ill. App. 500.

[83] Pond v. Holbrook, 32 Minn. 291, 20 N. W. 232. See § 392.

garded as such a reletting as was intended by the parties to the lease in the provision under consideration, and which should have the effect of releasing the lessor from his obligation to pay for improvements.[84]

Where two leases between the same parties are executed at the same time and relating to the same subject matter, both are to be construed together as one instrument.[85]

§ 70. **Reformation of lease.**—The general principle that an error in a written instrument made by mutual mistake of the parties thereto will justify its reformation by a court of equity is applicable to a lease.[86] Thus it has been held to be a valid defense to an action for rent that the written lease did not contain the agreement of the parties. The court dismissed the suit and ordered that the lease be corrected and reformed.[87] It is a further well established principle that to justify the reformation of a written lease, the alleged mistake or omission must be shown by clear, unequivocal and satisfactory proof.[88] Relief was not granted when the parties to the transaction directly disputed one another as to the actual agreement and no third person was present at the negotiations.[89] The inquiry in such a case is always directed to the ascertainment of what was really the object of the agreement. The question is not whether there has been a previous agreement in parol, but whether the subject of the agreement as made was that stated in the lease, or some other, which the party through some mistake failed accurately to describe.[90] A lease which by reason of the ignorance and mistake of the scrivener failed to conform to the oral agreement made by the parties was reformed where the evidence

[84] Moseley v. Allen, 138 Mass. 81. The word "term," though appropriate to designate a lease-estate, will yet be controlled by the plain meaning of the contract, and may mean the end of the term for which one is employed. State v. Page, 1 Speer (S. Car.) 408.

[85] Cook County &c. Co. v. Labahn Brick Co., 92 Ill. App. 526; Wilson v. Roots, 119 Ill. 379, 386, 10 N. E. 204. *Compare* Gardt v. Brown, 113 Ill. 475.

[86] Nielander v. Chicago &c. R. Co., 114 Iowa 420, 87 N. W. 285; Silbar v. Ryder, 63 Wis. 106, 23 N. W. 106; Crookston Co. v. Marshall, 57 Minn. 333, 59 N. W. 294; Jenkins v. Jenkins Univ., 17 Wash. 160, 49 Pac. 247; Green Bay &c. Co. v. Hewitt, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588; Rose Clare Lead Co. v. Madden, 54 Ill. 260; Pomeroy's Eq. Jur., § 852, et seq.

[87] Wyman v. Sperbeck, 66 Wis. 495, 29 N. W. 245.

[88] Chapman v. Dunwell, 115 Iowa 533, 88 N. W. 1067; Murphy v. First Nat. Bank, 95 Iowa 325, 63 N. W. 702; Wyman v. Sperbeck, 66 Wis. 495, 29 N. W. 245; Harter v. Christoph, 32 Wis. 245.

[89] Chapman v. Dunwell, 115 Iowa 533, 88 N. W. 1067.

[90] Nielander v. Chicago &c. R. Co., 114 Iowa 420, 87 N. W. 285.

clearly showed what the agreement was. The omission of the lessee to read the instrument did not defeat his right to a reformation. The evidence showed that the lessee was an ignorant man, reading English with difficulty, and he had a right to rely on the scrivener.[91]

A party to an instrument seeking relief of this nature should use diligence in enforcing his rights and avoid undue delay. However, not every negligence in this respect will stay the hand of the court, the highest possible care not being demanded. Thus the relief asked for was granted in a case where not only had the defendant suffered no prejudice from the delay, but the very purpose of defeating the relief demanded would be to obtain an advantage to which it was not entitled.[92] Fraudulent conduct on the part of the person seeking reformation will defeat his right to relief. But where the application was by an assignee of the lease who was in no way connected with the alleged fraudulent erasure of a clause in the lease, the court granted his request. The bill, on its face, entitled the plaintiff to relief.[93]

Where a dispute in regard to a defective lease is no longer between the original parties, the remedy of specific performance might be given the lessee against an assignee who was affected with knowledge so as to stand in no better position than the lessor. Thus when a tenant entered into possession of premises under a lease which did not contain a name of one of the lessors, and which was not acknowledged, and the tenant made improvements and paid rent, he was entitled to specific performance of the terms of the defective lease as against a vendee of the lessor who took with actual knowledge.[94]

II. *Execution and Delivery.*

§ 71. All that is necessary to the execution of a lease is that it should be signed and delivered. It is not necessary that it should be either witnessed or acknowledged, except for the purpose of entitling

[91] Silbar v. Ryder, 63 Wis. 106, 23 N. W. 106. Where a lease signed by an aged and ignorant German omitted a material portion of the things which the lessee was to do, as payment of rent, by reason of a mistake of the draftsman, it was held that the lease would be reformed to conform to the original intent of the parties, or if lessee would not agree to that, it would be cancelled. Neuenberger v. Neuenberger, 16 Ky. L. R. 710.

[92] Nielander v. Chicago &c. R. Co., 114 Iowa 420, 87 N. W. 285.

[93] Rose Clare Lead Co. v. Madden, 54 Ill. 260.

[94] Schulte v. Schering, 2 Wash. 127, 26 Pac. 78; McGlauflin v. Holman, 1 Wash. 239, 24 Pac. 439.

it to record.[95] It is a general rule supported by an abundance of authority that a lease of real property, duly signed by the parties but not witnessed or acknowledged, is valid between the parties and against purchasers having actual notice of its existence.[96] Tenants who enter under a lease sufficient except for lack of acknowledgment, and pay rent and erect improvements, cannot be ejected by a subsequent vendee of the landlord's, who takes with knowledge of these facts.[97] A lease is obligatory against the grantor though not acknowledged, and when the grantee goes into possession under it the rights of the parties are regulated by the terms of the contract.[98] Where a statute provides that a lease shall be good against none but the lessor unless it is acknowledged, witnessed and signed, it is held that such a lease is good against a lessee who has occupied the premises. The legislature did not intend to make such a contract binding on one party and void as to the other. The reasonable construction of the statute is to hold that it was intended to make the contract valid as to both parties if to either. Otherwise there would be a want of mutuality. The lease being in force against the landlord, the agreement to pay rent is in force against the tenant.[99]

However, the effect of the almost universal legislation on this subject is, that unless a lease for more than seven years or some similar term specified by statute has been acknowledged and recorded according to law, it is valid only between the parties and such as have actual notice thereof. In this respect a lease stands on the same footing as a deed, and an intending purchaser is entitled to rely on the record title in determining whether real estate is free from incumbrances.[100] Where a lease purporting to have been executed by and between

[95] Roberts v. Nelson, 65 Minn. 240, 68 N. W. 14; Morton v. Leland, 27 Minn. 35, 6 N. W. 378; Lydiard v. Chute, 45 Minn. 277, 47 N. W. 967. In Minnesota in 1863, leases for a term not exceeding three years did not have to be executed in the presence of two witnesses. It seems that leases for a longer period did have to be thus witnessed. Chandler v. Kent, 8 Minn. 524.

[96] Emrich v. Union &c. Co., 86 Md. 482, 38 Atl. 943; Kittle v. St. John, 10 Neb. 605, 7 N. W. 271; Weaver v. Coumbe, 15 Neb. 167, 17 N. W. 357; Baldwin v. Walker, 21 Conn. 168; Johnson v. Phœnix &c. Ins. Co., 46 Conn. 92; Lake v. Campbell, 18 Ill. 106; McGlauflin v. Holman, 1 Wash. 239, 24 Pac. 439.

[97] McGlauflin v. Holman, 1 Wash. 239, 24 Pac. 439; Schulte v. Schering, 2 Wash. 127, 26 Pac. 78.

[98] Town of Lemington v. Stevens, 48 Vt. 38.

[99] Johnson v. Phœnix &c. Ins. Co., 46 Conn. 92, 103.

[100] Anthony v. New York &c. R. Co., 162 Mass. 60, 37 N. E. 780; Toupin v. Peabody, 162 Mass. 473, 39 N. E. 280; Wilhelm v. Mertz, 4 G. Greene (Iowa) 54; Hopping v. Burnam, 2 G. Greene (Iowa) 89. See §§ 163–167.

strangers and a party to the suit is offered in evidence, and its execution is not admitted by the opposite party, such execution must be proved. However, where such lease purports to be signed by a subscribing witness, proof of such signature being the genuine handwriting of the witness is sufficient.[101]

§ 72. On the other hand, a different rule prevails in some states, to the effect that unless the statutory requirements as to the execution of a lease are complied with, no action can be maintained upon it in its character of a lease. In one of these jurisdictions an action of covenant for rent was brought on a lease which was neither witnessed nor acknowleged. The court refused to allow a recovery, saying: "Because the agreement was not acknowledged and recorded agreeably to the registration laws of the state, it passed at law no title whatever in the demised premises to the appellant, and consequently the covenant for the payment of rent which is dependent on the appellant's title, or interest in the demised premises created by the agreement, is wholly inoperative and void; and no such action of covenant can be maintained thereon." The landlord's remedy for rent would not be in covenant. If the occupation of the premises was without his consent it would be *trespass quare clausum fregit;* if with his consent, an action for use and occupation could be maintained.[102] In Ohio it is held that a deed for the conveyance of the title of lands not in accordance with the provisions of the statute is insufficient to convey title.[103] The same doctrine would be applicable to an indenture which was not acknowledged or recorded. It would be utterly inoperative to convey the term as a lease. The lessees would take nothing by the instrument as a lease. If this instrument entitled the landlord to recover rent in an action of covenant, one executed in a similar manner, purporting to convey a fee simple in land, would entitle the grantee to recover in an action for the title and possession of the lands, but such is not the law.[104] In a case where the defectively executed lease purported to convey a perpetual leasehold estate, it was held that the lessee took only an equitable rather than a legal estate.[105] A defectively executed lease could not be held good for the short period during which in-

[101] Oberfelder v. Kavanaugh, 21 Neb. 483, 32 N. W. 295.

[102] Anderson v. Critcher, 11 Gill & J. (Md.) 450.

[103] Courcier v. Graham, 1 Ohio 330; Patterson v. Pease, 5 Ohio 190; Roads v. Symmes, 1 Ohio 281; Johnston v. Haines, 2 Ohio 55.

[104] Richardson v. Bates, 8 Ohio St. 257.

[105] Abbott v. Bosworth, 36 Ohio St. 605.

formal leases are valid and void only as to the excess. It is invalid throughout.[106]

§ 73. Rights of third parties.—It has been laid down that a lease reserving a lien which is neither acknowledged nor recorded can create no lien on the lessee's goods for rent, even though the creditor attaching the goods has actual notice of the lease.[107] The reservation of a lien is in effect a chattel mortgage which would not be valid without record; and notice of the lease cannot charge a third person with knowledge of a chattel mortgage clause in it. The contrary result was reached in a case where the lien for rent was reserved on growing crops, on the ground that if the lease was not valid the entire property in the crops remained in the lessor.[108] This reason is invalid and the objection can be removed in two ways. First, it is possible to hold the unrecorded lease valid between the parties for the purpose of creating a tenancy and yet invalid to curtail the rights of third persons; or, second, a tenancy might exist between the parties by reason of occupation and payment of rent, although the written lease was void *in toto*. The court admit the invalidity of the lease to the extent that it could be terminated before the end of the term by an attaching creditor or grantee of the lessor. Such an admission seems inconsistent with a decision allowing validity to the clause reserving a lien.

§ 74. Seal unnecessary.—Notwithstanding some early English cases to the contrary, the universal rule to-day, both in this country and in England, is that the written document which furnishes evidence of a demise sufficient to satisfy the statute of frauds need not be under seal.[109] By the common law all contracts were divided into agreements by specialty and agreements by parol; there was no such third class as agreements in writing. If they were written and not under seal, they were parol agreements. A lease for years written but not sealed

[106] Brohawn v. Van Ness, 1 Cranch C. C. 366, 4 Fed. Cas. No. 1920.

[107] Kendall &c. Co. v. Bain, 55 Mo. App. 264.

[108] Buswell v. Marshall, 51 Vt. 87.

[109] O'Brien v. Smith, 37 N. Y. St. 41, 13 N. Y. S. 408, affirmed without opinion 129 N. Y. 620; Warren v. Leland, 2 Barb. (N. Y.) 613, 618; Stoddard v. Whiting, 46 N. Y. 627, 633; Witman v. City of Reading, 191 Pa. St. 134, 43 Atl. 140; Crescent City &c. Co. v. Simpson, 77 Cal. 286, 19 Pac. 426; Gay v. Ihm, 3 Mo. App. 588; Hunt v. Hazelton, 5 N. H. 216; Mayberry v. Johnson, 15 N. J. Law 116; Lake v. Campbell, 18 Ill. 106; Hill v. Woodman, 14 Me. 38; Farmer v. Rogers, 2 Wilson 26; Beck v. Phillips, 5 Burr. 2827; Baxter v. Browne, 2 W. Bl. 973; Goodtitle v. Way, 1 Term R. 735.

was a parol lease as well as a lease unwritten and verbal only.[110] The question then occurs, what change did the statute of frauds introduce in the mode of creating estates for less than freehold. It did not prescribe the manner in which such estates should be created or transferred, but only declared that estates for years, if made by parol and not put in writing, should operate as estates at will. In whatever way, therefore, such estates might have been created prior to the statute, other than by parol and not put in writing, they may still be created. Before the statute of frauds leases might have been made by writing simply, or to speak technically, by a parol agreement reduced to writing. It follows that after the statute leases for more than three years could be made by indenture of lease, or by parol agreement "in writing signed by the parties."[111]

In accordance with the foregoing principles a lease by a corporation may be valid although it is not executed under its corporate seal. Execution of the lease by an authorized agent of the company is valid and effectual to create the term without the use of the corporate seal. An entry upon the use and occupation of the land under a lease purporting to be made by the agent of the company, and paying rent pursuant to its terms is sufficient to bind the corporation to the lease.[112] It is not necessary to the validity of the lease that the lessee should affix his seal thereto. His acceptance is abundantly shown by claiming under it.[113] So, a lease has been held valid although it was signed and sealed by one party and signed merely by the other. It was contended that there was no mutuality of contract, the tenant sealing his contract and it not appearing that the agent who sealed the instrument for the landlord had any authority under seal to do so. This objection was overruled. The landlord, whether he sealed the contract or not, signed it and each side became bound thereby. If was the same as if the contract had been in two instruments, one containing covenants or promises under seal and the other containing promises unsealed, each being a sufficient consideration for the other. Each would be valid.[114] While a lease is valid without a seal, the con-

[110] Rann v. Hughes, 7 Term R. 346, n; Ballard v. Walker, 3 Johns. Cas. (N. Y.) 60, 65; Perrine v. Cheeseman, 11 N. J. Law 174; Ford v. Campfield, 11 N. J. Law 327.

[111] Mayberry v. Johnson, 15 N. J. Law 116. In an early case Holt, J., ruled that all leases for more than three years must be by deed. Rawlins v. Turner, 1 Ld. Raym. 736. To the same effect see Rex v. Inhabitants of Little Dean, 1 Str. 555.

[112] Crawford v. Longstreet, 43 N. J. Law 325.

[113] Crescent City &c. Co. v. Simpson, 77 Cal. 286, 19 Pac. 426.

[114] Rice v. Brown, 81 Me. 56, 16 Atl. 334.

sideration for the covenants may be gone into in case the seal is omitted. However, the covenant to pay rent is supported by an abundant consideration in the demise of the premises and can be enforced even though the premises fall into disrepair and become useless, so that the use becomes of no value.[115]

In Delaware it is provided by statute that no demise, except it be by deed shall be effectual for a longer term than one year.[116] So it was held that a lease for five years not under seal was not binding except as a lease from year to year. For a breach of covenant occurring in the first year the statute of limitations would begin to run at once rather than from the end of the term.[117]

§ 75. A lease must be signed by the lessor, for he stands in the position of a grantor who is conveying an estate. An indenture of lease in which the lessee binds himself to pay rent for a certain term does not create any leasehold estate till it has been properly executed by the lessor. If the lessee takes possession of the premises his occupation is as tenant at will or by sufferance only, and he is only liable for rent for the time he actually occupied them.[118] Until the lessor signs the indenture it creates no estate or interest in the land and imposses no obligation upon either of the parties.[119] Where an instrument began "I have leased" and followed by description of property, statement of term and of terms with provisions for entry in case of non-payment of rent, and was signed by the lessee, it was held that this was not a lease of itself, for the lessor makes no written lease until he signs the paper. The action here was by the lessor to recover rent and he wished to establish the validity of the instrument.[120] It has been declared to be the well established rule that a lease must be signed by the lessor to be evidence of a demise,[121] and a signature by an agent not properly authorized in writing is not a compliance with this requirement.[122]

In an action of covenant on an indenture of lease for failure to repair during the term, it is an answer that the lessor never executed

[115] Hill v. Woodman, 14 Me. 38.

[116] Laws 1852, Amended 1893, ch. 120, § 3.

[117] Stewart v. Apel, 5 Houst. (Del.) 189, S. C. 4 Houst. 314.

[118] Nickolls v. Barnes, 32 Neb. 195, 49 N. W. 342, reversed on rehearing on another point, 39 Neb. 103, 57 N. W. 990; Sigmund v. Newspaper Co., 82 Ill. App. 178.

[119] Lawrence v. Hasbrouck, 46 N. Y. S. 868, 21 Misc. R. 39; Laughran v. Smith, 75 N. Y. 205.

[120] Clemens v. Broomfield, 19 Mo. 118; Marlow v. Wiggins, 3 G. & D. 504; Richardson v. Gifford, 1 A. & E. 52, 55.

[121] Hyatt v. Third Baptist Church, 10 Mo. App. 582.

[122] Sigmund v. Newspaper Co., 82

the indenture, and consequently that the term to which the covenant was annexed was never created. It makes no difference that the lessee occupied from year to year for the whole period of years comprised in the intended lease. In an ordinary indenture a covenantee, who is a party to it, may sue the covenantor who executed it, though he never did, for he is a party though he did not execute. But with respect to leases by indenture, the covenants which depend on the interest of the lease—such as those to repair and pay rent during the term—are not obligatory if the lessor does not execute. The reason is because that interest has not been created to which the covenants are annexed, and during which only they operate. Unless there be a term a covenant to repair *during it* is void. But with respect to collateral covenants, not depending on the interest in the land, it is otherwise, and they are obligatory.[123] However, where the lessee has occupied during the term, the landlord could recover rent from him in an action of use and occupation.[124] Where all but one of several joint lessors signed the indenture, it would seem that the reasoning of the foregoing cases would not apply, as the lessee would acquire an undivided estate in the land. In that case the lessee should be liable on his covenant to pay rent.[125]

It seems to be valid for a lease to be drawn in duplicate and to have each copy signed by one party and then exchanged; the failure of both to sign the copy they retain does not affect the validity of the lease. It is a complete and obligatory contract binding upon each of the parties as fully as if each of them had in form signed and sealed both of the papers.[126]

§ 76. Errors in signature.—A lease, whether in the form of an indenture or a deed-poll, is nevertheless a grant of an interest in real estate, and must conform in many respects to the requirements for a deed which would be valid to transfer an estate in fee. It must contain a granting clause which usually names the grantor, and such clause is as essentially operative in passing the estate as the signature at the bottom of the lease. So the instrument must be executed by the same

Ill. App. 178.

[123] Pitman v. Woodbury, 3 Exch. 4; Swatman v. Ambler, 8 Exch. 72; Waller v. Deane &c., Owen 136, 2 Brownl. & G. 158; Knipe v. Palmer, 2 Wils. 130.

[125] Codman v. Hall, 9 Allen (Mass.) 335.

[126] Codman v. Hall, 9 Allen (Mass.) 335. The dictum in this case contrary to the law as stated in the text seems to be wrong.

[124] Campau v. Lafferty, 43 Mich. 429, 5 N. W. 648; Fields v. Brown, 188 Ill. 111, 58 N. E. 977, reversing 89 Ill. App. 287; Ames v. Moir, 130 Ill. 582, 22 N. E. 535.

person who is named as grantor in the body of the lease. Where another signs as lessor, it is not a valid lease, for it is just as if the place for signature had been left blank.[127] The granting clause also names the grantee and the estate passes to the person or persons there named by virtue of the grant without regard to the signatures which may be affixed to an indenture of lease as parties of the second part. The signature below the name of the lessee of one whose name is not mentiond in the body of the lease does not make him a co-lessee and liable for rent.[128] But where the first name to the lease was misstated in the body of the lease, but the signature was correct, it was held this did not invalidate the lease. Since the lessee intended to sign it and to make it his lease, it was immaterial what he was called in the body of the instrument.[129] Where a lease ran to two and was executed by both of them as lessees, parol evidence is not admissible to affect the rights of the lessor by showing that one of them signed as surety for the other. Evidence to this effect would be available for the purpose of determining the rights of the two lessees against each other, but not for the purpose of altering the legal effect of the written instrument.[130]

§ 77. **Lessee need not sign.**—Where a lease recites that the lessee is to pay a certain sum as rent for the premises, his acceptance of the lease makes him a direct obligor or promisor to pay the rent, although he has not signed or executed the instrument.[131] Fry, in his text-book on Specific Performance, cites cases where "an agreement contained in a deed-poll was enforced, notwithstanding an objection which was taken from the unilateral nature of the instrument, and declares them to represent the law.[132] The contract to pay the rent reserved on the part of the tenant is not an express contract, but an implied contract, or contract raised by law from the nature of the transaction. Such contracts are not within the statute of frauds.[133]

[127] Roff v. Duane, 27 Cal. 565.

[128] Evans v. Conklin, 71 Hun (N. Y.) 536, 54 N. Y. St. 915, 24 N. Y. S. 1081. See, however, Magee v. Fisher, 8 Ala. 320, where the contrary was held.

[129] Montanye v. Wallahan, 84 Ill. 355.

[130] Hobbs v. Batory, 86 Md. 68, 37 Atl. 713.

[131] McFarlane v. Williams, 107 Ill. 33; Kershaw v. Kershaw, 102 Ill. 307; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Schmucker v. Sibert, 18 Kan. 104.

[132] Fry on Specific Performance (2 Am. Ed.) 202, *137, § 298; Otway v. Braithwaite, 1 Finch 405; Butler v. Powis, 2 Coll. C. C. 156. To same effect see Old Colony R. Corp. v. Evans, 6 Gray (Mass.) 25.

[133] Goodwin v. Gilbert, 9 Mass. 510; Fletcher v. McFarlane, 12 Mass. 43; Pike v. Brown, 7 Cush. (Mass.)

The doctrine has been broadly laid down that, where land is conveyed by deed-poll, and the grantee enters under the deed, certain duties being reserved to be performed, as no action lies against the grantee on the deed, the grantor may maintain assumpsit for the nonperformance of the duties reserved and the promise, being raised by the law, is not within the statute of frauds.[134] Occupation under the lease is not indispensible to the recovery if only the lease has been accepted. "It is enough," said the Massachusetts court, in deciding this question, "that they accepted the conveyance which gave them the right of immediate and exclusive occupation. The law would imply from such acceptance a promise to comply with the terms of the lease, and such a promise is not within the statute of frauds."[135] The reason is, the estate vests the moment the lease is accepted, and the lessee in taking the estate takes it *cum onere,* and accordingly must pay the rent so long at least as he holds it.[136] Where there has been both acceptances of the lease and entrance into possession liability would, of course, follow, and a lessee by accepting a lease under seal and entering into the occupation of the premises becomes liable for the performance of the conditions of the lease although the same is not signed by him. The action against him for failure to perform would be assumpsit.[137]

An offer in writing to allow a tenant to remain in possession for two years, rent free, made and signed by the owner of the land, was held to be a lease which the tenant accepted by remaining; and it was not necessary for it to be signed by the tenant. So that at the termination of the two year period, the tenant could be evicted without any notice to quit, he being in the position of a tenant holding for a fixed term.[138]

133; Kabley v. Worcester &c. Co., 102 Mass. 392; Providence &c. Union v. Eliott, 13 R. I. 74; Trapnall v. Merrick, 21 Ark. 503; Sage v. Wilcox, 6 Conn. 81; Allen v. Pryor, 3 A. K. Marsh. (Ky.) 305; Browne on Statute of Frauds, § 166.

[134] Goodwin v. Gilbert, 9 Mass. 510; Providence &c. Union v. Eliott, 13 R. I. 74; Evans v. Conklin, 71 Hun (N. Y.) 536, 54 N. Y. St. 915, 24 N. Y. S. 1081; Loughran v. Smith, 11 Hun (N. Y.) 311; Fitton v. Inhabitants of Hamilton City, 6 Nev. 196; Natural Gas Co. v. Philadelphia Co., 158 Pa. St. 317, 27 Atl. 951; Weaver v. Southern Oregon Co., 31 Ore. 14, 48 Pac. 167.

[135] Kabley v. Worcester &c. Co., 102 Mass. 392.

[136] Providence &c. Union v. Eliott, 13 R. I. 74.

[137] First Cong. &c. Soc. v. Town of Rochester, 66 Vt. 501, 29 Atl. 810; Henderson v. Virden Coal Co., 78 Ill. App. 437.

[138] Hulett v. Nugent, 71 Mo. 131. See § 255.

§ 78. **Where the parties contemplated the signing of an indenture of lease by both parties,** and it was signed by the lessor only, and the lessee had not taken possession under it, it was held by the New York Supreme Court that he was not liable for rent.[139] But the general rule of law would be that a party who enters into possession of property as tenant, after promising to sign a written lease, cannot rely on the fact that he did not sign to relieve himself from the burdens imposed by the lease.[140] This is because there is no adequate reason why an original intention to have the lessees sign the lease would prevent its taking effect as a deed-poll after it had been accepted. The absence of the lessee's signature would afford evidence that he had not accepted the lease, but if it be shown that the instrument was accepted, occupation and privity of estate would have the ordinary effect in fixing liability on the lessees. Thus, in a lease to four lessees, which had been signed by two only, it was argued that an action could not be maintained on the covenants of the lease against the two defendants who executed it, because it was apparent that it was intended that all four lessees should execute it, and it did not purport to be a lease to two. But the lessees could have accepted the demise on the terms and conditions contained in the indenture without executing it. In such a case the indenture would take effect as a deed-poll, and a promise would be implied on the part of the lessees to perform the stipulations expressed in the indenture on their part to be performed.[141] If the transfer of land by a lease is unconditional, the covenants intended to be undertaken by the lessee by his signing and sealing the instrument are independent. The right of the lessor to have such covenants executed by the lessee might be waived by him. By putting the lease on record and treating it as in all respects valid to pass the land described, the lessor must be regarded as waiving his right to the lessee's signature.[142]

§ 79. **Acceptance of lease.**—Where lessees have accepted a lease, their liability to pay rent is not qualified, or taken away, by proof that they never actually occupied the premises. It is enough that they accepted the conveyance, which gave them a right of immediate and exclusive occupation. The law would imply, from such accept-

[139] Adams v. Boelger, 15 Misc. R. (N. Y.) 140, 71 N. Y. St. 823, 36 N. Y. S. 801.

[140] Bonaparte v. Thayer, 95 Md. 548, 52 Atl. 496; Carroll v. St. John's &c. Soc., 125 Mass. 565; Libbey v. Staples, 39 Me. 166.

[141] Burkhardt v. Yates, 161 Mass. 591, 37 N. E. 759.

[142] Libbey v. Staples, 39 Me. 166.

ance a promise to comply with the terms of the lease[143] and such a promise is not within the statute of frauds.[144] In contemplation of law they hold the premises whether they occupy them or not.[145] A lease signed by the lessor and *accepted* by the lessee has the same force and effect as it would have if signed by the lessee. But such is not the case where there is no evidence tending to prove that the lease was accepted by the lessee. If he had accepted the lease and had occupied the premises under it, the law would imply a promise to pay the rent reserved, although the lessee had never signed the lease. In the absence of proof of acceptance, the lease would not be binding on him.[146] Where the lessee signed and retained a lease tendered by the lessor and prepared, signed, and sent a duplicate to the lessor, there was held to be an acceptance, even though the lease was accompanied by a letter indicating unwillingness to pay the rent reserved.[147]

The presumption that a lease beneficial in its nature has been accepted can only be availed of when it was in fact beneficial; which depends on the circumstances of the entire case.[148] The presumption of assent is not founded on the face of the instrument, but in the nature and circumstance of the entire case; and it is an indispensable inquiry, whether the person claimed to assent derives a benefit from the transaction.[149]

While the construction of a written lease should be passed upon by the court, it is proper to leave to the jury the question whether an unexecuted instrument was accepted by the lessees. After the parties had made an oral agreement the landlord prepared a writing and sent it to the tenants for their signature. It was submitted to the jury whether this agreement was accepted by the lessees, and this was the proper course to take. The construction of a written document is exclusively the province of the court, but when the making of such contract is in dispute it is the province of the jury to say whether it is established.[150]

[143] Guild v. Leonard, 18 Pick. (Mass.) 511, 516; Goodwin v. Gilbert, 9 Mass. 510; Kabley v. Worcester &c. Co., 102 Mass. 392.

[144] Felch v. Taylor, 13 Pick. (Mass.) 133; Kabley v. Worcester &c. Co., 102 Mass. 392.

[145] Pinero v. Judson, 6 Bing. 206.

[146] Castro v. Gaffey, 96 Cal. 421, 31 Pac. 363.

[147] Leiter v. Pike, 127 Ill. 287, 20 N. E. 23, affirming 26 Ill. App. 530.

[148] Camp v. Camp, 5 Conn. 291, 300.

[149] Thompson v. Leach, 2 Vent. 198, 206; Mutton's Case, 2 Leon. 223; Treadwell v. Bulkley, 4 Day (Conn.) 395.

[150] Folsom v. Cook, 115 Pa. St. 539, 9 Atl. 93.

§ 80. **Form of action.**—Where a leasehold estate has been created by a deed poll executed by the lessor and accepted by the lessee, assumpsit is the proper form of action by which to compel performance by the lessee of the undertakings placed upon him.[151] The rent could be recovered of him in an action of debt. In the case under consideration, the lease is not in the form of an indenture, and is neither signed or sealed by the tenant. By taking possession under it the tenant accepted the lease and became bound to carry out and perform those provisions of it which rested on him to perform. But such acceptance did not make the lease an instrument under the seal of the tenant. In law it was similar to, and no more than, a written acceptance of its provisions, signed by the tenant but not under his seal.[152]

So, in such case the lessor cannot maintain an action of covenant against the lessee, because the general rule is that covenant will lie only where the instrument is actually signed and sealed by the party or by his authority.[153] The doctrine with regard to covenants running with the land has no application to confer a right to sue in covenant. No such covenants can be created or assigned except by deed. Their relation to the land does not convert them into covenants, but only characterizes them as contracts which concern the realty.[154]

§ 81. **An undisclosed principal** is not liable as lessee on the covenants of a lease executed by its agent by reason of its subsequent occupation of the premises. In the case where this doctrine was announced there was no evidence that either party understood that the principal was to occupy as lessee under the lease. The subsequent conduct of the parties was not inconsistent with holding the agent to be the lessee under the lease, and there was nothing which could control the terms of the lease, or show that the principal was bound by the covenants.[155] The general principles of the law of agency as to the execution of an instrument under seal by an agent apply in a

[151] Providence &c. Union v. Elliott, 13 R. I. 74; Trapnall v. Merrick, 21 Ark. 503; First Cong. &c. Soc. v. Town of Rochester, 66 Vt. 501, 29 Atl. 810; Johnsons v. Muzzy, 45 Vt. 419.

[152] First Cong. &c. Soc. v. Town of Rochester, 66 Vt. 501, 29 Atl. 810.

[153] Trustees Section 16 v. Spencer, 7 Ohio 493; Hinsdale v. Humphrey, 15 Conn. 431; Goodwin v. Gilbert, 9 Mass. 510; Gale v. Nixon, 6 Cow. (N. Y.) 445; Johnsons v. Muzzy, 45 Vt. 419; First Cong. &c. Soc. v. Town of Rochester, 66 Vt. 501, 29 Atl. 810; Burnett v. Lynch, 5 B. & C. 589; *Contra* Finley v. Simpson, 22 N. J. Law 311.

[154] Trustees Section 16 v. Spencer, 7 Ohio 493.

[155] Haley v. Boston Belting Co., 140 Mass. 73, 2 N. E. 785.

case where a lease is executed by one person in behalf of another. A lease which was made to the agent as lessee and signed in his individual name and not as agent, recited the facts of the agency in the body of the instrument. It was held that the agent was liable on the instrument and the principal was not.[156] If the form of the lease makes the agent the lessee, the covenants in the deed can only be enforced against the party who, upon the face of the instrument, is the covenantor, although it appears by extrinsic proof that he acted as the agent for another.[157] Thus, where an agent executed a lease as lessor in behalf of an undisclosed principal, the principal could not maintain an action of covenant against the lessee for the rent. The rule is well established that an action upon a sealed instrument must be brought by and in the name of the person who is a party to the instrument, and that a stranger to the instrument cannot maintain an action upon it.[158] Furthermore, the owner of premises cannot maintain distress for rent under a lease executed by his agent in the agent's own name. The tenant holds under the agent as landlord and not under the principal. It makes no difference that the agent wrote the word "agent" under his signature.[159] Nor can a lessee deny the title of his lessor because the latter described himself as agent in executing the lease.[160] Where one joint owner acting for all executed a lease and signed himself agent without stating his principal, the lease ran to the agent alone as lessor.[161]

An attaching creditor of a landowner would prevail over a lessee holding under a lease improperly executed by an agent of the owner. The lease described the parties as principal and agent but recited that the agent had leased, etc., and was signed by the agent in his own name.[162] Recitals of the agency will not avail against the effective granting portion of the lease that the *agent* has leased, etc. So a bill to cancel a lease was allowed, though the lease began with a recital of the agency and was signed by the agent as representing an estate. The recitals of the agency are mere *descriptio personae*,[163] which serve to identify the parties but do not change the legal effect of the instrument.

[156] Kiersted v. Orange &c. R. Co., 69 N. Y. 343.

[157] Taft v. Brewster, 9 John. (N. Y.) 334; Stone v. Wood, 7 Cow. (N. Y.) 453; Guyon v. Lewis, 7 Wend. (N. Y.) 26.

[158] Schaefer v. Henkel, 75 N. Y. 378.

[159] Seyfert v. Bean, 83 Pa. St. 450.

[160] Bedford v. Kelly, 61 Pa. St. 491.

[161] Holt v. Martin, 51 Pa. St. 499.

[162] Murray v. Armstrong, 11 Mo. 209.

[163] Potter v. Bassett, 35 Mo. App. 417.

However, after a lessee has occupied the premises during the term under a lease executed by an agent as lessor, he cannot deny the validity of the demise when sued for rent, even though it was not a good conveyance against the principal. In the case where this holding was made the agent had assigned the lease and the principal had conveyed the reversion to the plaintiff who brought suit for the rent so that he combined all rights in himself.[164] Furthermore, one acting in a representative capacity cannot object that his predecessor did not properly execute a lease in behalf of the estate. If it can be shown that the person acting as administrator intended to bind the estate by the lease, it is not open to the person who succeeds as administrator to object that the lease was not properly executed.[165]

Where lessees acting for a lodge were described in the caption as "trustees" but executed in their individual names, and in the body of instrument covenanted to pay rent without using any words to show an intention to bind their lodge, it was held they were personally liable and the words "trustees" was merely *descriptio personae*.[166]

§ 82. Leases by corporations.—The liability of parties to a lease must be determined by the terms of the written instrument which they execute. Accordingly it has been held that a lessee, in the face of the terms of a written lease, cannot show that he was acting as agent for a proposed corporation and thus by parol relieve himself of liability. He must also show fraud or misrepresentation.[167] But the opposite result was reached where the lease was by a *de facto* corporation. Covenants in the lease were expressed to be by it and the signature was by the corporation through its trustees, so it did not create any liability on the trustee signing but a corporate liability.[168] In another case a lease by a corporation was signed by its secretary in his own name, followed by a statement of his representative capacity, and on the margin was written the initials of the name of the corporation. This was held to be a valid lease by the corporation. It was simply for the court to determine, as a matter of law, whether, on its face, it was the contract of the corporation.[169] It has been held, also, that a lease by a corporation signed and sealed in

[164] Kendall v. Carland, 5 Cush. (Mass.) 74.

[165] Russell v. Erwin, 41 Ala. 292.

[166] Stobie v. Dills, 62 Ill. 432; Seaver v. Coburn, 10 Cush. (Mass.) 324.

[167] Sanders v. Sharp, 153 Pa. St. 555, 25 Atl. 524.

[168] Hancock v. Yunker, 83 Ill. 208.

[169] West Side &c. Co. v. Connecticut &c. Ins. Co., 186 Ill. 156, 57 N. E. 839, 85 Ill. App. 497.

the corporate name by a proper officer is not invalid, because in the beginning the lease is described as an indenture made by an individual officer of the corporation.[170] These decisions accept a lax rule as to the execution of instruments, and such a tendency can hardly be regarded with favor.

§ 83. Delivery is a question of intent and it depends on whether the parties meant it to be a delivery to take effect immediately. Where a lease was signed by both parties and then put in the hands of the lessee to procure an endorsement for payment of rent, it was held there was no delivery of the lease as the deed of the lessee and the instrument was not binding since the proposed guaranty could not be obtained.[171] Yet the general rule regarding escrows is that a lease or other instrument cannot be delivered in escrow to one of the contracting parties. That rule is that if the deed is absolute on its face, parol evidence cannot be admitted to prove that the parties agreed it should be conditional.[172]

Delivery in a popular sense implies an actual transfer of possession from one person to another and such a transfer made unconditionally constitutes a valid delivery. But a manual transfer of the instrument in writing, required by the statute of frauds, is not always necessary. If the grantee, by formal assent, or unequivocal acts, such as entering into possession, treats the writing as in his possession, it is sufficient to constitute a delivery.[173] The exact time when delivery takes place is important, because a lease takes effect as a binding instrument from the time of its delivery and not from its date, or from the time when the signatures were affixed to it.[174] The technical requirements for the execution of an instrument includes delivery in addition to signing, if it be a simple contract, and delivery of the signed and sealed instrument, if it be a specialty. This rule applies equally to indentures signed by both parties and to deeds poll which are signed and sealed by only one. So in strictness it is true that a lease, though signed by both parties, does not take effect till it has been delivered.[175] But after both parties have signed an

[170] Douglass v. Branch Bank &c., 19 Ala. 659; Northwestern &c. Co. v. Brant, 69 Ill. 658.

[171] Jordan v. Davis, 108 Ill. 336.

[172] Browning v. Haskell, 22 Pick. (Mass.) 310.

[173] Witman v. City of Reading, 191 Pa. St. 134, 43 Atl. 140.

[174] De Ronde v. Olmsted, 5 Daly (N. Y.) 398.

[175] Stetson v. Briggs, 114 Cal. 511, 46 Pac. 603; Davidson v. Ellmaker, 84 Cal. 21, 23 Pac. 1026; Witthaus v. Starin, 12 Daly (N. Y.) 226.

indenture of lease it is a sufficient delivery to leave the instrument with the scrivener who prepared it for him to make a copy for the lessee.[176] So where a lease is signed by both parties and retained by one, it is immaterial whether the other has a counterpart or not as long as he is content to be without one. No objection can be made on the score that the instrument was invalid for lack of due delivery, but as long as the tenant has not entered into possession, delivery becomes material on the question whether the lease became operative or not.[177] An agreement between two parties in which the former agrees to give the latter a lease of certain land, for a stipulated rent, as soon as he shall comply with certain conditions, manifestly prepared and intended to be executed by both, but signed by the lessor alone, with the day of the month left blank, and never signed or attempted to be signed by the lessee and never delivered to him during the lessor's life, is an inchoate instrument, passing to the lessee no interest either legal or equitable.[178] Where a lease was signed by the lessees, in whose favor it was drawn, but was never delivered to them and was assigned by them at the request of the lessor's agent, and delivered to the agent, and the first installment of rent was received by the lessor from the assignee, the original lessees never became obligated to pay rent.[179]

Retention of possession of a lease by the lessor is not conclusive evidence that it has not been delivered so as to become operative. A finding that it is duly "executed" will be construed to include its delivery.[180] The use of the word "execute" will not, however, import a delivery when it is used as a synonym of the word "sign."[181]

III. *Parties to Leases.*

§ 84. In general.—In regard to the execution of every lease there may arise questions as to the capacity of the person to enter into such a contractual relation, and as to the authority of the alleged

[176] Reynolds v. Greenbaum, 80 Ill. 416.

[177] David Stevenson &c. Co. v. Culbertson, 41 N. Y. S. 1039, 18 Misc. R. (N. Y.) 486.

[178] Howard v. Carpenter, 11 Md. 259.

[179] Stetson v. Briggs, 114 Cal. 511, 46 Pac. 603.

[180] Oneto v. Restano, 89 Cal. 63, 26 Pac. 788.

[181] Davidson v. Ellmaker, 84 Cal. 21, 23 Pac. 1026. The execution of a lease may be proved in an action by the lessor for rent by the production of the certified copy of a judgment for possession recovered by lessee against landlord. McCoy v. Oldham, 1 Ind. App. 372, 27 N. E. 647.

lessor to convey by demise the particular premises covered by the lease. The first of these questions has to do with the effect of some personal disability of one of the contracting parties, such as infancy, insanity, or coverture. The second question deals with the rights of persons acting in a representative capacity, such as an agent, executor, or trustee. It would also include the right of a husband to make a lease of lands belonging to his wife, the right of one tenant in common to convey the community lands and the extent to which a corporation may alienate its lands by this mode of conveyance. The capacity to execute a lease depends in general upon the capacity to contract, which depends, not upon the peculiar doctrines of the law of landlord and tenant, but upon the law of infancy, the law of contracts, or the law of husband and wife, as the case may be. The question of authority is complicated by the doctrine of estoppel, which precludes a lessee in the full enjoyment of possession from denying the validity of the lessor's title. Although, without any rightful title or interest in the land, a person who can transfer the possession alone can execute a lease which will be binding on the lessee as long as he continues in undisturbed possession of the premises. From this rule, the result may obviously be deduced that a person who has any rightful title and interest in real estate, coupled with a present possession, may make a valid demise of such property to the extent of his own interest. An estate in fee is not necessary to enable one to execute a valid lease.[182] The actual ownership of the premises is only one element to be considered in determining the question whether the relation of landlord and tenant exists between parties. One may be a landlord who is not an owner.[183] So in the absence of restrictive covenants a valid lease may be made by a tenant for life[184] or by a tenant for years.

In accordance with these principles a joint lease may be made by adjoining owners who hold severally and not in common. Such a lease of mining land could reserve as rent a royalty to be paid jointly to the lessors, and each lessor would be entitled to share equally in the royalty thus reserved, regardless of what portion of the mine the ore is taken from. The court said in the opinion: "No case has been cited, and I have found none in which distinct contiguous properties

[182] Strickland v. Stiles, 107 Ga. 308, 33 S. E. 85; Goldsmith v. Wilson, 68 Iowa 685, 28 N. W. 16; Lindsey v. Leighton, 150 Mass. 285, 22 N. E. 901, 15 Am. St. 199; Cross v. Freeman, 22 Tex. Civ. App. 299, 54 S. W. 246.

[183] Lindsey v. Leighton, 150 Mass. 285, 22 N. E. 901, 15 Am. St. 199.

[184] Sykes v. Benton, 90 Ga. 402, 17 S. E. 1002.

of different owners have been jointly leased as in this case; though leases by tenants in common have been of frequent occurrence. Yet I have no doubt that the lease in question here was, and is, a valid lease, as seems to be conceded by both parties who differ only as to its effect."[185]

The estoppel of a tenant to deny his landlord's title must be distinguished from the ancient doctrine as to the transfer of title by estoppel. That doctrine was that where one purported to convey premises in which he had no title, any interest which the grantor subsequently acquired in the premises inured to the benefit of the grantee whose claims the grantor was by estoppel precluded from denying. This doctrine applied with equal force in case of a transfer by way of lease,[186] as in a conveyance of the fee, and the following illustrative case is put by Lord Raymond: "As if a man makes a lease by indenture of D. in which he hath nothing and afterward purchases D. in fee, and afterward bargains and sells it to A. and his heirs; A. shall be bound by this estoppel; and where an estoppel works on the interest of the lands, it runs with the land into whose hands soever the land comes."[187] It was laid down in an early New York case "that a man shall never be permitted to claim in opposition to his deed; and that if a man makes a lease of land by indenture, which is not his, . . . and he afterward purchases the land, he shall notwithstanding be bound by his deed and not be permitted to aver he had nothing."[188]

§ 85. **The general doctrine of the law is that a person dispossessed cannot make a valid conveyance,** being disabled both by the common law and by the effect of the statute, 32 Hen. VIII, ch. 9. That this objection applies as well in cases of conveyances of terms for years as of estates in fee was long ago determined[189] and more recent cases show that courts hold themselves as much bound, as at any previous period, to maintain the principle.[190] However, the state cannot be disseized, and therefore the state may make a valid lease

[185] Higgins v. California &c. Co., 109 Cal. 304, 41 Pac. 1087.

[186] Gilman v. Hoare, 1 Salk. 275; Skidmore v. Pittsburg &c. R. Co., 112 U. S. 33, 5 Sup. Ct. 9; McKenzie v. City of Lexington, 4 Dana (Ky.) 129; Bank of Utica v. Mersereau, 3 Barb. ch. (N. Y.) 528; Austin v. Ahearne, 61 N. Y. 6; Jackson v. Murray, 12 Johns. (N. Y.) 201, Wms. Real Property 329, 1 Wash. Real Property (3d ed.) 399.

[187] Trevivan v. Lawrence, 1 Salk. 276.

[188] Jackson v. Bull, 1 Johns. Cas. (N. Y.) 81, 90.

[189] Partridge v. Strange, 1 Plow. 77.

[190] Doe v. Evans, 1 M. G. & S. 717, 50 E. C. L. 716; Doe v. McInnis, 6 U. C. Q. B. 28.

of lands held adversely to it.[191] Moreover, if the lessee comes into actual possession, the effect of the lease is not destroyed by the fact that another was in possession claiming title at the time the lease was executed.[192] In fact, by the early law of Vermont, an owner while disseized could make a valid transfer of his interest to a lessee by an instrument of demise.[193] Nor is it necessary that the owner of land should be in actual possession of it, to enable him to give a valid lease. The undisputed right of possession is sufficient. As where one purchases land at a sheriff's sale and the defendant in the execution has not actually surrendered the possession, yet the purchaser may give a valid lease to a third person, before acquiring possession by ejectment. The defendant is presumed to remain in as tenant to the purchaser and in subordination to his title. It is not for strangers to say that he holds in hostility to the true owner.[194] So the possession of a tenant for life is not adverse to the remainderman and hence the latter may make a valid lease notwithstanding such possession.[195] A lease for years which is granted during the continuance of an outstanding term for years is valid also. It is admitted that the first lessee was in possession claiming a right of possession when the second lessee received his lease. But the lessors had not been ousted from their possession. The first lessee had done the lessors no wrong or injury. He had not disseized or ousted them of the possession; they could not have maintained an action of ejectment against him. He was their tenant; and the possession of the tenant was the possession of the landlord. The possession of the mortgagor is the possession of the mortgagee. In short the possession of any one who properly holds under the legal proprietor, is the possession of such proprietor.[196] A holding can never be adverse when it can be considered as the constructive possession of the real owner. The possession of the first lessee could not have made void a conveyance of the fee by the lessors, but if the lessors had been disseized, every conveyance they might have made would have been void.[197]

In California the common law right to transfer property which is in the possession of another is supported and enlarged by a provision

[191] People v. Mayor &c., 28 Barb. (N. Y.) 240.

[192] Kinsman v. Greene, 16 Me. 60.

[193] Rood v. Willard, Brayt. (Vt.) 67.

[194] Russell v. Doty, 4 Cow. (N. Y.) 576.

[195] Grout v. Townsend, 2 Hill (N. Y.) 554.

[196] Bryan v. Atwater, 5 Day (Conn.) 181; Willison v. Watkins, 3 Pet. (U. S.) 43.

[197] Emerson v. Goodwin, 9 Conn. 422; Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501; Wilbur v. Collin, 4 N. Y. App. Div. 417.

in the code. Under the code property of every kind except a mere possibility not coupled with an interest may be transferred; any person claiming title to real property in the adverse possession of another may transfer it with the same effect as if in actual possession. Surely it could not then be said that a landowner cannot make a valid lease of his land until all former leases have expired and the tenants have surrendered back to him the possession.[198]

§ 86. **One tenant in common cannot as such make a lease of community land** that will bind his fellows. Unless he has authority from his co-tenants he can only lease his own individual share.[199] The law is well settled that a license to use land or a lease of land by some of several tenants in common owning land is invalid as to the others who do not join therein. Such a lease is not void as to those who execute it, but is voidable by the tenants in common who have not joined;[200] it being of the essence of a tenancy in common that the tenants have each and equally the right to occupy the property. A lease by one tenant in common of a portion of the estate, in severalty, in which the others do not join, violates the rights of the latter and as to them is invalid.[201] But it has been held that one tenant in common may make a valid parol lease at will of a specific portion of the common property; because such a lease from a tenant in common does not prevent the estate of his co-tenant from having partition, and holding in severalty his full share of the common property.[202] So a lease of a parcel of land executed by two of three tenants in common confers sufficient title upon the lessee to enable him to maintain an action for possession against a tenant at will of the lessors. They were entitled to possession against everybody except their tenant in common, and could give a lease of the premises good against every one who does not claim under him.[203] Where one of two tenants in common has acquiesced in a lease for a year executed by his co-tenant alone, and has brought suit against the lessees as holding

[198] Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501, Civ. Code, §§ 1044–1047.

[199] Mussey v. Holt, 24 N. H. 248; Tainter v. Cole, 120 Mass. 162; Tipping v. Robbins, 64 Wis. 546, 25 N. W. 713; Martens v. O'Connor, 101 Wis. 18, 76 N. W. 774; Valentine v. Healey, 158 N. Y. 369, 52 N. E. 1097, reversing 1 App. Div. 502.

[200] Martens v. O'Connor, 101 Wis. 18, 76 N. W. 774; Tipping v. Robbins, 64 Wis. 546, 25 N. W. 713; Tainter v. Cole, 120 Mass. 162.

[201] De Witt v. Harvey, 4 Gray (Mass.) 486; Cunningham v. Pattee, 99 Mass. 248.

[202] Rising v. Stannard, 17 Mass. 282.

[203] Grundy v. Martin, 143 Mass. 279, 9 N. E. 647; Cunningham v. Pattee, 99 Mass. 248.

over for another year under the lease, he is deemed to have adopted the lease as his own and to have recognized the authority of his co-tenant to make it and to treat with third persons in reference to the premises.[204] However, if two persons own land, and one of them rents it by a written lease, he alone has the legal interest in the contract, and it is not admissible in evidence in a suit brought by the administrators of both owners—the contract, being a chose in action, passed at the death of the lessor to his administrator alone.[205]

Where one of four tenants in common became dissatisfied with the amount of rent received and notified the lessee that if he continued to hold after a certain date the rent would be at an increased rate, it was held that the dissatisfied co-owner could only recover the reasonable value of the use of the premises.[206] The lessee had not agreed to pay the increased rental and did not so agree by continuing to occupy. Whatever rights the discontented owner in common had would merely have entitled him to recover back the possession of the premises.

The circumstance that tenants in common in a certain piece of land are partners as well does not ordinarily increase the authority of one of the co-owners to execute a lease conveying the entire property. There may be cases where a partner would have power, as such, to make a lease of land binding on the other partners; but it must be where the lease is made in the prosecution of the partnership business and where the making of the lease was in the exercise of an authority necessarily implied from the nature and object of the partnership.[207]

In the absence of special covenants, the real estate owned by partners must be considered theirs in common without any reference to the partnership. The parties are tenants in common, not partners

[204] Valentine v. Healey, 158 N. Y. 369, 52 N. E. 1097, reversing 1 App. Div. 502.

[205] Fesmire v. Brock, 25 Ark. 20.

[206] Nott v. Owen, 86 Me. 98, 29 Atl. 943. Some language in the opinion suggests a doctrine in conflict with the authorities, such as the following: "The plaintiff's proposition that the tenant can not rightfully occupy the store at all unless there be an agreement with him for the occupancy of his one-quarter is far from tenable. Were he a sole owner, he could manage his own property in his own way. But as an owner of property in common with other owners he is not entitled to dictate the management of their interests as well as his own without their consent. . . . Were it otherwise any tenant in common would have the power by his perverseness to actually destroy the valuable use of the common property. The law frowns upon the idea of any such despotic power being possessed by an owner in common over the common property."

[207] Mussey v. Holt, 24 N. H. 248, 254.

in the land. The principles and rules of law applicable to partnerships, and which govern and regulate the disposition of the partnership property, do not apply to real estate.[208] When a lease is executed by a firm composed of several members, the covenants thereto are several as well as joint, and each individual member of the firm is liable thereon.[209]

§ 87. Leases by and to married women.—At common law marriage makes the husband and wife one person; suspending the legal capacity or existence of the wife during the coverture, depriving her of a free will, and subjecting her to obedience to her husband.[210] The wife cannot enter into any contract with any person, her capacity to do so being suspended during coverture and therefore her promise or contract of any kind is absolutely void.[211] So at common law a lease by a married woman was in no way binding upon her.[212] As a general rule a deed by a married woman was void and incapable of being confirmed, but an exception was made in favor of a lease, which could be confirmed by the wife after the death of her husband.[213] So where a lease by deed was executed by the husband and wife jointly, the wife could, upon the death of the husband, confirm the lease, although it was not in the first instance binding upon her after his death.[214]

Although the wife cannot in any manner make a valid contract, she may take property as grantee, but her husband can avoid the gift or purchase by dissent, and she, on becoming discovert, may repudiate and annul it.[215] So at common law a married woman could not take a lease and thereby render the covenants on her parts binding on

[208] Coles v. Coles, 15 Johns. (N. Y.) 159; Thornton v. Dixon, 3 Bro. C. C. 199; Balmain v. Shore, 9 Ves. 500.

[209] Dunn v. Jaffray, 36 Kan. 408, 13 Pac. 781.

[210] 1 Bl. Com. 442, Litt., §§ 112b, 168, 1 Bishop M. & D., §§ 754-760.

[211] Co. Litt., 112a, 1 Bl. Com. 442; Brittin v. Wilder, 6 Hill (N. Y.) 242; Edwards v. Davis, 16 Johns. (N. Y.) 281; Young v. Paul, 10 N. J. Eq. 401; Wallace v. Rippon, 2 Bay (S. Car.) 112; Dorrance v. Scott, 3 Whart. (Pa.) 309; Johnston v. Jones, 12 B. Mon. (Ky.) 326; Harris v. Taylor, 3 Sneed (Tenn.) 536; Stephenson v. Osborne, 41 Miss. 119.

[212] Goodright v. Straphan, 1 Cowp. 201.

[213] Sanborn v. French, 22 N. H. 246; Ela v. Card, 2 N. H. 175; Nash v. Berkmeir, 83 Ind. 536.

[214] Toler v. Slater, L. R. 3 Q. B. 42; Atherstone v. Huddleston, 2 Taunt. 181; Greenwood v. Tyber, Cro. Jac. 563.

[215] Scanlan v. Wright, 13 Pick. (Mass.) 523; Gordon v. Haywood, 2 N. H. 402; Junction R. Co. v. Harris, 9 Ind. 184; Brackett v. Wait, 6 Vt. 411; Co. Litt. 3a, 356b; 2 Bl. Com. 292; 2 Kent Com. 150.

her,[216] but where possession was taken under a lease to her, her husband was liable in an action for use and occupation.[217] If a married woman took a lease and in fact voluntarily performed all the stipulations on her part to be performed, the lessor would not be allowed to treat the lease as void, for that would be against equity and good conscience.[218] However, in one case a married woman was not allowed to recover rent on an invalid lease executed by her, although some of the lessees had occupied the premises by virtue of the lease.[219]

Where by statute all real and personal property of a married woman is declared to be her sole and separate property, subject to her control, the power is necessarily conferred to sell and convey without the husband's consent, and such a statute so modifies the common law as to enable her to make valid contracts in regard to her real estate and personal property, and to execute a lease which shall bind all the parties to it.[220] But to be bound by the contract the married woman must follow the mode of contracting pointed out by the statute.[221] The statutes enabling a married woman to receive, hold, manage and dispose of real and personal property in the same manner as if she were sole, cannot be construed to apply to the estate by entireties of husband and wife, where other statutes prevent this conveyance from being construed as creating a tenancy in common.[222] The decisions in many states upon the effect of such statutes turn more or less upon the particular terms of the statutes. Many cases hold that these statutes do not affect estates by entireties.[223] In a few other jurisdictions the contrary conclusion has been reached.[224]

The Mississippi code in its provision regarding the renting of lands and personalty between husband and wife applies only to persons dealing without notice, while a similar section regarding transfers and

[216] Westervelt v. Ackley, 62 N. Y. 505.

[217] Vincent v. Buhler, 1 Daly (N. Y.) 165.

[218] Baxter v. Smith, 6 Binn. (Pa.) 427; Ray v. Western Pa. &c. Co., 138 Pa. St. 576, 20 Atl. 1065, 21 Am. St. 922.

[219] Schenck v. Stumpf, 6 Mo. App. 381.

[220] Parent v. Callerand, 64 Ill. 97.

[221] Keller v. Klopfer, 3 Colo. 132; Carlton v. Williams, 77 Cal. 89, 11 Am. St. 243.

[222] Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824.

[223] Bertles v. Nunan, 92 N. Y. 152; Marburg v. Cole, 49 Md. 402; Hulett v. Inlow, 57 Ind. 412; Hemingway v. Scales, 42 Miss. 1; McCurdy v. Canning, 64 Pa. St. 39; Diver v. Diver, 56 Pa. St. 106; Fisher v. Provin, 25 Mich. 347; Robinson v. Eagle, 29 Ark. 202; McDuff v. Beauchamp, 50 Miss. 531; Rogers v. Grider, 1 Dana (Ky.) 242; Den v. Hardenbergh, 10 N. J. Law 42.

[224] Cooper v. Cooper, 76 Ill. 57; Hoffman v. Stigers, 28 Iowa 302; Clark v. Clark, 56 N. H. 105.

conveyances contains no clause in regard to notice. The result is that in contracts of the former class persons with notice are bound by the contract between the husband and the wife. The doctrine of estoppel has no application, but notice alone is sufficient to bind all persons dealing with one spouse in adverse interest to that of the other.[225]

In Maine it is provided that real estate directly or indirectly conveyed to a married woman by her husband, or paid for by him or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband.[226] The question presented to the court in one case under this statute was whether a lease was a conveyance within the meaning of the act. The court thought it was not. The word convey or conveyance must refer to an alienation of the estate,—a transference of the title. It is "real estate" that cannot be conveyed. A lease is personal property. It bargains away a temporary possession,—does not dispose of any fee or title. There is no inhibition against a sale of personal property by the wife alone, although given to her by her husband. The statutory provision under review should not be very generously interpreted for the husband when the rights of third persons are likely to be inperiled thereby.[227]

By an Indiana statute there is an absolute denial of power to a married woman "to encumber or convey her lands" except by deed in which her husband shall join.[228] The ordinary lease of agricultural lands, for the purpose of cultivation, although carrying an interest in the lands has been held not to fall within the inhibition of this statute.[229] By statute the lands of a married woman, and the rents and profits therefrom, are her separate property. To realize rents, lands must be let; so it seems that a lease for a term not exceeding three years is not an encumbrance or conveyance within the meaning of the act. Oil and gas leases differ from agricultural leases in that they may carry a substantial and enduring interest in the freehold. But in their primary effect, they part with no immediate title or estate and carry but a right of exploration. For the purpose of prospecting, such leases involve a mere use, and part with no greater interest in the freehold than the ordinary agricultural lease. For such purpose there is no doubt as to the right of a married woman

[225] Underwood v. Ainsworth, 72 Miss. 328, 18 So. 379.

[226] R. S., c. 61, § 1.

[227] Perkins v. Morse, 78 Me. 17, 2 Atl. 130.

[228] Burns' R. S. 1894, § 6961.

[229] Pearcy v. Henley, 82 Ind. 129; Nash v. Berkmeir, 83 Ind. 536; Indianapolis, City of, v. Kingsbury, 101 Ind. 200, 51 Am. R. 749.

to make a lease without her husband joining.[230] But an absolute conveyance of all the oil and gas under certain land has been held to be within the prohibition of the statute.[231]

The interest of a surviving spouse in real estate before dower or homestead has been assigned is not such as to enable him to make a valid lease against the right of the administrator to sell the property to pay debts of the estate.[232] It is a rule of property that a surviving husband or wife cannot sell and convey the right of dower and homestead to a person other than the owner of the fee, or lease the same before dower and homestead have been set off and assigned.[233]

§ 88. **Right of husband to lease wife's real estate.**—If there is no ante-nuptial contract or enabling statute, the marriage vests in the husband an estate in all the wife's real property in her possession at the time of the marriage or which comes to her during the marriage, to last during the joint lives of himself and wife, he being seized thereof with his wife in her right, and the death of the wife or death of the husband will end it.[234] This control which a husband has over the real estate of his wife, gives him the right to grant leases of it. He has, during coverture, the usufruct of all the real estate which his wife has in fee simple, fee tail, or for life.[235] "By the great weight of authority, the husband has the right to make a lease of an estate conveyed in fee to him and his wife, which will be good against the wife during coverture, and will fail only in the event of his wife surviving him."[236] Such a lease by the husband alone could not be con-

[230] Heal v. Niagara Oil Co., 150 Ind. 483, 50 N. E. 482.

[231] Columbian Oil Co. v. Blake, 13 Ind. App. 680, 42 N. E. 234.

[232] Union Brewing Co. v. Meier, 163 Ill. 424, 45 N. E. 264.

[233] Best v. Jenks, 123 Ill. 447, 15 N. E. 173.

[234] Kelly on Contracts of Married Women, p. 38; Robertson v. Norris, 11 Q. B. 916, 63 E. C. L. 916; Harcourt v. Wyman, 3 Exch. 817; Cheek v. Waldrum, 25 Ala. 152; Bishop v. Blair, 36 Ala. 80; Montgomery v. Tate, 12 Ind. 615; Gregory v. Ford, 5 B. Mon. (Ky.) 471; Beale v. Knowles, 45 Me. 479; Jackson v. Cairns, 20 Johns. (N. Y.) 301; Clapp v. Stoughton, 10 Pick. (Mass.) 463; Guion v. Anderson, 8 Humph. (Tenn.) 298; Shallenberger v. Ashworth, 1 Casey (Pa.) 152; Evans v. Kingsberry, 2 Rand. (Va.) 120.

[235] Pray v. Stebbins, 141 Mass. 219, 4 N. E. 824.

[236] Washburn v. Burns, 5 Vroom. (N. J.) 18; Barber v. Harris, 15 Wend. (N. Y.) 615; Jackson v. McConnell, 19 Wend. (N. Y.) 175; Topping v. Sadler, 5 Jones L. (N. Car.) 357; Fairchild v. Chastelleux, 1 Barr (Pa.) 176; Pollok v. Kelly, 6 Ir. C. L. 367, 375; Bertles v. Nunan, 92 N. Y. 152; Wyckoff v. Gardner, Spencer (N. J.) 556; Ames v. Norman, 4 Sneed (Tenn.) 683; Ward v. Ward, L. R. 14 Ch. D. 506; Godfrey v. Bryan, L. R. 14 Ch. D. 516.

firmed, for the balance of the term, by the wife on the death of her husband. Though it be admitted that the lease of a husband is only binding on his wife during his lifetime, it might be contended that by her acceptance of rent and apparent acquiescence in the lease after she became discovert she would affirm it and become bound by its provisions. This would be so, no doubt, if she had originally joined her husband in the lease, for then she might, after her husband's death, affirm the act or avoid it according to her election. But the principle has been laid down in accordance with the weight of authority that a mere verbal lease by husband and wife of her lands, or a written lease to which she is not a party, is void as to the wife.[237]

So in regard to the leasehold estates of a married woman, the rule is that the husband acquires all the chattels real, legal or equitable, of which the wife is possessed at the marriage, provided he does some act of appropriating them or survive his wife. The husband could under-let and the under-lease would be good for the entire term, even though the husband died during the term and his wife survived him.[238] A sub-lease by a husband to commence at his death would be valid, although his wife survived him,[239] and a covenant by a husband to sublet was held binding upon the estate after the death of the husband.[240]

By statute in Washington community lands, that is, those held by husband and wife jointly, can only be leased by the assent and signature of both parties. However, where such lands have been leased by an instrument signed by one party only, the lessee cannot repudiate the lease without first demanding a valid lease from the lessor and giving him an opportunity to execute a valid lease.[241] While a husband could not execute a valid lease of community lands, still his lease would not be absolutely void. If the lessees had been ousted there is no good reason why they could not have maintained an action for damages upon the breach of the covenant for quiet enjoyment. If the lessees had no notice that the property was community property when the lease was executed, they could not be charged as standing in the position of wilful violators of the law.[242]

§ 89. **Guardians.**—Although it has been said to be a well-settled principle that a guardian cannot by his contract bind the person or

[237] Winstell v. Hehl, 6 Bush (Ky.) 58.

[238] Loftus' Case, Cro. Eliz. 279.

[239] Grute v. Locroft, Cro. Eliz. 287.

[240] Steed v. Cragh, 9 Mod. 43.

[241] Isaacs v. Holland, 4 Wash. 54, 29 Pac. 976; Tryon v. Davis, 8 Wash. 106, 35 Pac. 598.

[242] Isaacs v. Holland, 4 Wash. 54, 29 Pac. 976.

estate of his ward,[243] there is no doubt but that a guardian may lease the lands of the ward during infancy, if the guardianship so long continue.[244] In case the demise were from year to year, if another guardian were appointed, the term would cease. Where a lease was made by a guardian, the reservation of rent to the infant was proper, and could not be likened to the reservation of rent to a stranger; for the inheritance being in the ward, there is privity between him and the lessee. It is true, also, that the guardian may, by a lease in writing, reserve the rent to himself to cover advances which he may make for the use of the ward, and in that case the action for rent must be brought in his own name unless he assign the lease to the ward.[245] Except when licensed by the judge of probate to sell the real estate or to mortgage it, the power of the guardian is by most modern statutes limited to leasing and to the reception of the rents and profits.[246] The power to lease any of the ward's property of such character as to be the subject of a lease does not carry with it the right to dispose of any part of the realty. It follows that as oil is a mineral, and being a mineral, is part of the realty, a guardian cannot grant an oil and gas lease of land of his ward, as that would in effect be the grant of a part of the *corpus* of the estate of the ward. Not infrequently the oil forms by far the most valuable part of an estate, and to permit a guardian to dispose of it at will and without security would often lead to consequences disastrous to his ward.[247] The foregoing statements as to the powers of guardians applies only to guardians of an infant's estate and not to a natural guardian or a guardian for nurture, because a guardian for nurture has not even the right of possession of his ward's real estate and hence would have no right to bring ejectment for it.[248] It was laid down in an early authority that

[243] Jones v. Brewer, 1 Pick. (Mass.) 314.

[244] Ross v. Gill, 1 Wash. (Va.) 87; Windon v. Stewart, 43 W. Va. 711, 28 S. E. 776; Stoughton, Appeal of, 88 Pa. St. 198; Hughes' Appeal, 53 Pa. St. 500; Weldon v. Lytle, 53 Mich. 1, 18 N. W. 533; Kinney v. Harrett, 46 Mich. 87, 8 N. W. 708; Huff v. Walker, 1 Ind. 193; Snook v. Sutton, 10 N. J. Law 133; Hutchins v. Dresser, 26 Me. 76; Richardson v. Richardson, 49 Mo. 29; Graham v. Chatoque Bank, 5 B. Mon. (Ky.) 45; Putnam v. Ritchie, 6 Paige (N. Y.) 390; People v. Ingersoll, 20 Hun (N. Y.) 316, 58 How. Pr. 351; Ronald v. Barkley, 1 Brock. (U. S.) 356; Rex v. Sutton, 3 A. & E. 597; Wade v. Baker, 1 Ld. Raym. 130.

[245] Ross v. Gill, 1 Wash. (Va.) 87;

[246] Kinney v. Harrett, 46 Mich. 87, 8 N. W. 708.

[247] Stoughton, Appeal of, 88 Pa. St. 198; Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781.

[248] Kinney v. Harrett, 46 Mich. 87, 8 N. W. 708; Anderson v. Darby, 1 Nott & McC. (S. Car.) 369; May v.

a guardian for nurture has only the care of the person and education of the infant and has nothing to do with his lands, and that he cannot make a lease of them for years, either in his own name or in that of the infant.[249]

In Illinois the only power a guardian has over the real estate of his ward is to lease it upon such terms and for such length of time as the county court shall approve. As respects the minors, a lease purporting to be made by their guardian, but without the approval of the court, is voidable. Such a lease is not void, however, and all that can be reasonably claimed under the statute is that a lease made by a guardian may be rejected and set aside by the court, but it may be regarded as binding until the court should examine it and refuse approval.[250]

The Iowa statute regarding guardians provides that "they must also, in other respects, manage their (wards') interests under the direction of the court. They may thus lease their land or loan their money during their minority, and may do all other acts which the court may deem for the benefit of the wards." The effect of this is that guardians must manage the interests of their wards under the direction of the probate court. The statute implies an inhibition upon the doing of these acts without the direction of the court.[251] So a lease made by a guardian is invalid, or voidable at least, unless ordered or approved by the proper probate court. If a lease be made without such order or approval, it could be avoided upon proof of unconscionable inadequacy of the rent reserved, if indeed the instrument was not absolutely void.[252]

§ 90. Except in regard to the duration of the terms, there seems to be no restriction as to the mode in which the guardian must proceed in effecting a lease of his ward's land. A lease for a crop rent would be valid. The guardian would have the legal right to make such an arrangement, and if the land were sold under a probate license to a person with notice of the letting, the cropper's rights would not be affected by the sale.[253] It is the duty of the trustees or

[249] 3 Bacon Abr. Guardian G. 15, 414; Comyn Landlord & Tenant 45; May v. Calder, 2 Mass. 55; Ross v. Cobb, 9 Yerg. (Tenn.) 463; Anderson v. Darby, 1 Nott & McC. (S. Car.) 369.

[250] Field v. Herrick, 5 Ill. App. 54, affirmed in 101 Ill. 110.

[251] Bates v. Dunham, 58 Iowa 308, 12 N. W. 309.

[252] Alexander v. Buffington, 66 Iowa 360, 23 N. W. 754.

[253] Weldon v. Lytle, 53 Mich. 1, 18 N. W. 533.

guardians of infants to lease the lands of their wards, as the wards are incapable of acting for themselves, and they must collect the rents and account for them.[254] In common with all other kinds of fiduciaries no more is required of guardians than that they act in good faith and with the same prudence and discretion that a prudent man is accustomed to exercise in the management of his own affairs.[255] Common skill, common caution, common prudence are all that can be required. That a guardian did not rent at public renting is not a sign of fraud where the law does not require a public renting.[256]

The right of a guardian to lease his ward's lands is limited strictly to the infancy of the ward, and if a lease by the guardian exceed the time when the ward will be twenty-one, it is void. So where a lease provided that the term should continue till the ensuing year after the infant came of age unless he thought proper, in pursuance of the power reserved to him, to put an end to it, the entire lease was void; because the power did not affect the main stipulation, as it was collateral, and might never be exercised.[257] The reason of this rule is, that the age of the infant and, by consequence, the time when the wardship and incapacity of the infant will terminate, are well known. There is no such certainty in the case of a wardship which can only be determined by the death of the ward. The guardian of a person *non compos mentis* has no power to create a term which will remain valid beyond the lifetime of the ward. In case the ward dies during the term of the lease, the lease though good up to the time of his death, becomes by that event invalid as against his heirs and probably against his administrators. But the lease is not so absolutely void for the remainder of the terms as to be incapable of confirmation by the heirs and other parties claiming under the ward. If such parties chose to confirm it, it becomes binding upon both them and the lessees. However, the lessees would not be bound to accept a confirmation by a part of the heirs or other persons who had a right to disaffirm it, without the whole.[258]

Furthermore, the right of the guardian to lease his ward's lands is limited to such time as he shall continue to be guardian. On the

[254] Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150; Byrne v. Van Hoesen, 5 Johns. (N. Y.) 66; Genet v. Tallmadge, 1 Johns. Ch. (N. Y.) 561.

[255] Myers v. Zetelle, 21 Grat. (Va.) 758.

[256] Windon v. Stewart, 43 W. Va. 711, 28 S. E. 776.

[257] Ross v. Gill, 4 Call (Va.) 250; 2 Kent's Com. 255.

[258] Campau v. Shaw, 15 Mich. 226.

appointment of another guardian, the former guardian's power to lease, and all leases made by him of the ward's lands, cease.[259]

§ 91. **Trustees have a general power of leasing,** if the lease does not exceed the quantity of estate that is in them and is a reasonable one.[260] In an early case in New York it was held that trustees under a will "had authority to grant leases for such length of time and upon such terms as they might think proper, and at law all such leases would be valid. But, although good at law whatever may be their terms, they are, nevertheless, subject to the supervisory jurisdiction exercised by courts of equity over every species of trust. As, however, the will in this case contained no limitation, either express or implied, upon the powers which the trustees possessed as incident to their legal estate, the only ground upon which a court of equity can interfere with leases executed by them is, that such leases are to be regarded, in view of the duration of the trust estate and the object of the trust, as an abuse or grossly improvident exercise by the trustees of the powers with which they are clothed. In all such cases if the trustee act honestly, and with a reasonable degree of prudence and foresight, their acts are to be upheld."[261] Not only is a trustee authorized to grant leases of the trust property, but that mode of dealing with property which is expected to yield a monetary return is the rule and not the exception. So that in a case where a plantation was placed in the hands of a trustee, a special authorization was necessary to entitle him to exercise personal supervision over the management rather than renting it out.[262] It is not unusual for an owner of farm lands to grant a lease of them for a term of years, and so a trustee would have the implied power to do so if there was nothing in the instrument creating the trust to restrict him.[263]

It is a general rule that trustees of a charitable use should only lease for years unless they have obtained an order of the court to

[259] Emerson v. Spicer, 55 Barb. (N. Y.) 428; Sylvester v. Ralston, 31 Barb. (N. Y.) 286; Holmes v. Seely, 17 Wend. (N. Y.) 75; Putnam v. Ritchie, 6 Paige (N. Y.) 390, 399; Roe v. Hodgson, 2 Wils. 129, 135.

[260] Hutcheson v. Hodnett, 115 Ga. 990, 42 S. E. 422; Naylor v. Arnitt, 1 R. & M. 501; Bowes v. East London &c. Co., Jac. 324; Drohan v. Drohan, 1 Ball & B. 185; Middleton v. Dodswell, 13 Ves. Jr. 266; City of Richmond v. Davis, 103 Ind. 449, 3 N. E. 130.

[261] Greason v. Keteltas, 17 N. Y. 491, 494, per Selden, J. To same effect see Cone v. Corse, 144 N. Y. 569, 39 N. E. 630, and Middleton v. Dodswell, 13 Ves. 266.

[262] Dennis v. Dennis, 15 Md. 73.

[263] Hutcheson v. Hodnett, 115 Ga. 990, 42 S. E. 422.

lease for a longer term. However, where the terms of the lease are fair and reasonable, and for the benefit of the charity, the court, on being satisfied of these facts, has upheld leases granted by trustees for long terms, such as eighty years, or even for so long an absolute term as amounts in fact to an alienation.[264] Even where such leases are set aside, the court, whenever equity requires it, will protect the rights of the party who, acting under such lease, has in good faith made permanent improvements upon the demised land, and will allow him the reasonable value of such improvements.[265]

Where a trustee rightfully and legally assumes in his representative capacity the relation of landlord, he is liable in that capacity to answer to the tenant for the violation of any duty which the general law attaches as an incident to that relation. Accordingly, where a trustee, duly authorized, rented a store belonging to the trust estate, and in the contract of rental bound himself by a formal covenant to keep the shelving in the store in thorough order and repair, the trust estate was liable in damages for his failure to do so. The ultimate liability of the trustee to the *cestui que trust* is not involved in such a suit. As far as the tenant is concerned he is entitled to a judgment against the trust estate for whatever damages he may have sustained.[266]

Where a mere naked trustee, with the consent of the *cestui que trust* having the beneficial title and right to the possession, leases the trust property, the leasing will be regarded as the act of the *cestui que trust*, and he will be entitled to whatever rights belong to the landlord.[267]

§ 92. Infancy of lessee.—Leases to infants are not absolutely void; they are but voidable, and it is not for third persons to set up the defense of infancy. However, a lease to an infant is voidable upon his own application and may be avoided by the infant lessee when he comes of age.[268] But he cannot, by putting an end to the lease, recover back any consideration which he has paid for it; the

[264] Richmond v. Davis, 103 Ind. 449, 3 N. E. 130; Hill on Trustees 463.

[265] Richmond v. Davis, 103 Ind. 449, 3 N. E. 130; Att'y General v. Baliol College, 9 Mod. 407; Att'y General v. Backhouse, 17 Ves. 283; Second Unitarian Soc. v. Woodbury, 14 Me. 281.

[266] Miller v. Smythe, 92 Ga. 154, 18 S. E. 46.

[267] White v. Cannon, 125 Ill. 412, 17 N. E. 753.

[268] Field v. Herrick, 101 Ill. 110, affirming 5 Ill. App. 54; Griffith v. Schwenderman, 27 Mo. 412; Holmes v. Blogg, 2 Moo. 552, 8 Taunt. 508, 4 E. C. L. 252; Cheshire v. Barrett, 4 McCord L. (S. Car.) 241, 17 Am. Dec. 735; Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38.

law does not enable him to do that. He may, it is true, avoid the lease; he may escape the burden of the rent and avoid the covenants; but that is all he can do.[269] Lord Mansfield once said in delivering his opinion in a famous case before the House of Lords: "If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again."[270] In one case the lessee who was an infant at the time the lease was made, became of age before the expiration of the term but continued to occupy the leased premises until the end of it. Even if his infancy would have been otherwise available, this continuance in possession subsequent to his becoming of age was a ratification of the lease, and rendered all its provisions obligatory upon him.[271] It is laid down in an ancient authority that if an infant take a lease rendering rent and continue in possession several years after he comes of age it is a confirmation of the contract *ab initio* and he is bound for the rent in arrear.[272] So if the term be from month to month and the infant, after reaching full age, holds over after the expiration of a month, such holding over is a ratification of the lease so as to render him liable for the rent in arrear during his occupancy before as well as after attaining his majority.[273] Indeed, the mere fact that an infant has enjoyed the possession of premises up to a rent day has been held to make him liable for rent even without the concurrent circumstance that he has prior thereto come of age.[274] There is a dictum to the contrary by Baron Parke,[275] based on a passage from Bacon.[276] Chief Baron Pigot,[277] however, thought that the proposition in Bacon was not borne out by the authorities cited. He was of opinion that if the infant does not avoid the tenancy under which he occupies before the rent becomes due, the mere fact of infancy constitutes no defense. According to the authorities the infant owes the rent, because he has an equivalent in the occupation and enjoyment of the land. The reason given by Justice Newton lies at the root of the infant's liability; "he has had a *quid pro quo*."[278] So if the infant continues to

[269] Holmes v. Blogg, 2 Moo. 552, 8 Taunt. 508, 4 E. C. L. 252.

[270] Drury v. Drury, 2 Eden 39, 72.

[271] Baxter v. Bush, 29 Vt. 465.

[272] Ketsey's Case, Cro. Jac. 320; Cheshire v. Barrett, 4 McCord L. (S. Car.) 241, 17 Am. Dec. 735; Bacon's Abr. Infancy and Age (I) 8.

[273] Harris v. Knowles, 26 Wkly. N. Cas. 249.

[274] Kirton v. Elliott, 2 Bulst. 69.

[275] North Western R. Co. v. M'Michael, 5 Ex. 114, 125.

[276] Bacon's Abr. Infancy and Age (I) 8, where it is said that the case in 2 Bulst. 69, is the same as Ketsey's Case, Cro. Jac. 320, but that in the former report no notice was taken of the fact that the infant had come of age.

[277] Blake v. Concannon, Ir. R., 4 C. L. 323.

occupy without repudiation, the landlord, on the accruing of the rent, has a vested right of suit against the infant for the rent which has so accrued.

§ 93. Executors and administrators.—Except in the states where an authority is conferred by statute, the executor or administrator is not entitled or bound to take charge of the real estate of his testator or intestate, unless he is ordered by the probate court to sell or lease it to pay debts and legacies.[279] In about half the states of the United States statutes exist which confer a greater or less amount of authority upon a personal representative to deal with the real estate of a deceased person. Even when a right of possession is conferred by statute, it would cease when the estate is settled; so a lease which extends beyond the time when the administration is wound up, would be voidable at the election of the heirs. The right to lease is conferred by the statutes for the purpose of administration and is limited to that period. If, however, the heirs did not elect to terminate the lease, but recognized its validity and the tenancy under it during the term named, it was afterward of no consequence that it might have been avoided. Furthermore, the heirs could not ratify the lease without accepting all its terms.[280] But any lease for a definite term is subject to termination by final distribution of the estate and the discharge of the administrator.[281] In Michigan the statute gives to the executor the right to lease the real estate of his testator from year to year subject to the contingency that the estate be not settled in the meantime. The term from "year to year" as used in the statute should be construed according to the well-understood meaning of the term. So a lease by executors for a two-year term, being void, creates a tenancy from year to year, as in ordinary cases, terminable at the expiration of one year from the time of the service of a notice to quit.[282] In Arkansas the statutory authority of an administrator

[279] 21 Hen. 6, 31b.

[279] Woerner on Administration, 2d ed., p. 715; Grady v. Warrell, 105 Mich. 310, 63 N. W. 204.

[280] Smith v. Park, 31 Minn. 70, 16 N. W. 490.

[281] Doolan v. McCauley, 66 Cal. 476, 6 Pac. 130.

[282] Grady v. Warrell, 105 Mich. 310, 63 N. W. 204. The court says: "There are reasons for thinking the legislature may have intended to allow technical leases from year to year. It is well known that farming lands are leased in the spring. Such a lease for a single year does not permit the raising of a crop of wheat, which is the great staple crop of the state, and without the privilege of raising which the rental value of farming lands would be lessened. . . We therefore conclude that we should construe this statute according to the well under-

to deal with his intestate's lands is narrowly confined. The authority of the lawful administrator to sue for the rents of real estate does not follow. The statute confers the power upon an administrator to control the lands of his intestate for the purpose of paying debts. His authority in that respect is derived solely from the statute, for at common law the administrator had nothing whatever to do with the lands of his intestate. After the lands were no longer needed for the purposes of administration, the administrator would have no power to control the rents.[283] In Utah the statutory authority of executors to lease land belonging to their intestate is such that written authority from the others is necessary to enable a minority to contract for the estate if the others are in the state and not under disability.[284] So where one of six executors executed a lease without written authority from the other five, such instrument was invalid by the statute of frauds.[285]

Moreover, if an administrator leases land in pursuance of a power conferred by statute he must comply with the requirements of the statute as to the mode of effecting the contract. If the statute enacts that the lease shall be made at public outcry, a renting by private arrangement would be invalid and would not in any way affect the right of devisees.[286] The power and duty of an administrator to lease lands will authorize him to make such repairs as are necessary to make the lands tenantable. Otherwise it would be impossible for the power to be justly and prudently exercised. But even if without authority to stipulate with the tenant for the making of repairs, the administrator could not avoid the stipulation. It would be binding upon him personally and would inhere to the contract of renting, and whoever claimed its enforcement would take it *cum onere*.[287] As a general rule, a trustee cannot avoid his contracts, or nullify his acts, because they may be in excess or in abuse of his authority.[288]

§ 94. Mortgagor and mortgagee.—A lease already existing at the date of the mortgage is in no way invalidated by the giving of the mortgage. It is then a paramount interest, and the mortgage is sub-

stood meaning of the term 'from year to year.' . ."

[283] Stewart v. Smiley, 46 Ark. 373; Chowning v. Stanfield, 49 Ark. 87, 91, 4 S. W. 276.

[284] 2 Comp. Laws 1888, § 4030.

[285] Utah L. & T. Co. v. Garbutt, 6 Utah 342, 23 Pac. 758.

[286] Martin v. Williams, 18 Ala. 190; Chighizola v. Le Baron, 21 Ala. 406.

[287] Vandegrift v. Abbott, 75 Ala. 487.

[288] Stoudemeier v. Williamson, 29 Ala. 558; Farrow v. Bragg, 30 Ala. 261; Riddle v. Hill, 51 Ala. 224.

ject to it. The mortgagee has only the rights of the mortgagor as against the lessee. The mortgagor may lawfully receive the rents until the mortgagee interferes. A mortgage of premises already leased operates as an assignment of the reversion. The rights and liabilities of the parties under a lease made after the mortgage are very different from those which exist when the mortgage is made after the lease. There is then no privity of contract between the mortgagee and the lessee of mortgaged land. The mortgagee may treat a lessee holding under a lease from the mortgagor as a trespasser, and eject him; but unless the tenant has attorned to him, he cannot distrain or bring an action for rent, as there is no relation of landlord and tenant between them. A mortgagor cannot make a lease of the mortgaged premises which will be binding upon the mortgagee.[289] If the mortgagee obtains possession of the property after the maturity of the mortgage and pending the right of the mortgagor to redeem and leases it, such lease will be determined by the exercise of the mortgagor's right to redeem.[290] The purchaser at a foreclosure sale under a mortgage senior to an outstanding lease does not thereby become the landlord of the lessee and cannot recover rent from him without an attornment.[291] Mere notice of the sale does not make the tenant liable to such purchaser.[292]

§ 95. Infancy of lessor.—The general rule of law undoubtedly is that a grant of a leasehold estate by an infant lessor is voidable by him but is not absolutely void. However, it seems that an infant must act in person to grant a lease which is *prima facie* valid, and if an agent appointed by the infant attempts to do so, the instrument is absolutely void. Baron Parke said on this point: "An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the infant, neither does his ratification bind him. There is no doubt about the law; the lease of an infant to be good must be his own personal act."[293] So it was ruled in an early case that a total failure of consideration rendered a lease absolutely void.[294] But any valuable consideration seems sufficient

[289] Jones on Mortgages, ch. XVIII.
[290] Willard v. Harvey, 5 N. H. 252.
[291] Reed v. Bartlett, 9 Ill. App. 267; Rogers v. Humphreys, 4 A. & E. 299.
[292] Evans v. Elliot, 9 A. & E. 342.
[293] Doe v. Roberts, 16 M. & W. 778, 781.
[294] In Humphreston's Case, 2 Leon. 216, Gawdy "conceived that this lease for years made by the infants, without deed and without rent reserved is not void, so as every stranger shall take advantage of it, but only voidable; for an infant may make a bond, and a contract for his commodity and profit and

and an ordinary lease made by an infant is not void but voidable only, notwithstanding that the rent reserved is not the best obtainable. A lease made by an infant, so reserving a rent, is not avoided by a lease of the same lands, made to a third person by the infant on his attaining his full age. To avoid a lease made by an infant, under which the lessee is in possession, upon the lessor attaining twenty-one years of age, some act of notoriety, such as ejectment, entry, or demand of possession, is requisite.[295] And, according to modern authority, it would seem that an infant cannot during infancy avoid a lease made, reserving a rent for his or her benefit. There are express decisions to that effect,[296] and the law is so stated by text writers.[297] A passage in Coke on Littleton[298] is usually cited to the contrary effect, but that was under the notice of the court in one of the decisions referred to. In another case the very learned Judge Buller says: "Notwithstanding the decisions in Co. Lit., which is also laid down in Brownlow, I will freely own that I am of opinion against the lessor of the plaintiff on the other ground; for all the modern cases have expressly held that an infant cannot avoid a lease which is for his own benefit."[299] It has been laid down as a general principle, that if an agreement be for the benefit of the infant at the time, it shall bind him.[300]

§ 96. Although a room may properly be regarded as a necessary, it does not follow that a lease to an infant can be supported on the ground that the premises demised were a necessary for him. An

the same shall bind him; as for his meat and drink, apparel, etc., but if upon such lease he had reserved a small rent, as one penny where the land was worth £100 per annum, such a lease had been void; and in this case this lease was made upon the land and was made for to try the title to it, which is a good consideration and to the profit of the infant and for his advancement and the lease is not void."

[295] Slator v. Brady, 14 Ir. C. L. 61. In the case of Hudson v. Jones, Trinity Term, 6 Ann. B. R., it is said to have been held that if an infant grant a rent charge out of his land it is not absolutely void, but only voidable by him when he comes of age, for that if the grantee should then distrain for the rent, though the other may bring an action of *trespass*, yet he cannot plead *non concessit;* for the deed is only voidable by the showing of his infancy, and not void because it was delivered with his own hand. Note in 3 Mod. 310.

[296] Slator v. Brady, 14 Ir. C. L. 61; Hartshorn v. Earley, 19 W. C. C. P. 139; Lipsett v. Perdue, 18 Ont. 575.

[297] Woodfall's Landlord & Tenant 40, 41.

[298] Co. Lit. 380b.

[299] Maddon v. White, 2 Term R. 159.

[300] Zouch v. Parsons, 3 Burr. 1794; Drury v. Drury, 5 Bro. P. C. 570.

infant cannot make a binding executory agreement even to purchase necessaries. So long as the infant actually occupied the room as his sole lodging room, it was clearly a necessary for him, for the use of which the law would compel him to pay, but the question is only as to liability for rent after occupation ceased. The transaction may be regarded as an agreement on the part of the landlord to supply the infant with necessary lodgings for the year, and on the part of the infant as an executory agreement to pay an agreed price for them from week to week; or it may be regarded as what on the whole the parties intended it to be, a parol lease under which possession was taken, and an executory agreement on the part of the infant to pay rent. If regarded in the former light the defense of infancy is a good defense; for in that case the suit is upon an executory contract to pay for necessaries which the infant refused to take and which therefore he may avoid. If the transaction is regarded as a lease under which possession was taken, executed on the part of the landlord, with a promise or agreement on the part of the infant to pay rent weekly, infancy is equally a defense. As a general rule, with but few exceptions, an infant may avoid his contracts of every kind, whether detrimental to him or not and whether executed or executory. The agreement here does not come within any of the exceptions to the general rule.[301] Where an infant agrees to pay a stipulated price for necessaries, the party furnishing them recovers not necessarily that price but only the fair and reasonable value of the necessaries.[302]

§ 97. **Assignment by infant.**—Transfers of the reversion do not affect the term which precedes it, so that the assignment of the reversionary interest to an infant does not render voidable an outstanding lease. In case an infant acquires the reversion upon a periodical lease, he must give the required notice to quit the same as other lessors.[303] Where an infant lessee assigns the term, the lessee is liable to pay rent to the lessor during his occupancy, until the minor disaffirms the assignment. The foundation for this is that the assignee has enjoyed the premises, and his occupation has been legal, and the assignment being voidable and not void, does not relate back to invalidate everything before it.[304]

[301] Gregory v. Lee, 64 Conn. 407, 30 Atl. 53.

[302] Earle v. Reed, 10 Metc. (Mass.) 387; Barnes v. Barnes, 50 Conn. 572; Trainer v. Trumbull, 141 Mass. 527, 6 N. E. 761; Keener's Quasi Contracts, p. 20.

[303] Maddon v. White, 2 Term R. 159.

[304] Rothschild v. Hudson, 6 Wkly. L. Bul. 752, 8 Ohio Dec. R. 259.

4. *Description of Premises.*

§ 98. Where a lessee has not entered into occupation, the lease must with reasonable certainty describe the land demised, either by particular words or by reference to something by which its location can be determined. Unless it does, a lessee who has not entered cannot be held for rent.[305] The authorities establish the proposition that a lease or contract for the conveyance of land must, to be enforced, contain a description of the land. But where the description, as far as it goes, is consistent, without being sufficiently complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract. Parol evidence cannot be given first to describe the land and then to apply the description; such evidence must not contradict the written instrument, but aid it.[306] Where a lease described the premises as a farm belonging to the lessor, known as "Rose Hill," but did not show the state, county or civil district in which the farm was situated, it was nevertheless valid, as it was shown on the face of the lease that both parties resided in the same county. It could be shown by extrinsic evidence that a farm lying in that county had been owned by the lessor named and that it was known generally as "Rose Hill."[307] The parol proof thus resorted to is not to introduce any additional evidence as to the terms of the contract but simply to ascertain if there be lands or property known by the name or description given in the writing and where that property is.[308] In applying a lease to the land, oral evidence is competent to show where, at the time of the execution of the lease, the streets mentioned in it were and what buildings there were at the corner of such streets. The lease must be construed with reference to the existing geography of the premises. But parol evidence of the practical construction given to a lease by the subsequent acts of the parties thereto is not admissible unless the language in the description of the property leased is doubtful.[309] The general rule as to the construction of grants is

[305] Bingham v. Honeyman, 32 Ore. 129, 51 Pac. 735, 52 Pac. 755; Noyes v. Stauff, 5 Ore. 455; Patterson v. Hubbard, 30 Ill. 201.

[306] Baldwin v. Kerlin, 46 Ind. 426; Miller v. Campbell, 52 Ind. 125; Pulse v. Miller, 81 Ind. 190; Weaver v. Shipley, 127 Ind. 526, 27 N. E. 146; Guy v. Barnes, 29 Ind. 103; Crawford v. Morris, 5 Grat. (Va.) 90.

[307] Dougherty v. Chestnutt, 86 Tenn. 1, 5 S. W. 444.

[308] Guy v. Barnes, 29 Ind. 103; Johnson v. Kellogg, 7 Heisk. (Tenn.) 262; House v. Jackson, 24 Ore. 89, 32 Pac. 1027.

[309] Durr v. Chase, 161 Mass. 40, 36 N. E. 741.

that if there are certain particulars once sufficiently ascertained which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant;[310] and this general rule has been held to apply to grants by way of lease.[311] Thus where premises were correctly described by number on a surveyor's plan and the lessee occupied and paid rent, a further erroneous description by metes and bounds could be rejected as surplusage.[312] A technical misdescription of the leased premises is immaterial in an action for rent, where the property is otherwise so defined as to fully advise the parties of the subject-matter of the lease,[313] or where the tenant has been in occupation of the premises during the time for which rent is claimed.[314]

A misstatement of the quantity of land included in a given description will not control but will give way to the other parts of the description.[315]

§ 99. **The practical location of the boundaries of the leased premises,** coupled with the subsequent possession of the same by the tenants by and with the landlord's knowledge and consent, is a sufficient location of the property.[316] The lessee cannot escape liability for the rent provided for in a lease, where he enters into possession, on the ground that the description of the premises was uncertain.[317] This is in accord with the general rule that parol evidence of the practical construction given by the parties, by acts of occupancy, recognition of monuments or boundaries, is admissible for the purpose of identifying the land and in aid of the interpretation of the deed.[318] As between the parties to a lease extrinsic evidence is admissible to

[310] Jackson v. Brownson, 7 Johns. (N. Y.) 227; Jackson v. Wilkinson, 17 Johns. (N. Y.) 146; Doe v. Thompson, 5 Cow. (N. Y.) 371.

[311] Lush v. Druse, 4 Wend. (N. Y.) 313; Hibbard v. Hurlburt, 10 Vt. 173; Hamilton v. Ames, 74 Mich. 298, 41 N. W. 930; Andrew v. Carlile, 4 Colo. App. 336, 36 Pac. 66.

[312] Lush v. Druse, 4 Wend. (N. Y.) 313; Hay v. Cumberland, 25 Barb. (N. Y.) 594; Tumbridge v. Read, 109 N. Y. 641, 16 N. E. 534.

[313] Andrew v. Carlile, 4 Colo. App. 336, 36 Pac. 66.

[314] Hoyle v. Bush, 14 Mo. App. 408; Whipple v. Shewalter, 91 Ind. 114.

[315] Jackson v. Barringer, 15 Johns. (N. Y.) 471.

[316] Weaver v. Shipley, 127 Ind. 526, 27 N. E. 146; Jackson v. Perrine, 35 N. J. Law 137; Lush v. Druse, 4 Wend. (N. Y.) 313; Pierce v. Minturn, 1 Cal. 470; Richards v. Snider, 11 Ore. 197, 3 Pac. 177.

[317] Whipple v. Shewalter, 91 Ind. 114; Hoyle v. Bush, 14 Mo. App. 408.

[318] Stone v. Clark, 1 Metc. (Mass.) 378; Waterman v. Johnson, 13 Pick. (Mass.) 261; Ballance v. City of Peoria, 180 Ill. 29, 54 N. E. 423, reversing 70 Ill. App. 546.

show that land described in the lease as about four acres was set off by the parties by metes and bounds. Had there been any reference, however vague, in the lease to the demarcation resorted to by the parties, there could be no doubt that the proof of such demarcation might be shown by parol. From the terms of this lease it did appear that they had in mind a particular tract of four acres and "we see no reason," say the court, "why extrinsic evidence to identify this tract was inadmissible. It must be remembered, however, that we are discussing this question only as it affects the immediate parties to the instrument."[319] A gas lease of eighty acres of a certain tract, reserving sixty acres around the buildings to be specified by the lessor, is a valid description when the lessor is ready and willing at all times to designate the sixty acres and he need not do so till the lessee is ready to begin operations.[320]

After the lessee had occupied the premises and paid rent for them, he cannot raise the objection of insufficiency of description because such defects were cured by possession.[321] Where the lessee has occupied during the term of the lease, it is not necessary to consider whether the uncertainty of the words of description is helped by the fact of occupation at the time, so far as to make the instrument a good demise. If the lessee kept possession under it, whether it is good or bad, the covenant is the measure of his liability to pay. He cannot take the benefit and repudiate the liability for rent, upon the ground that the benefit was not conveyed to him in effectual terms. Even if the covenant did not bind as such, the law would imply a promise to pay at the rate expressed in the covenant.[322] Nor can the lessor object to a description in the lease after the lessee has gone into possession of land designated by the lessor.[323]

§ 100. A defective or totally inadequate description cannot be cured by parol evidence where the instrument to be valid must be in writing. It is permissible for an instrument to refer to another description to identify the premises; but a reference to a conversation for this purpose would not be sufficient because of the require-

[319] Schneider v. Patterson, 38 Neb. 680, 57 N. W. 398.

[320] Indianapolis Nat. Gas. Co. v. Spaugh, 17 Ind. App. 683, 46 N. E. 691.

[321] Pierce v. Minturn, 1 Cal. 470; Bulkley v. Devine, 127 Ill. 406, 20 N. E. 16; Appleton v. O'Donnell, 173 Mass. 398, 53 N. E. 882; McLennan v. Grant, 8 Wash. 603, 36 Pac. 682.

[322] Appleton v. O'Donnell, 173 Mass. 398, 53 N. E. 882.

[323] Weaver v. Shipley, 127 Ind. 526, 27 N. E. 146.

ment of the statute of frauds that the lease be in writing.[324] If the paper purporting to be a lease does not describe the property leased, the ambiguity is patent, and parol evidence is not admissible to explain it.[325] If there is no ambiguity or exception in a description, the general rule is that the language used must control in determining what lands are included in a lease.[326]

§ 101. **"The question whether a particular place is a part of the demised premises** does not depend exclusively on the question of boundary but also upon the question of intention, which may be determined by bringing in aid of the words of the demise such extrinsic facts explanatory of the subject and all the rights of the parties as may show the meaning of the instrument and the intention of the parties."[327] In a conveyance, in general terms, of a house, everything that belongs to it passes with it, and whether a thing is parcel of the thing demised is always a matter of evidence. Thus parol evidence was admitted to show that the parties could not have intended to embrace in the lease a cellar situated under the yard which was demised.[328] A description of an entire building such as a hotel building by the name by which the hotel business is known is open to testimony upon the point as to what the name ordinarily meant and included in common parlance. Whether the entire building or only the part used for hotel purposes was intended by the parties in the contract could be legitimately determined by parol testimony.[329] It was argued that "house" means the whole of a house, and not part of a house; that it includes all upon the same foundation and covered by the same roof. This was admitted to be an argument of considerable weight if the term were used in its generic sense, as "my house, situated in" such a town or such a street. But it was plainly used here as a proper name or specific designation. A hotel may be complete in all its parts without including separate tenements under it and is often designated by the term "house," so in a demise for a term of years with the furniture of the hotel, it leaves the matter questionable.[330]

[324] Jarboe v. Mulry, 49 N. Y. Super. Ct. 525; Wright v. Weeks, 25 N. Y. 153.

[325] Noyes v. Stauff, 5 Ore. 455.

[326] Ballance v. City of Peoria, 180 Ill. 29, 54 N. E. 428, reversing 70 Ill. App. 546; Fowler v. Black, 136 Ill. 363, 26 N. E. 596.

[327] Trimble v. Ward, 14 B. Mon. (Ky.) 8, citing Doe v. Burt, 1 Term R. 701; 1 Greenleaf's Evidence, § 286; Hibbard v. Hurlburt, 10 Vt. 173.

[328] Cary v. Thompson, 1 Daly (N. Y.) 35; Doe v. Burt, 1 Term. R. 701, 704.

[329] Harris v. Dub, 57 Ga. 77; Sargent v. Adams, 3 Gray (Mass.) 72, 63 Am. Dec. 718.

[330] Sargent v. Adams, 3 Gray (Mass.) 72, 63 Am. Dec. 718.

The word "furniture" employed in a lease of "a hotel with the furniture therein," includes that which furnishes or with which anything is furnished or supplied,—whatever must be supplied in a house, a room, or the like, to make it habitable, convenient or agreeable; goods, vessels, utensils and other appendages necessary or convenient for housekeeping; whatever is added to the interior of a house or apartment for use or convenience.[331] But the term "appurtenances" was held not to include an iron kettle for heating water situated on the lessor's adjacent lot, not included in the lease and not indispensable to the enjoyment of the hotel, though used by the lessor in connection therewith.[332]

§ 102. A lease of a building eo nomine is a lease of the land on which the building stands. Land may be granted or leased by the description of a building on it. "And by the grant of a house," we find it said in Shepard's Touchstone, "the ground whereon it doth stand doth pass."[333] Nearly two centuries ago it was adjudged by the court of King's Bench that a garden may be said to be parcel of a house, and by that name will pass in a conveyance.[334] So the general rule is well settled today that the grant of a house, store, mill or other building carries with it the land under the building.[335] A case may be taken out of this general rule if the lease or other grant shows that it was the intention of the parties that the building only or a room in it should pass, and not the land. But there is nothing to indicate that such was the intention of the parties where the lease is of the whole building. The plain intent of a clause requiring the lessee to pay all taxes assessed upon the premises is that they are to pay taxes upon the whole estate including the land. A provision that if the premises are destroyed by fire, the rent shall be suspended until the premises are put in proper condition for use, by the lessor, implies that the lease is to continue though the build-

[331] Bell v. Golding, 27 Ind. 173.

[332] Barrett v. Bell, 82 Mo. 110, 52 Am. R. 361.

[333] Shep. Touch. 90.

[334] Smith v. Martin, 2 Saund. 400.

[335] Humiston &c. Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893, affirming 70 Ill. App. 349; Leiferman v. Osten, 167 Ill. 93, 47 N. E. 203, affirming 64 Ill. App. 578; Chesebrough v. Pingree, 72 Mich. 438, 40 N. W. 747, 1 L. R. A. 529; Winton v. Cornish, 5 Ohio 477; Lanpher v. Glenn, 37 Minn. 4, 33 N. W. 10; Winchester v. Hees, 35 N. H. 43; Wilson v. Hunter, 14 Wis. 683, 80 Am. Dec. 795; Blake v. Clark, 6 Me. 436; Forbush v. Lombard, 13 Metc. (Mass.) 109; Oliver v. Dickinson, 100 Mass. 114; Sherman v. Williams, 113 Mass. 481; Rogers v. Snow, 118 Mass. 118; Bacon v. Bowdoin, 22 Pick. (Mass.) 401.

ing should be destroyed.[336] However, a lease of certain apartments in a building is not to be considered as a lease of land but only as a lease of apartments in the building distinct from the land.[337] This is the rule where the building is destroyed by fire, the cases holding that where the building containing the apartments leased is destroyed by fire, the lease is terminated.[338] Not only the land under the building but the land under its overhanging projections passes. Thus land under the eaves of a house was included in a lease and passed as parcel under the description of the "brick building," as the eaves are a part of the building, the land under them is included in the description when owned by the grantor. Where land is conveyed, bounded on a house as a monument, the land to the edge of the eaves only passes, that being the extreme part of the building; so where the house itself is granted or demised, the extreme parts of the house are the bounds and limits of the conveyance, and such title as the grantor has to the land thus occupied by the whole house passes by the grant or demise.[339]

"In cases where different rooms in the same building are leased to separate tenants," said the Massachusetts court, "the situation of the property and the nature of the tenures exclude the idea that each tenant takes an estate for years in the land. Such estates existing at the same time in different tenants are inconsistent and impossible. . . . The bank and Lawrence cannot both take an estate for years of the same land."[340] The owner can grant the right to take all the minerals underneath, or those twenty feet beneath the surface only; to dig all the turf; to inhabit a cave, if there be one; to occupy a room in the third story; to occupy the second story, a room in the first story or the cellar or a part of the cellar. By such grants the land does not pass. The lessees of a middle story of a house are limited above and below as well as on the sides, yet the land is as necessary to sustain their part of the house as that below.[341] So a lease of a basement and first story of a building without anything more does not transfer the land upon which the building

[336] Rogers v. Snow, 118 Mass. 118.

[337] Kerr v. Merchants' Exch. Co., 3 Edw. Ch. (N. Y.) 316; Leiferman v. Osten, 167 Ill. 93, 47 N. E. 203, affirming 64 Ill. App. 578; Lanpher v. Glenn, 37 Minn. 4, 33 N. W. 10.

[338] Stockwell v. Hunter, 11 Metc. (Mass.) 448; Womack v. McQuarry, 28 Ind. 103; Graves v. Berdan, 26 N. Y. 498; McMillan v. Solomon, 42 Ala. 356, 94 Am. Dec. 654; Harrington v. Watson, 11 Ore. 143, 3 Pac. 173; Leiferman v. Osten, 167 Ill. 93, 47 N. E. 203, affirming 64 Ill. App. 578.

[339] Sherman v. Williams, 113 Mass. 481.

[340] Shawmut &c. Bank v. City of Boston, 118 Mass. 125, per Dewey, J.

[341] Winton v. Cornish, 5 Ohio 477.

stands to the lessee so that a mechanic could claim a lien for materials under the mechanic's lien law.[342]

A lease of a building, described as being certain numbers on a certain street, was, however, held to carry the land as well as the building, although certain portions of the building were reserved to the use of the lessor. It was contended that on account of the exceptions from the general description, the lease was to be regarded as a lease merely of portions of the building. On the contrary, the lease was not of certain portions of the building without the land, but of the land and building except certain minor portions of the building. The legal rights of the parties would be the same as if the lessor had leased the excepted portions to a third person instead of retaining them. In that case the lease would surely convey an estate in the land which the tenant of particular rooms had not acquired.[343]

§ 103. **A description of a house by the street number** in a demise carries with it the premises of which the building which is strictly the house is the main or principal feature.[344] Only so much of the lot upon which the building described by number is situated passes as is necessary for the complete enjoyment of the building for the purpose for which it was let. If a lease does not in terms convey any right to passageways, to lots in the rear of the buildings, all that can be claimed is that, by construction, the lease conveys so much of adjoining premises as is necessary for the enjoyment of the building for the purpose for which it is rented. Whether passageways or other parts of the lot are so necessary as to pass is a question of fact for the jury.[345] When a house or building is described in a lease by the numbers over the outside doors on the street, the inference is that a building is intended access to which is had by these doors from the street. A part of the building inaccessible by this entrance was held not to be included in the lease. When the building thus described has a solid brick partition wall "extending from the cellar to the roof, without door passageway or other opening therein,"

[342] Seidel v. Bloeser, 77 Mo. App. 172.

[343] Humiston &c. Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893, affirming 70 Ill. App. 349.

[344] Armstrong v. Crilly, 51 Ill. App. 504, affirmed in Ill.; Humiston &c. Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893, affirming 70 Ill. App. 349; Houghton v. Moore, 141 Mass. 437, 6 N. E. 517.

[345] Patterson v. Graham, 40 Ill. App. 399, affirmed 140 Ill. 531, 30 N. E. 460; Hosher v. Hestermann, 58 Ill. App. 265.

the inference is unavoidable that it was so constructed that the different parts of the building might be separately occupied. Such a partition wall makes the structure two tenements for the purpose of occupation as distinctly as if they had not been built as parts of one block. If the partition wall had remained intact, the lease could not be construed to include a building on a different street inaccessible from the street mentioned in the lease. The separate character of the two parts above the first story was not changed although the partition was so far taken down in the first story as to make the whole floor on that story one room. As regards the upper stories, it was still true that occupants of one part could not enter the other except by going out of the building upon the street and entering through outside doors, in the same manner as the public entered.[846]

§ 104. **Any right of way or other easement** necessary to the enjoyment of the demised premises passes as appurtenant thereto, although not expressly mentioned in the lease, and although there is no express mention of easements, privileges, or appurtenances.[847] Thus a lease of a canal constructed by a hunting and boating club was held to pass a footpath on the side of the canal which was used by the members of the club.[848] A lease of "the storeroom in its present condition" was held to pass a backyard, back ways and outhouses used in connection with it.[849] And it was held that a demise of a "store" included the land under it and to the middle of a private way in the rear, the fee of which was in the lessor.[850] But in another case where a lease of a building did not in terms convey a right to a passageway in the rear, all that could be claimed was that the lease conveyed so much of the lot as was necessary for the enjoyment of the building for the purpose for which it was rented.[851]

The appurtenances of ingress and egress, essential to use and reasonably within the contemplation of the parties at the time of the leasing, are as much a part of the room conveyed as the room itself. In other words when a person leases a room in a building with doors and passageways so connected with other rooms as to be

[846] Houghton v. Moore, 141 Mass. 437, 6 N. E. 517.

[847] Oliver v. Dickinson, 100 Mass. 114; Pettingill v. Porter, 8 Allen (Mass.) 1; Kent v. Waite, 10 Pick. (Mass.) 138.

[848] Alexander v. Tolleston Club, 110 Ill. 65.

[849] Witte v. Quinn, 38 Mo. App. 681.

[850] Hooper v. Farnsworth, 128 Mass. 487.

[851] Patterson v. Graham, 140 Ill. 531, 30 N. E. 460.

essential to the use and enjoyment of the one leased, the law implies a covenant that such use shall not be interfered with during the continuance of such term.[352] When a person hires a room in a building, a right to use the apparent means of access and exit often passes as appurtenant to the premises hired. In modern buildings of great height this doctrine may be applied to elevators. Whether an active duty to maintain an elevator can be implied may be open to question, but the duty to permit tenants to use it may be implied if this is reasonably necessary for the beneficial occupation of the rooms let, and if, from the construction of the elevator and of the passageways it is apparent that the elevator was intended for the use of the tenants.[353]

In construing what passes as appurtenances in a lease, the situation of the parties at the time of making the lease must be considered, and where the lease contained an agreement to give plaintiff one half the steam power and to keep up such power ten hours per day, it was held that the right to maintain an exhaust pipe to plaintiff's part of the premises passed as an appurtenance.[354] A blast used in a blacksmith's shop was held to pass as an appurtenance to "power" which was to be furnished by the lessor by the terms of the lease.[355]

A lease of a loft contained the memorandum, "tenant to have privilege of storing a reasonable number of cases in the basement," and it was held that this was a grant of the privilege in premises not included in the lease. This right could be waived and in that case failure to get the use of the basement could not be set up as a defense in an action of rent.[356]

§ 105. The lease of property abutting on a public street carries with it all the easements, incidents, and rights of the owner in such street belonging to such property, unless especially reserved to the lessor in the lease. The tenant acquires all rights to the use of the street in front of the leased premises, including the right to air and light, access, ingress and egress, incident to the property, not only as against the public but as against the landlord. He becomes entitled, by virtue of his lease, to a free and unobstructed street, incumbered only with the easement of the public and the privileges of the municipality, and this right constitutes a part of the leased premises. The tenant's rights in this respect are as full

[352] Shaft v. Carey, 107 Wis. 273, 277, 83 N. W. 288.

[353] Cummings v. Perry, 169 Mass. 150, 47 N. E. 618

[354] Thomas v. Wiggers, 41 Ill. 470.

[355] Thropp v. Field, 26 N. J. Eq. 82.

[356] Cluett v. Sheppard, 131 Ill. 636, 23 N. E. 589.

and complete as his right to the part of the building he occupies, and his right to the one can no more be interfered with than his right to the other.[357] Thus in a case where premises fronting on a river were leased to a boating club for a boat house and by the terms of the lease the lot extended to the channel bank of the river and included "all and singular the benefits, liberties and privileges to the said premises belonging," the water way was a material portion of the leased premises; so that an interference by the landlord with the use of such water way constituted an eviction which suspended rent. The right to enter upon the land leased was of interest or benefit to the tenant only as it furnished a water front upon which the club could store its boats, and launch and land the same unobstructed. The disturbance of the lessee's beneficial enjoyment of the water front amounted to an actual eviction.[358]

§ 106. A tenant could prevent an interruption of his right to an easement for light and air by the threatened erection of a building in the yard where his easement extended, by a decree enjoining such a use of the yard. If the yard had not been part of the lot upon which the building had been standing and if it had not been appropriated for use with the building so as to pass as appurtenant thereto, and to give easements therein to the tenants, they could not have complained of the new building. Under the authorities, if the lessor had sold the store and land upon which it stood, the grantee would have taken no right to light and air from the balance of the lot. In that case the grantor could have built upon the balance of the lot, and thus have darkened the windows in the granted building without violating any rights of the grantee.[359] Yet in case of a lease failure to give tenants access to a yard does not indicate that they were to be deprived of the light and air from the yard. Windows facing such a yard are in many instances the only means to procure light for the proper transaction of business in the demised premises. The light passing into the windows from the yard is then essential to the

[357] Edmison v. Lowry, 3 S. Dak. 77, 52 N. W. 583, 17 L. R. A. 275, 44 Am. St. 774. See also, Newman v. Metropolitan El. R. Co., 10 N. Y. St. 12.

[358] Pridgeon v. Excelsior Boat Club, 66 Mich. 326, 33 N. W. 502. See also, Cochran v. Ocean Dry-Dock Co., 30 La. Ann. 1365.

[359] Parker v. Foote, 19 Wend. (N. Y.) 309, 315; Palmer v. Wetmore, 2 Sandf. (N. Y.) 316; Myers v. Gemmel, 10 Barb. (N. Y.) 537; Mullen v. Stricker, 19 Ohio St. 135; Haverstick v. Sipe, 33 Pa. St. 368; Keats v. Hugo, 115 Mass. 204.

beneficial use of the store, and it would clearly be the intention at the time the lease is made that the tenants should have it. To this extent the tenants will be entitled to enjoy an easement in the yard. They will be so far interested in it that the landlord cannot change its condition to their detriment.[360]

§ 107. What constitutes the curtilage.—By the "curtilage" which passes with the demise of a house is meant the court yard in the front or rear, or at its side, or any piece of ground lying near, inclosed and used with the house, and necessary for its convenient occupation.[361] A strip of land belonging to the lessor which had been fenced off as a separate lot was held not to pass as parcel of the premises belonging to a house although it had been formerly treated as such.[362] Yet the general rule of law is that where a house or store is conveyed, everything then belonging to or in use for the house or store passes by the grant. It is implied from the nature of the grant that the grantee shall possess the house in the manner and with the same beneficial rights as were then in and belonged to it.[363] The yard would pass, not by force of the word "appurtenances," but as portion of the premises demised.[364] An adjoining piece of land lying on a separate lot was held not to pass under the description all the "buildings, outhouses and premises of said place with the appurtenances." The land in question had no outhouses or other buildings upon it. The outhouses and erections were on the other side of the lot designated by number. By construction, the words "buildings, outhouses and premises of said place" would embrace the lot on the west side. Such a construction was necessary to give effect to the description of the property as demised in the lease. But there was nothing in the lease to make the description apply to the strip on the east side.[365]

No title in a separate out-building, yard and passageway passed as parcel of premises described as a "wooden building" when they were not within a curtilage or inclosure adjoining the wooden

[360] Doyle v. Lord, 64 N. Y. 432.

[361] People v. Gedney, 10 Hun (N. Y.) 151.

[362] McBurney v. McIntyre, 38 Ga. 261.

[363] United States v. Appleton, 1 Sumn. (U. S.) 492, 24 Fed. Cas. No. 14463; Whitney v. Olney, 3 Mason (U. S.) 280, 29 Fed. Cas. No. 17595; Comyn's Dig. Title, Grant, E. 6; Ship. Touch 94.

[364] Riddle v. Littlefield, 53 N. H. 503, 16 Am. R. 388; Doyle v. Lord, 64 N. Y. 432.

[365] Morris v. Kettle, 57 N. J. Law 218, 30 Atl. 879, s. c. 34 Atl. 376.

building and distinct from other premises; nor as appurtenant to the premises granted because land will not pass as appurtenant to land.[366]

§ 108. Use of outside walls for signs.—It may be laid down as a general rule that a tenant of business property is entitled to use for his business signs the outside of the part of the building occupied by him.[367] Though only one story of the building be included in the demise, the outside wall of the part leased passes by the lease or deed as much as the inside of the same wall.[368] The outside wall of a store or house is essential for the proper enjoyment of the interior of the building. The outer side of the wall is but one side of the same wall that has an inner side, and the removal of the wall removes both sides. Who, then, shall occupy the exterior walls of the demised building? The landlord, who for a sufficient consideration has parted with the possession and use of the property? or the tenant, who cannot have the full and complete as well as the reasonably beneficial enjoyment of the property for which he pays rent, without the opportunity to display his wares and his advertisements upon the external walls of the building? The lessee who affixes his signs and advertisements upon the walls, or thereupon suspends his wares, does so in order to attract custom and thereby increase the profit derived from the use of the demised premises. The outer wall is therefore to him a source of legitimate profit. If the lessee deems it more advantageous to employ the walls for advertising the goods or the business of others, receiving payment therefor, than to advertise or expose his own goods upon the wall, it is none of the landlord's business, unless he has restricted or forbidden such use of the premises.[369] The words "first floor" in a building are equivalent to "first story" of the building, and naturally include the walls. The apparent intention is to separate a section of the building as a distinct tenement. The words "first floor" define the lower and upper boundaries of this, but there is nothing to fix the lateral boundaries except the boundaries of the building. In this respect the words differ

[366] Oliver v. Dickinson, 100 Mass. 114; Leonard v. White, 7 Mass. 6; Ammidoun v. Ball, 8 Allen (Mass.) 293.

[367] Law v. Haley, 9 Ohio Dec. R. 785, 17 Wkly. L. Bul. 242; Baldwin v. Morgan, 43 Hun (N. Y.) 355; Riddle v. Littlefield, 53 N. H. 503, 16 Am. R. 388; Lowell v. Strahan, 145 Mass. 1, 12 N. E. 401, 1 Am. St. 422.

[368] Lowell v. Strahan, 145 Mass. 1, 12 N. E. 401, 1 Am. St. 422; Riddle v. Littlefield, 53 N. H. 503, 16 Am. R. 388.

[369] Riddle v. Littlefield, 53 N. H. 503, 16 Am. R. 388.

somewhat from the word "room." The word "room" includes a description of the perpendicular as well as the horizontal planes which bound the parcel of the house described by it and excludes the outside of lateral walls, at least when they constitute the walls of another room, as clearly as the words "first floor" exclude the flooring of the story above it. When the building adjoins the side-walk the words "first floor in building" must be held to include the entire front wall of that part of the building, unless there is something to control the natural meaning of the language.[370] However, where the general granting words of the lease do not include outside walls, an express provision authorizing the placing of signs would take effect as a license and must be exercised with regard to existing conditions as to other signs already occupying the wall.[371] In a slightly different case the facts were that certain premises contained an auditorium and certain one-story houses. The owner of land leased the auditorium to B. and the houses also situated thereon to G. The landlord then leased the space above the one-story buildings to B. to be used for advertising purposes. It was held that the landlord had a perfect right to do what he wanted with the space above the roof of the one-story building, and an injunction should be granted to protect B.'s rights.[372]

The right to the use of outside walls is one of which equity takes cognizance to enforce by injunction and where a lease does not preclude the painting of pictures on outside walls to advertise a business, the lessee may have the lessor enjoined from interfering with such form of advertising.[373] However, where the sign space, to which several tenants have the right for their business purposes, is properly and reasonably used by some of them to the exclusion of the remainder, the former, having prior possession, will not be enjoined from such exclusive use at the suit of the latter.[374] A lease of rear offices containing no privileges or directions as to the lessee's right to place signs, gives the lessee no right, as against other lessees, to place his sign in a particular locality arbitrarily chosen by him. A court of equity will not interfere by injunction until the means for an amicable settlement with the other tenants have been exhausted.[375] A new tenant would not be prevented from putting his sign on the balcony of the second floor when the lessee of that floor led him to

[370] Lowell v. Strahan, 145 Mass. 1, 12 N. E. 401, 1 Am. St. 422.

[371] Pevey v. Skinner, 116 Mass. 129.

[372] Booth v. Gaither, 58 Ill. App. 263.

[373] Baldwin v. Morgan, 43 Hun (N. Y.) 355.

[374] Law v. Haley, 9 Ohio Dec. R. 785, 17 Wkly. L. Bul. 242.

[375] Knoeppel v. Kings County F. Ins. Co., 48 How. Pr. (N. Y.) 208.

believe before he took the lease that no objection would be made, such right being conferred as against the lessor by a clause in the lease.[376]

§ 109. Riparian boundaries.—The general rule is that a riparian owner holds title to the middle of a navigable stream subject to the right of navigation resting in the public. So, where an owner of premises fronting on a river leases the property, the lessee will take to the center thread of the stream, unless there is something in the instrument showing a different intention of the parties. That is the legal effect of the conveyance and it cannot be varied or controlled by parol testimony.[377] According to these principles a lease of a tract of land bordering on a stream, would include half the bed of the stream and give the lessee whatever rights the lessor has to cut and remove ice.[378] So, a lease of certain land covered by a pond conveys as incident the water and the fish in the pond,[379] and tide and shore lands extending from a certain lot to deep water will pass under a lease of the lot as an appurtenance thereto.[380] A lessee of land bordering on a stream is entitled to the accretions thereto caused by the receding of the stream or a change in its current, during his term, even though the bank of the stream is named as a boundary of the demised premises. Such accretions will attach to and form a part of the grant, the same as under a deed of conveyance. The accretions are a part and parcel of the property, and no reason is perceived why they should not pass under a lease as well as under a deed.[381]

Where there was a lease "of the east one-half of the north one-half" of a forty-acre tract which was bounded diagonally by a lake, it was held this meant one-half the actual acreage and not one-fourth of the rectangular lot.[382]

§ 110. The reservation to lessor of a right to select a portion of the leased premises and retain them for his own use has the effect of a condition subsequent; and until the option is exercised the whole be-

[376] Snyder v. Hersberg, 33 Leg. Int. (Pa.) 158.

[377] Tyler v. Williamson, 4 Mason (U. S.) 397, 24 Fed. Cas. No. 14312; Hooker v. Cummings, 20 Johns. (N. Y.) 91; Claremont v. Carleton, 2 N. H. 369; Ballance v. City of Peoria, 180 Ill. 29, 54 N. E. 428, reversing 70 Ill. App. 546.

[378] Marsh v. McNider, 88 Iowa 390, 55 N. W. 469, 45 Am. St. 240, 21 L. R. A. 333.

[379] Smith v. Miller, 5 Mason (U. S.) 191 22 Fed. Cas. No. 13080.

[380] Brown v. Carkeek, 14 Wash. 443, 44 Pac. 887.

[381] Cobb v. Lavalle, 89 Ill. 331, 31 Am. R. 91; Rutz v. Kehn, 143 Ill. 558, 29 N. E. 553. See also; Lombard v. Kinzie, 73 Ill. 446.

[382] Hartford &c. Min. Co. v. Cambria Min. Co., 80 Mich. 491, 45 N. W. 351.

longs to the lessees.[383] But an ordinary exception or reservation, if definite and valid, prevents the title from ever passing out of the grantor or lessor.[384] Where a definite general description has been given, and is followed by a loose and indefinite exception, such as "being the farm on which I live," it hardly seems possible that the parties intended to create an exception by so unsatisfactory an expression. It is not to be regarded as qualifying and restricting the definite grant, but as a matter merely of further description, introduced for the purpose of further particularity which can be rejected when found inconsistent with what preceded.[385] If an intended exception is not expressed in the contract and is not agreed to by the lessee, it will not be effective to curtail the grant.[386] The clause "which were lately in the occupation of A. B." following a general description is a restriction only where the preceding clause is general and all form but one and the same sentence, and the description is not ended as certain till the end of the sentence. Whether such language is to be construed as restrictive of what has preceded, depends more upon the connection and manner in which it is used, than upon the exact language. The expression "premises" is general and applies alike to a manor, a farm, a building or a tenement. After such a word the phrase "recently occupied by so and so" closely following is not repugnant to what has preceded, but gives definiteness and set limits to what has before been indefinitely and generally described as "the premises."[387] When following a definite description, or when repugnant to a preceding description, or when manifestly added by way of further description, different rules of construction, and different considerations control the effect to be given the phrase.[388]

A lease of land, if no reservation is made, includes the improvements or buildings on the premises leased.[389] The general principle that a lease of land carries with it the mines upon the land applies only where the contract relates to the land generally without exception or reservation.[390]

[383] Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684.

[384] Spillman v. Brown, 45 Fed. 291; Munn v. Worrall, 53 N. Y. 44; Low v. Settle, 32 W. Va. 600, 9 S. E. 922.

[385] Hibbard v. Hurlburt, 10 Vt. 173.

[386] Grauel v. Soeller, 52 Hun (N. Y.) 375, 24 N. Y. St. 278, 5 N. Y. 254.

[387] Alger v. Kennedy, 49 Vt. 109, 24 Am. R. 117; Swyft v. Eyres, Cro. Car. 548.

[388] Doe v. Burt, 1 Term R. 701; Sargent v. Adams, 3 Gray (Mass.) 72; Mitchell v. Stevens, 1 Ark. (Vt.) 16; Putnam v. Smith, 4 Vt. 622; Hibbard v. Hurlburt, 10 Vt. 173.

[389] St. Louis Pub. Schools v. Hollingsworth, 34 Mo. 191.

[390] Shaw v. Wallace, 25 N. J. Law 453; citing Keyse v. Powell, 2 E. & B. 132, 75 E. C. L. 132.

Where certain lots were definitely and unconditionally excepted from a lease of a larger parcel of ground, such lots did not pass to the lessee even though the reason assigned for excepting them was that they were subject to outstanding leases, which was not true, because these leases were not in writing and consequently void by the statute of frauds.[391]

V. *Duration of Term.*

§ 111. Leases may at law be for years, for life or of perpetual duration. Indeed, they may be made for any period which will not exceed the interest of the grantor in the premises.[392] Thus, a demise to a person, his heirs and assigns, for such term of time as he pays rent, he on his part covenanting for himself and his heirs to pay rent and perform covenants, is a perpetual lease.[393] A lease, no matter how long, does not offend the rule against perpetuities because it does not suspend the power of alienation. The concurrent action of lessee and lessor can always pass a clear estate and discharge any burdens or conditions created by the lease.[394] Nor is a lease for a term of years to commence in the future, however remote, objectionable on this score. The free and active circulation of property is not in any way impeded by such a disposition as that. But an agreement to grant a lease for life at a time more than twenty-one years in the future is bad because the *quantum* of the interest cannot be determined within the prescribed time, and so the lease could not vest within that time. Such an agreement would not be made good by a covenant for perpetual renewal.[395]

In Alabama it is provided by statute that leases shall not be made for a longer period than twenty years.[396] The construction placed upon this act is that a lease, though for a term exceeding the prescribed limit, will stand good for the term authorized by the statute. The statute draws the boundary line, separating the legal from the illegal

[391] Hargrove v. Miller, Busb. L. (N. Car.) 68.

[392] Warner v. Tanner, 38 Ohio St. 118; Folts v. Huntley, 7 Wend. (N. Y.) 210; Theobalds v. Duffoy, 9 Mod. 102; Denn v. Barnard, 2 Cowp. 595.

[393] Folts v. Huntley, 7 Wend. (N. Y.) 210.

[394] Toms v. Williams, 41 Mich. 552, 2 N. W. 814; Gomez v. Gomez, 81 Hun (N. Y.) 566, 31 N. Y. S. 206; Henderson v. Virden Coal Co., 78 Ill. App. 437; Richmond, City of, v. Davis, 103 Ind. 449.

[395] Redington v. Browne, 32 L. R. Ir. 347.

[396] Code of 1886, § 1836.

parts and leaves it to stand good for the term for which the lessor had authority to create the leasehold estate.[397]

In New York leases of agricultural lands for a longer period than twelve years are prohibited by a constitutional provision. The character of the land and not the purpose for which it is leased is made the test of the validity of the lease.[398] A lease for life is valid for twelve years after which it would terminate by operation of law.[399] A covenant for renewal extending the term for a greater period than twelve years is bad, but the lease is good for the first term.[400] So two leases executed at the same time and as part of the same transaction which create a term for more than twelve years violate the constitutional provision.[401]

Where there is nothing in the contract requiring the personal presence of the lessee, a lease for years is not terminated by his death,[402] nor would such a lease be terminated by the death of the lessor.[403]

§ 112. The term for which a lease for years is to run should be certain, with a definite time for commencement and for termination. For the sake of the validity of the instrument the duration of a lease must be certain; this includes both its commencement and termination. Unless these requirements are complied with, an estate at will only is created.[404] A long settled rule makes it essential to the validity of a lease that it be for a definite period, either expressly fixed or capable of being fixed by computation. Thus a lease of premises so long as the buildings should be used for a certain business was held not to create a term for years because it lacked a definite term.[405] A lease for so long as both parties shall please, or for

[397] Robertson v. Hayes, 83 Ala. 290, 3 So. 674; Trammell v. Chambers Co., 93 Ala. 388, 9 So. 815.

[398] Odell v. Durant, 62 N. Y. 524.

[399] Parish v. Rogers, 20 N. Y. App. Div. 279.

[400] Hart v. Hart, 22 Barb. (N. Y.) 606.

[401] Clark v. Barnes, 76 N. Y. 301, 32 Am. R. 306.

[402] Alsup v. Banks, 68 Miss. 664, 9 So. 895.

[403] Jaques v. Gould, 4 Cush. (Mass.) 384.

[404] 1 Shep. Touch 272; Co. Litt. 45b; Murray v. Cherrington, 99 Mass. 229; Cheever v. Pearson, 16 Pick. (Mass.) 260, 271; Collier v. Hyatt, 110 Ga. 317, 35 S. E. 271; Corby v. McSpadden, 63 Mo. App. 648; McClain v. Abshire, 72 Mo. App. 390; Reed v. Lewis, 74 Ind. 433, 39 Am. R. 88; Western Transp. Co. v. Lansing, 49 N. Y. 499; Lloyd v. Cozens, 2 Ashm. (Pa.) 131; Lea v. Hernandez, 10 Tex. 137; United States v. Gratiot, 14 Pet. (U. S.) 526; Bishop of Bath's Case, 6 Coke 35.

[405] Melhop v. Meinhart, 70 Iowa 685, 28 N. W. 545. See also, Cheever v. Pearson, 16 Pick. (Mass.) 260, 266.

so long as the lessee shall please, is said to be a lease at the will of both lessor and lessee. It is at most a tenancy from year to year, so long as both parties please.[406] And a lease to continue until the party of the second part is prepared to improve the ground with new buildings was held to be for so indefinite a period that it constituted a mere tenancy at will. Its duration was uncertain, since it could not be known when the lessor would be prepared to improve the property with new buildings.[407] A license given by a school district to three parties to erect a second story over a school house, and followed by a lease to them for so long as the building should stand, could not take effect as a lease for years because it was for no specified term; and it could not be more than a life estate because there were no words of inheritance. So the proper construction was that the licensee owned the second story all the time. There had been in fact no lease at all.[408]

The duration of a valid term may, however, be determined by something *ex post facto* referred to in the lease, provided the matter occur in the lifetime of both lessor and lessee.[409] The latter requirement is because no interest passes out of the lessor during his lifetime, and after his death the naming of the years will come too late. Thus it is said in an ancient case:[410] "If I make a lease for years, for so many years as I. S. shall name, and afterwards I. S., in my lifetime, names a certain number of years, it shall be a good lease for so many years as he names, for it is my demise and I am content that he should name the years, which by my own reference to his nomination, is as much as if I myself had named them. This instance is put in illustration of the general principle, that every contract sufficient to make a lease for years ought to have certainty in three limitations, viz.: in the commencement of the term, in the continuance of it, and in the end of it. So all these ought to be known at the commencement of the lease; but it is a sufficient compliance with this requirement that the duration of the term may be made certain." For a lease may be good although its duration must be settled by something *dehors* the lease itself. Thus, where a tenant erected improvements during the term and the lessor covenanted to allow him to continue to occupy until they were paid for out of the rents and profits, a valid term for years was created.[411] A lease for such time as lessee shall continue to be

[406] Doe v. Richards, 4 Ind. 374; Bacon Abr. Lease, L. 3.

[407] Corby v. McSpadden, 63 Mo. App. 648.

[408] Peaks v. Blethen, 77 Me. 510.

[409] Rector of Chedington's Case, 1 Coke 153; Say v. Smith, 1 Plowd. 269; Western Transp. Co. v. Lansing, 49 N. Y. 499.

[410] Say v. Smith, 1 Plowd. 269.

[411] Batchelder v. Dean, 16 N. H. 265.

postmaster was construed to mean for the four years during which his commission would last if it were not terminated in some unexpected way, for in every estate for years the term must be certain.[412]

§ 113. Leases running from an indefinite future time.—If a lease has a certain appointment of the number of years, although the commencement or the end of it is certainly appointed upon an uncertain time, yet such lease shall be good as a lease for years. When a lease is to run for a certain term of years, it is not rendered invalid by the circumstance that it is to begin upon the completion of an unfinished building. It has been conceded that a lease for years may begin when a home is suitable to be occupied according to the maxim, *Id certum est quod certum reddi potest.*[413]

The circumstance that the term does not take effect at once, but is postponed till a future date, is no objection, because it is a familiar doctrine that a lease for years may commence *in futuro,* as being an estate which could, even in ancient times, be created without livery of seisin.[414] Such a lease is a valid lease *in praesenti* for a term to commence *in futuro,* and the necessary element of certainty in the commencement of the term is satisfied by the completion of the building as prescribed.[415]

§ 114. A contingent limitation of a term is valid and enforceable. A lease of a grist-mill contained an agreement that, if the mill broke down, so that it could not be operated, the tenancy should expire. This provision created a contingent limitation, and when the contingency happened, the tenant was bound to take notice of it and surrender the possession.[416] When the period is fixed and definite, it does not invalidate the lease that it may come to an earlier termination. Whatever the term, it may be subject to a condition which

[412] Easton v. Mitchell, 21 Ill. App. 189.

[413] McClain v. Abshire, 72 Mo. App. 390; Noyes v. Loughead, 9 Wash. 325, 37 Pac. 452; Hammond v. Barton, 93 Wis. 183, 67 N. W. 412; Murray v. Cherrington, 99 Mass. 229.

[414] McClain v. Abshire, 72 Mo. App. 390; Batchelder v. Dean, 16 N. H. 265; Noyes v. Loughead, 9 Wash. 325, 37 Pac. 452; Hammond v. Barton, 93 Wis. 183, 67 N. W. 412; Field v. Howell, 6 Ga. 423. Under sections 1044–1047 of the Civil Code of California land may be leased to another pending its possession by a tenant whose term has not expired. A lease to begin in future is valid. Rice v. Whitmore, 74 Cal. 619, 16 Pac. 501.

[415] Hammond v. Barton, 93 Wis. 183, 67 N. W. 412; Colcough v. Carpeles, 89 Wis. 239, 61 N. W. 836.

[416] Scott v. Willis, 122 Ind. 1, 22 N. E. 786.

is a qualification annexed to the estate by the grantor[417] or the lessor,[418] whereby the estate or term granted may, among other things, be defeated or terminated.[419] Unless a definite time is set for its termination, it does not take effect as a term for years, and either party would be able to put an end to the holding, although the condition puts it in the control of one. But in spite of the fact that a tenancy at will was created rather than a term for years, the happening of the contingency would still be effective to end the estate at will. So, a lease of premises by parol till they should be sold would be terminated on a sale without any notice to quit. The agreement to give up possession on a sale operated as a contingent limitation, and when the contingency happened the term was at an end.[420] Such a stipulation in a lease would usually contemplate a perfect sale by deed which would pass both title and right to possession. As long as the landlord had the right of possession, the tenant could occupy the property. Therefore, a contract of sale which did not deprive the landlord of the right of possession and did not disturb the tenant's right to the occupancy of the property was not a sale contemplated in the lease.[421] However, it is not competent for the tenant to object that the contract of sale was not evidenced by deed conveying a perfect title. It is quite immaterial whether the agreement for a sale was such as could be coerced. Objections to its validity concerned the parties themselves, and it was not for a stranger to supervise their contract. The event on which the right of the tenant to occupy the land was to cease did actually happen as soon as the landlord sold it with a right to immediate possession.[422] In one case there was a lease of premises for five years if not sold, reserving annual rent payable semi-annually and providing that if the landlord sold within the five years, he should pay reasonable damages to the tenant. This term might be ended in two modes, either by sale or by lapse of time, and reasonable damages only became payable in case the tenancy was terminated before the crops matured in a single season.[423] Where there was a lease for three years if land were not sold, with provision that if it was not sold and landlord did not return and occupy it himself, the said lessee was to continue to have possession, it was

[417] Sperry v. Pond, 5 Ohio 387, 24 Am. Dec. 296.

[418] Folts v. Huntley, 7 Wend. (N. Y.) 210.

[419] Warner v. Tanner, 38 Ohio St. 118.

[420] Clark v. Rhoads, 79 Ind. 342; Stewart v. Pier, 58 Iowa 15, 11 N. W. 711; Dean v. Fail, 8 Port. (Ala.) 491.

[421] Stewart v. Pier, 58 Iowa 15, 11 N. W. 711.

[422] Dean v. Fail, 8 Port. (Ala.) 491.

[423] Taylor v. Frohock, 85 Ill. 584.

held that entry by the landlord would terminate it just the same as a sale of the land.[424] But in the case of a lease of land to a club during the existence of said club, the lease to cease whenever said club shall cease to exist as now organized, it was held the incorporation of the club did not put an end to the lease.[425]

The expression "used for railroad purposes" in a lease was held to mean public use for such purposes. Thus, a lease to a railroad was to continue as long as the land demised was used for railroad purposes. The main tracks were changed and this line was sold to be used for a private siding. The court decided that this terminated the lease.[426]

Where lessor reserved right to sell premises, in which case he was to purchase improvements from the tenant, it was held that the tenant could not be forced to continue as tenant of the vendee, but could insist upon a purchase of the improvements.[427]

§ 115. Happening of contingency.—When the act which terminates a contingent lease is done by the lessee, or is peculiarly within the knowledge of the lessee, the mere doing of the act does not necessarily bring the lease to an end. Thus a lease of a saw-mill was to continue until certain logs had been sawed, and it was held that the mere sawing of the last log did not *ipso facto* terminate the lease without notice to the landlord to that effect. The bare statement by the tenant that he had ceased sawing and had discharged his mill hands and the knowledge of these facts by the landlord did not constitute such notice. The tenant had a right to retain possession till he had removed his lumber and a duty to put the premises in proper repair before he asked the landlord to accept possession. If the tenant had fully performed his contract and then abandoned the premises, with the knowledge of the landlord, there would be force in the contention that the lease was at an end and no formal surrender necessary. But the premises were not in such condition that the landlord could be called on to accept possession. It followed that the tenant was responsible for negligently leaving the premises without a watchman and liable for damage caused by a fire which occurred in consequence of such neglect.[428]

After a contingent limitation, as distinguished from a condition,

[424] Lord v. Walker, 49 Mich. 606, 14 N. W. 564.

[425] Alexander v. Tolleston Club, 110 Ill. 65.

[426] Kugel v. Painter, 166 Pa. St. 592, 31 Atl. 338.

[427] Morton v. Weir, 70 N. Y. 247.

[428] Stevens v. Pantlind, 95 Mich. 145, 54 N. W. 716.

no act is necessary to vest the right in him who has the next expectant interest, since the limitation marks the period which is to determine the estate, without entry or claim.[429] A provision in a lease that the lessor may "terminate the lease at the end of any year by giving sixty days' previous notice, in case he should sell or desire to rebuild" is not a condition but a limitation and the term expires by force of the sale and notice, in sixty days thereafter, without any further act on the part of the lessor. Where covenants form conditions and not conditional limitations, a breach of them does not *ipso facto* terminate the lease. If broken, the lessor may thereupon take advantage of the breach and declare the lease at an end. The lessor, upon breach, is not to be in immediately of his former estate, but at his option, the hiring and the relation of landlord and tenant are to cease and are to continue till he shall otherwise elect.[430] If a grant be on condition, only the grantor or his representatives could avoid the estate by entry, and so a remainder man might be defeated by their failure to enter, but when it is a limitation, the former estate determined and the remainder man may enter without any act, such as entry or claim.[431]

A lease which was to continue during "the life of a building" was terminated when a material portion of the building was destroyed by fire. The question before the court was as to the interpretation of the phrase "life of the building." It decided the life of the building was terminated, within the meaning of the lease, when the building had been injured by fire or other causes to such an extent as substantially to destroy the part demised and to render it impracticable for the lessees to perform the covenant to rebuild such part except by rebuilding other important parts of the building not covered by the lease.[432]

§ 116. Lease for life.—According to the strict rule of the common law, it was necessary that the word "heirs" be used in a grant of real estate in order to create an estate of inheritance, and the absence of this technical word prevented the grantee from taking anything more than a life interest.[433] Thus a lease to A, his executors, administrators and assigns forever was a lease for life or a life estate only.[434] Where a lease of premises was made to a minister of the gospel during

[429] Miller v. Levi, 44 N. Y. 489; Clark v. Rhoads, 79 Ind. 342.

[430] Benjamin v. Benjamin, 1 Seld. (N. Y.) 383; Beach v. Nixon, 5 Seld. (N. Y.) 35.

[431] Stearns v. Godfrey, 16 Me. 158.

[432] Ainsworth v. Moriah Lodge, 172 Mass. 257, 52 N. E. 81.

[433] Jones Real Prop. in Conveyancing, § 575, *et seq.*

[434] Williams v. Woodard, 2 Wend. (N. Y.) 487.

his natural life, for his use and improvement, and for the benefit of the ministry during his successor's good pleasure, the leasehold estate terminated upon the death of the original lessee. The terms of the instrument constituted it a personal lease to a minister designated by name as the lessee and the absence of the word "heirs" prevented him from taking an estate of inheritance.[485] In another case there was a lease of premises for five years with privilege of purchasing improvements at the end of that time. If the lessor did not purchase, the lease was to be renewed for another five-year term and so on indefinitely, but the lease in terms only bound executors, administrators and assigns. The construction put upon this instrument was that it was only intended to continue during the lives of the parties, for the law did not favor perpetual leases, and the intention to create one must appear from unequivocal language and would not be left to inference.[486] Formerly, in case of uncertain leases made until such a thing be done or so long as such a thing shall continue, if livery of seizin were made upon them, they might have been good leases for life, determinable upon these contingencies, although not good leases for years. But where by statute the word "heirs" is not necessary to create a fee, it would seem that an estate in fee was created by such a lease, subject to be determined by the happening of the contingency.[487]

When a lease is granted for a term of several lives, the construction to be placed upon it is that it was granted for the term of the longest of the lives of the persons named therein.[488] The same construction was placed upon a lease to two persons "for and during their natural life." The court said: "The lessees are two. The pronoun is in the plural and must include both of them. The noun life is in the singular, and refers to the life of one as much as to the other and must therefore be taken separately rather than jointly. If the lease is to terminate upon the death of one only, the full meaning of the language has not been exhausted. There is still one life included in the word 'their' which has not ceased and it must, therefore, follow that the lease has not terminated."[489] The expression "for the space of twenty years or during our natural lives" when used to describe the length of a term was construed to give an estate for twenty years provided the lessees lived so long. It did not confer any rights after

[485] Merwin v. Camp, 3 Conn. 35, 43; Co. Litt. 62b.

[486] Brush v. Beecher, 110 Mich. 597, 68 N. W. 420.

[487] Reed v. Lewis, 74 Ind. 433; citing Co. Litt. 45b, n. 2.

[488] Flagg v. Badger, 58 Me. 258.

[489] Kenney v. Wentworth, 77 Me. 203, 205, per Danforth, J.

the expiration of the twenty years, and if the lessees should die before the end of the twenty years the lease would expire sooner.[440]

In the absence of any growing crop upon the leased premises, the general rule seems to be that upon the death of a tenant for life, all his interest and all the interest of his lessee ceases.[441]

§ 117. **Errors in calculation.**—Inaccuracy of language which results from inserting a word not meant, or using the wrong word, will not be permitted to defeat the intention of the parties, when such intention can be distinctly ascertained from other portions of the written instrument. This general principle is applied to leases and instruments of demise.[442] Where a lease which fixes a definite time for the commencement of the term, states the number of months or years it is to run and then gives a wrong date for its termination, there is a clear mistake in calculation and the actual intention of the parties will prevail. There is no ambiguity or opportunity for applying rules by construction, but merely an error in computation.[443] In explaining its reasons for arriving at this conclusion, the Missouri court says: "What then is the principal or prominent idea in the words of both parties to this lease, and concerning which there was least probability of mistake? It would seem to be the number of years for which the lease was to run. When parties are in treaty for a lease of the character of the one in question, where buildings were to be erected by the lessee and a ground rent paid, it would be natural for both parties to have prominently in view its duration, whether it was to be for five, ten, fifteen or twenty years. This would be the material thing to be fixed."[444]

§ 118. **A lease is a single instrument** in spite of the fact that it covers separate parcels of land in different localities, and the presumption is that it will terminate as to all the parcels demised at the same time. Thus a lease of separate timber lots gave the lessee the right to box turpentine trees and to cut timber for a saw-mill. It contained a stipulation that the right to box trees should expire five

[440] Sutton v. Hiram Lodge, 83 Ga. 770, 10 S. E. 585.

[441] Carman v. Mosier, 105 Iowa 367, 75 N. W. 323; Page v. Wight, 14 Allen (Mass.) 182; Hoagland v. Crum, 113 Ill. 365; Peck v. Peck, 35 Conn. 390.

[442] Packer v. Roberts, 140 Ill. 9, 29 N. E. 668; Siegel &c. Co. v. Colby, 176 Ill. 210, 52 N. E. 917.

[443] Siegel &c. Co. v. Colby, 176 Ill. 210, 52 N. E. 917, 61 Ill. App. 315; Biddle v. Vandeventer, 26 Mo. 500; Nindle v. State, 13 Neb. 245, 13 N. W. 275.

[444] Biddle v. Vandeventer, 26 Mo. 500, 504, per Napton, J.

years from the time the lessee began to cut the timber. It was urged that this meant that the lease should terminate, and terminate only as to each lot in five years from the time of the beginning of the cutting of timber upon that particular lot. But the court saw nothing in the language of the lease to indicate that it should terminate piecemeal, or that the several lots should, or could, drop out of it at different times. The question is not how the timber was located, whether on one body of land or on several different tracts, but how it was treated and dealt with by the parties to the contract.[445] But it is possible to have the term expire as to some part of the premises every year. As where a lease provided for clearing so many acres of land every year for three years and allowed the lessor three crops off the land cleared; it was held that the agreement meant to give lessee the right to make three crops off the land cleared the last year and only three off the land cleared the preceding years.[446] However, where land was leased for a term of four years and to be broken by a certain date if practical, it was held that the term did not extend beyond the four years even though it was impractical to break the land till the following year.[447]

§ 119. **In determining when a term begins, the word "from" may be either exclusive or inclusive,** as would best express the intention of the parties, to be gathered from the whole instrument.[448] The early English case of Pugh v. Duke of Leeds involving this point was an issue to try whether a lease made in pursuance of a power was a good and valid lease. The power provided that leases executed in pursuance of it should not be in reversion, remainder or expectancy, and the lease had been made to commence 'from the day of the date.' Therefore the question was whether this was a lease in possession. And it turned upon this whether to commence 'from the day of the date' in a deed is to be construed inclusive or exclusive of the day it bears date. Lord Mansfield pronounced the opinion of the court, holding the lease was valid and concluded as follows: "The ground of the opinion and judgment which I now deliver is, that 'from' may in the vulgar use and even in the strict propriety of language, mean either inclusive or exclusive; that the parties necessarily understood and used it in that sense which made the deed effectual; that courts

[445] Perkins v. Peterson, 110 Ga. 24, 35 S. E. 319; Baxter v. Mattox, 106 Ga. 344, 32 S. E. 94.

[446] Dodson v. Hall, 11 Heisk. (Tenn.) 198, 203.

[447] Burris v. Jackson, 44 Ill. 345.

[448] McGlynn v. Moore, 25 Cal. 384; Deyo v. Bleakley, 24 Barb. (N. Y.) 9; Pugh v. Duke of Leeds, Cowp. 714.

of justice are to construe the words of parties so as to effectuate their deeds, and not to destroy them, more especially where the words themselves abstractedly may admit of their meaning."[449] The extent and effect of this decision has been well explained by the Supreme Court of Massachusetts in the following quotation: "Before the case of Pugh v. The Duke of Leeds, all the cases agree that the words 'from the day of the date', are words of exclusion. So plain was this meaning thought to be, that leases depending on this rule of construction were uniformly declared void, against the manifest intention of the parties. Of this doctrine, thus applied, Lord Mansfield very justly complains, not, however, on the ground that the general meaning of the words had been misunderstood, but because the plain intention of the parties to the contract had been disregarded. All that was decided in that case was, that 'from the day of the date' might include the day, if such was the clear intention of the contracting parties; and not that such was the usual signification of the words."[450] So where the validity of the instrument was not at issue but the question raised was whether the tenant vacated the premises in due season, it was held that a lease *from* the first of a month began on the second day of the month.[451] On the other hand, when a lease for a year has been construed by the parties to commence on the day of its date by a taking of possession then, that day is to be included in computing the year and the term expires on midnight on the preceding day in the next year.[452] In another case the court inferred that the parties intended to include the day of the date because there was a provision for the payment of quarterly rent at corresponding dates throughout the year.[453] The Connecticut court, however, without noticing the ancient authorities, held that a lease from the first day of a month included that day and expired on the last day of the next preceding month a year hence. The court said that they believed it was "the common understanding of the community, at least in this state, that a lease from the first of April should commence on the first of April." They add: "In most of our cities moving day is either April first or May first. One tenant goes out and

[449] Pugh v. Duke of Leeds, Cowp. 714, 725.

[450] Bigelow v. Willson, 1 Pick. (Mass.) 485, 494, per Wilde, J.; quoted with approval in Goode v. Webb, 52 Ala. 452.

[451] Atkins v. Sleeper, 7 Allen (Mass.) 487.

[452] Buchanan v. Whitman, 151 N. Y. 253, 45 N. E. 556, affirming 76 Hun 67; Marys v. Anderson, 24 Pa. St. 272.

[453] Deyo v. Bleakley, 24 Barb. (N. Y.) 9.

another goes in on that day. Yet leases almost invariably run from the first of April or May. It has never been supposed that the ingoing tenant by entering on that day was guilty of any intrusion or trespass."[454] Whatever view may be taken of the preceding conflict between authorities, it seems settled that the words "from the date" and "from day of the date", when used in a lease to designate the commencement of a term have precisely the same meaning. This principle has long been established. It is laid down by Lord Coke and by Lord Mansfield. It is also in strict conformity to the legal sense of the words. The date of a lease is not the hour or the minute when it was executed, but a memorandum of the day when the deed was delivered.[455] Generally a lease would not begin to run from a date prior to its execution. That a lease can relate back, without words clearly indicating that to be the intention of the parties, is a proposition which cannot be sustained. A landlord cannot claim rent or a tenant be entitled to enjoy the property before the relation of landlord and tenant existed. A reference to a past date as the time from which a term shall run for a given number of years does not make rent payable from that time. Such a reference is merely a convenient mode of designating the time when the term ends.[456]

VI. *Illegal Leases.*

§ 120. A colorable lease for an illegal purpose cannot be enforced. Certain contracts, such as gambling contracts, are illegal either because they are within the prohibition of some statutory enactment or because they are contrary to the policy of the common law. The general rule is that courts will not grant a relief to parties to illegal contracts and this applies to illegal leases. Thus, in one case, a lease was executed and entered into knowingly for the purpose of aiding an unlawful conspiracy and combination to limit the production and to enhance the price of an article of merchandise in violation of an act of legislature. It was held that no recovery of rent could be had upon this instrument. When suit is brought on an unexecuted contract, void as against sound morals or public policy, the law will

[454] Fox v. Nathans, 32 Conn. 348. In Marys v. Anderson, 24 Pa. St. 272, it was suggested that the matter might be affected by the universal custom of the people.

[455] Bigelow v. Willson, 1 Pick. (Mass.) 485, 494, per Wilde, J., citing Co. Lit. 46b, and Pugh v. The Duke of Leeds, Cowp. 714, 719; Bacon v. Waller, 1 Rolle 387, 3 Bulst. 203.

[456] Commonwealth v. Contner, 21 Pa. St. 266.

not lend its aid but will leave the parties where it finds them.[457] If a contract is illegal in the first instance the mere fact that it has been executed gives no right of recovery.[458]

If a building is let to a tenant who enters into possession under a lease, the building is not under the control of the landlord after such entry, but it is under the control of the tenant as long as he continues in possession under the lease, unless there are special provisions in the lease which give the control to the landlord. So it was held that a landlord not in control was not responsible for the illegal sale of liquor by his tenant although he could have taken control by ejecting the tenant because of such illegal sale.[459] This question was presented in a different form where a defendant charged with the illegal sale of liquor set up a lease of the barroom to his former barkeeper. The jury found that the lease was merely colorable for the purpose of acquitting the defendant from his accusation and the lessor was charged as principal in maintaining the nuisance.[460]

An attempt was made to vacate a lease under a provision that illegal use should annul or make void the lease or other title under which the occupant guilty of such conduct holds. The illegal use had been by an undertenant and it was held that the lease of such undertenant only was avoided and not the principal lease to the original lessee. Any other construction would operate harshly on innocent parties. The effect of it would be to destroy the title of a lessor however valuable the term by the acts of his undertenant of which he had no knowledge and over which for the time he had no control.[461]

§ 121. **Kind of illegality.**—Ordinarily the illegality in an illegal lease is not found in the instrument itself but consists in the purpose to which the parties intend that the demised premises shall be put. To make a lease invalid on such a ground it must be proved that the intention of an illegal use was mutual to both parties.[462] It is per-

[457] American &c. Co. v. Peoria &c. Co., 65 Ill. App. 502.

[458] Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884; Hutchins v. Weldin, 114 Ind. 80, 15 N. E. 804; Bishop v. American &c. Co., 157 Ill. 284, 41 N. E. 765.

[459] Commonwealth v. Wentworth, 146 Mass. 36, 15 N. E. 138.

[460] Commonwealth v. Locke, 148 Mass. 125, 19 N. E. 24.

[461] Healy v. Trant, 15 Gray (Mass.) 312.

[462] Ryan v. Potwin, 60 Ill. App. 637; Gibson v. Pearsall, 1 E. D. Smith (N. Y.) 90; Arras v. Richardson, 5 N. Y. S. 755.

missible, however, to go outside the lease to find the actual intention of the parties in regard to the use to which they intend the premises to be put. A lease may be avoided by parol evidence that it was made with the intention that the demised premises should be used for an unlawful purpose, and of their actual use for that purpose, although it contains an express covenant of the lessee to make no unlawful use of them.[463] A contract to let a house for a purpose forbidden by a city ordinance is void,[464] and if a business, such as maintaining a billiard parlor which requires a license from city authorities, is carried on in the leased premises without any license, a lessor, who has leased the premises for this purpose, with knowledge that no license had been granted, could not recover rent under his lease.[465] Still a lease valid upon its face is not to be condemned as unlawful because the purpose for which the demised premises are to be used might, under certain circumstances, be within the prohibition of a statute.[466] Certain premises were leased for the sale of intoxicating liquors but it was distinctly agreed that the traffic should be lawful. It was held under these circumstances that the lessor could recover rent.[467]

In fixing upon the lessor the knowledge of the illegal purpose to which the leased premises are to be put, the knowledge of a rental agent may be imputed to his principal.[468] It has been suggested, however, that the doctrine of constructive notice can only be applied in favor of an innocent party and cannot be set up for the benefit of one who is setting up his own wrongful act in his defense. So, where an agent rented premises for gambling purposes, an innocent principal was allowed to disown the agent's contract and recover, on a *quantum valebat,* for the use of the premises.[469]

In certain cases a lease has from the nature and situation of the

[463] Sherman v. Wilder, 106 Mass. 537; Ernst v. Crosby, 140 N. Y. 364, 35 N. E. 603; Vanbuskirk v. McNaughton, 34 N. Bruns. 125.

[464] Milne v. Davidson, 5 Mart. N. S. (La.) 409, 16 Am. Dec. 189.

[465] Simpson v. Wood, 105 Mass. 263.

[466] Shedlinsky v. Budweiser &c. Co., 163 N. Y. 437, 57 N. E. 620.

[467] Whalen v. Leisy &c. Co., 106 Iowa 548, 76 N. W. 842. Where premises are let for sale of intoxicating liquors, lessee will be liable for rent provided the jury find that lessors did not knowingly let the premises for the illegal sale or keeping for sale of intoxicating liquors, or knowingly permit the premises to be so used. Codman v. Hall, 9 Allen (Mass.) 335.

[468] Ryan v. Potwin, 62 Ill. App. 134; Ashbrook v. Dale, 27 Mo. App. 649.

[469] Stanley v. Chamberlin, 39 N. J. Law 565. See also, Arras v. Richardson, 5 N. Y. S. 755.

subject-matter necessarily involved the doing of some act forbidden by law and has therefore been held illegal and unenforceable. As where a part of a sidewalk was leased for private purposes in violation of an ordinance, the lease was invalid and an action for rent could not be maintained under it.[470] So the covenant of a lessor to keep up a dam across a navigable stream was an illegal contract and could not be enforced.[471] The same doctrine was applied where certain land reserved as the property of the United States was leased by a squatter who had taken possession of it. The lease was illegal and could not be enforced, even between the parties, to prevent the lessee from denying his landlord's title.[472] But a provision for the erection of an unlawful structure, such as a bay window which would encroach upon the street, would not render the entire lease void and prevent the recovery of rent.[473] And a letting which is originally in violation of an ordinance might become valid if acquiesced in by the proper authorities, so that rent could be recovered on it.[474]

To establish the defense of illegality, it must be shown that the landlord, at the time the agreement was made with his tenant, was a party to the illegal intent and let the premises in furtherance thereof.[475] Mere knowledge that the lessee would use the premises in violation of the law is not sufficient to avoid the lease unless the lessor was a party to such intent and did some act in aid and furtherance of the intended violation of the law.[476] The authority on which this rule is based is the well-established doctrine that subsequent illegal use of goods by a vendee will not prevent the vendor from maintaining an action for the purchase price. Mere knowledge of such intended use will not preclude the vendor where he does not in any manner participate in it.[477]

[470] Heineck v. Grosse, 99 Ill. App. 441.

[471] Dyer v. Curtis, 72 Me. 181.

[472] Dupas v. Wassell, 1 Dill. (U. S.) 213, 8 Fed. Cas. No. 4182.

[473] Burke v. Tindale, 12 Misc. (N. Y.) 31.

[474] Mayer v. Waters, 45 Kan. 78, 25 Pac. 212.

[475] Gibson v. Pearsall, 1 E. D. Smith (N. Y.) 90.

[476] Updike v. Campbell, 4 E. D. Smith (N. Y.) 570; Taylor v. Levy, (Md.) 24 Atl. 608; Almy v. Greene, 13 R. I. 350; Miller v. Maguire, 18 R. I. 770, 30 Atl. 966; Allen v. Keilly, 18 R. I. 197, 30 Atl. 965. In Ralston v. Boady, 20 Ga. 449, the court say: "There must be an agreement, express or implied, that the tenement should be used for an unlawful purpose. And the bare proof of a knowledge that it might and probably would be so used will not, *perhaps*, suffice. Some of the authorities I find, upon examination, go to the full extent of holding that bare knowledge is sufficient, and that the criminal intent will be inferred from the knowledge."

[477] Kreiss v. Seligman, 8 Barb. (N. Y.) 439; Dater v. Earl, 3 Gray

Still a Canadian case should be noticed in which it was held that mere knowledge on the part of the lessor of the illegal use to which the premises are put will bar him in an action for the rent.[478]

§ 122. **Use of premises for the purpose of prostitution.**—Letting a house to be used as a bawdy house has been held to be indictable at common law, because the exciting, encouraging and aiding one to commit a misdemeanor is of itself a misdemeanor.[479] While the letting of a house is in itself an innocent act, the purpose is not innocent in case the party lets his house for the purpose of prostitution and knows that it is used accordingly. Keeping a bawdy house was an offense at common law, and letting a house for such purpose must, therefore, be a misdemeanor.[480] So it has been generally held that rent cannot be recovered on a lease when the premises were let to be used for the purpose of prostitution, even in the absence of any statute prohibiting such traffic.[481] In charging the lessor with knowledge of the use to which the house is to be put, evidence of prior bad reputation of the house is admissible. The lessor cannot say he has no knowledge of that which is notorious in the neighborhood.[482] It is necessary for the defendant to prove (1) that the place was a house of ill-fame, and, (2) that the plaintiff had knowledge of that fact when he made the lease creating the tenancy. For this purpose evidence of the reputation of the house both before and after the execution of the lease is admissible. Evidence of acts tending to show the character of the house could be given even though the plaintiff was not present at the time the acts were committed.[483]

In Illinois it is made an offense by statute to let a house for purposes of prostitution and in consequence it is held with even greater

(Mass.) 482; Sortwell v. Hughes, 1 Curt. (U. S.) 244, 22 Fed. Cas. No. 13177; Hill v. Spear, 50 N. H. 253; Gaylord v. Soragen, 32 Vt. 110; Aiken v. Blaisdell, 41 Vt. 655; Green v. Collins, 3 Cliff. (U. S.) 494, 10 Fed. Cas. No. 5755.

[478] Vanbuskirk v. McNaughton, 34 N. Bruns. 125.

[479] Rex v. Philipps, 6 East 464.

[480] Commonwealth v. Harrington, 3 Pick. (Mass.) 26.

[481] Ashbrook v. Dale, 27 Mo. App. 649; Trobock v. Caro, 60 Cal. 304; Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 55 Am. St. 63; Dougherty v. Seymour, 16 Col. 289, 26 Pac. 823; Ernst v. Crosby, 140 N. Y. 364, 35 N. E. 603; Egan v. Gordon, 65 Minn. 505, 68 N. W. 103; Ralston v. Boady, 20 Ga. 449; Appleton v. Campbell, 2 C. & P. 347, 12 E. C. L. 609; Hunstock v. Palmer, 4 Tex. Civ. App. 459, 23 S. W. 294.

[482] Demartini v. Anderson, 127 Cal. 33, 59 Pac. 207.

[483] Egan v. Gordon, 65 Minn. 505, 68 N. W. 103.

reason that the lessor cannot recover rent under a lease for such purposes.[484]

Where the guardian of a minor owning a leased dwelling house knows that it is used solely for a house of prostitution, and continues from month to month to rent it and permit such use such guardian must be held to rent the property to be used as a house of prostitution and is liable in damages to an adjacent proprietor. He may be enjoined from continuing to permit such use.[485]

§ 123. **Premises to be used for gambling.**—Where a statute makes it an offense punishable with a fine to let a house for the purpose of a gambling resort, the taint of illegality attaches to the lease and the lessor cannot recover the rent reserved on it.[486] It seems also that the same result follows from a statutory provision that gambling is unlawful without any specific provision that real estate shall not be let for such a purpose.[487] However, where betting and gambling was not prohibited by the statute, but permitted by it under certain conditions, a sale of the exclusive betting and gaming privileges at a race course was not illegal, since the sale contemplated the exercise of the privilege in a mode which was authorized by the statute.[488] A lease of a store which, by the understanding of the parties, is to be used for the sale of lottery tickets is void where the laws of the state render void every contract made to further the lottery business.[489] But where premises leased for a clubroom are converted into a gambling house, the lessee is not released from his contract in the absence of evidence that the lessor knew the object for which the rooms were to be employed was different from the one mentioned in the written lease.[490]

§ 124. **Setting up defense of illegality.**—It is true that a tenant cannot ordinarily deny the title of his landlord, which he admits in the lease, or under which he receives possession. But no rule precludes either party from showing the illegality of the lease itself on grounds of public policy. On such grounds, because of the disability

[484] Fields v. Brown, 188 Ill. 111, 58 N. E. 977, reversing 89 Ill. App. 287.

[485] Massan v. French, 61 Tex. 173.

[486] Harris v. McDonald, 79 Ill. App. 638; McDonald v. Tree, 69 Ill. App. 134.

[487] Stanley v. Chamberlin, 39 N. J. Law 565; Holmead v. Maddox, 2 Cranch (C. C.) 161, 12 Fed. Cas. No. 6629; Gibson v. Pearsall, 1 E. D. Smith (N. Y.) 90; Updike v. Campbell, 4 E. D. Smith (N. Y.) 570.

[488] Stratford Turf Assn. v. Fitch, 28 Ont. 579.

[489] Edelmuth v. McGarren, 4 Daly (N. Y.) 467, 45 How. Pr. 191.

[490] Commagere v. Brown, 27 La. Ann. 314.

of the lessor not to afford protection to the lessee, the court refuses to enforce a contract to do an illegal act, or one in which the consideration is illegal, however the illegality may be made to appear in evidence, receiving even oral testimony to determine the status of a written contract in this respect.[491] Where the parties to a lease intended that the premises should be put to an illegal use, the lessor cannot maintain an action for the rent reserved in the lease[492] and he cannot bring use and occupation for the value of the use of the premises.[493] A bond given for the payment of rent reserved on a lease executed by the parties with the intent that the premises shall be used for an illegal purpose is equally illegal with the lease, and no recovery can be had thereon.[494] The illegality may be shown without regard to whether the contract is under seal or not. A contract sealed or not sealed, though on its face honest and lawful may nevertheless be shown to be illegal and contrary to public morals.[495] That the lessee is *in pari delicto* with the lessor does not deprive the lessee of the right to defend against the enforcement of the provisions of a lease on the ground that the contract was in violation of a statute, since such a defense is allowed on grounds of public policy and not for the benefit of the party presenting it.[496]

A lease originally void for illegality because of the purpose for which it was made, does not become valid by assignment of it by the lessee.[497]

VII. *Leases Obtained by Fraud.*

§ 125. The rule that fraud in the making of a written agreement may be shown by parol evidence, to change its legal effect, is too well established to need any citation of authorities to sustain it. The evidence, however, must be clear, precise and indubitable.[498] In jurisdictions where the distinction between law and equity is still pre-

[491] Dyer v. Curtis, 72 Me. 181.

[492] Sherman v. Wilder, 106 Mass. 537; Mound v. Barker, 71 Vt. 253, 44 Atl. 346; Holmead v. Maddox, 2 Cranch. (C. C.) 161, 12 Fed. Cas. No. 6629; Simpson v. Wood, 105 Mass. 263; Smith v. White, L. R. 1 Eq. 626.

[493] Ashbrook v. Dale, 27 Mo. App. 649.

[494] Mound v. Barker, 71 Vt. 253, 44 Atl. 346.

[495] Ryan v. Potwin, 60 Ill. App. 637.

[496] Fields v. Brown, 188 Ill. 111, 58 N. E. 977, reversing 89 Ill. App. 287.

[497] Sherman v. Wilder, 106 Mass. 537.

[498] Wolfe v. Arrott, 109 Pa. St. 473, 1 Atl. 333; Sisson v. Kaper, 105 Iowa 599, 75 N. W. 490.

served, if a trial be at law, fraud in the execution of a deed may be given in evidence; as that, through misreading, or the substitution of one paper for another, or by other device or trickery, the obligor was induced to seal it, believing, at the time, that he was sealing something else; and it may also be proved that what purports to be a deed is, in truth, not a deed, but a forged instrument; but in a tribunal without equity powers it cannot be proved that the transactions which preceded and induced the execution of the deed were fraudulent. Where a party knowingly and voluntarily signs a deed, although he be induced thereto by the fraudulent contrivances of others, yet if it be such, upon its face, as will convey title, it can only be impeached and set aside, and parol evidence received for that purpose, in a court of equity.[499] So it has been held that a lease under seal can only be defeated in a court of law by showing fraud in its execution whereby a party was induced to sign something he did not intend to sign. When a party knowingly and voluntarily executes a deed, even though it be by a fraudulent contrivance, it cannot be impeached and set aside in a court of law.[500] A bill in equity to cancel the lease would be a proper remedy where fraud in its procurement can be shown. But the right to the possession of land will not be changed and affected by a preliminary order granted on an *ex parte* application. For in that way the complainant would be given the fruits of a final decree in his favor. A court of chancery has no more power than any other to condemn a man unheard, and to dispossess him of property *prima facie* his, and hand over its enjoyment to another on an *ex parte* claim.[501] In several cases it has been decided that possession of lands is not to be disturbed by means of a preliminary injunction.[502] When there has been a premature adjudication of the merits of a controversy, the party injured by it may appeal as from a final order.[503]

§ 126. Rescission of lease and defense of action for rent.—Where a landlord by artifice prevents a tenant from discovering defects in the leased premises and fraudulently misrepresents their condition,

[499] Kerr on Fraud and Mistake (Bump's Ed.) 332; Story's Eq. Jur. (6th Ed.), § 437; Taylor v. King, 6 Munf. (Va.) 358, 8 Am. Dec. 748, note; Chapin v. Billings, 91 Ill. 539; Equitable Trust Co. v. Fisher, 106 Ill. 189.

[500] Resser v. Corwin, 72 Ill. App. 625.

[501] Arnold v. Bright, 41 Mich. 207, 2 N. W. 16.

[502] Hemingway v. Preston, Walk. Ch. (Mich.) 528; People v. Simonson, 10 Mich. 335.

[503] Barry v. Briggs, 22 Mich. 201; Lewis v. Campau, 14 Mich. 458; Taylor v. Sweet, 40 Mich. 736.

the tenant is entitled to rescind the lease, vacate the premises and defend an action based on a claim for rent under it.[504] That a lessee was induced to accept a lease by fraudulent representations on the part of the lessor as to a material point in the construction of the demised premises is a good defense to an action for rent.[505] This defense goes to the original execution and validity of the lease and the covenants to pay rent. If consent to it was obtained by fraud, then it was not such real and free consent as to give it validity. The false statement must be of some matter which is an essential element in the agreement which goes to the substance of it and upon which the consent was based. If it be of this material character, then there is no mutual consent to the contract, and the party deceived may rescind, provided he does it on discovery of the fraud and returns to the other party everything of value which he has received under it. If the contract has been fully executed on both sides and the party injured cannot restore the other to his previous condition, the only remedy at law is by action for deceit or by recoupment of damages. The mere possession of property which was the subject-matter of the contract will not take away the right of rescission if possession is surrendered as soon as the fraud is discovered.[506] In one case a lessee occupied the premises a year before rescinding the lease on the ground of fraudulent representation regarding the income from the property. Such action was early enough to be effective. The lessee could not come to a full and certain knowledge of what would be the amount of business or of profits yearly till the end of the year; and he could not be justly regarded as voluntarily confirming a contract believed to be fraudulent, because he did not repudiate it at an earlier period upon a violent presumption of fraud, instead of waiting till the close of the year when it would become so certain that it could be clearly proved.[507] However, a delay of fourteen months before vacating land because it was liable

[504] Haines v. Downey, 86 Ill. App. 373; Blake v. Ranous, 25 Ill. App. 486; Sisson v. Kaper, 105 Iowa 599, 75 N. W. 490; Rand &c. Co. v. Wickham, 60 Mo. App. 44; Morris v. Shakespeare (Pa.), 12 Atl. 414.

[505] Milliken v. Thorndike, 103 Mass. 382; Irving v. Thomas, 18 Me. 418; Fry v. Day, 97 Ind. 348; Barr v. Kimball, 43 Neb. 766, 62 N. W. 196; Dennison v. Grove, 52 N. J. Law 144, 19 Atl. 186; Daly v. Wise, 132 N. Y. 306, 30 N. E. 837; Haines v. Downey, 86 Ill. App. 373; Wolfe v. Arrott, 109 Pa. St. 473, 1 Atl. 333

[506] Milliken v. Thorndike, 103 Mass. 382, in the words of Judge Colt. Kiernan v. Terry, 26 Ore. 494, 38 Pac. 671; Whitney v. Allaire, 4 Denio (N. Y.) 554; Daly v. Wise, 132 N. Y. 306, 30 N. E. 837.

[507] Irving v. Thomas, 18 Me. 418.

to overflow barred the lessee's rights. He had ample means of ascertaining the character of the land and its liability to overflow before he took possession. If he desired to rescind he should have done so within a reasonable time, and not have waited till a time which was certainly unreasonable.[508] So, where a lessee continued to occupy premises for eighteen months after discovering fraud in the statement in regard to their condition he could not disaffirm the contract on that ground.[509] And a delay of sixteen years on the part of a lessee to object to a lease on the ground that it was obtained by fraud would defeat his right to set up such an objection after that time.[510] The lessee is deemed to affirm the lease if after discovering the fraud he continues to occupy the land, and makes no attempt to rescind.[511] So where the lessee left the premises and then returned to them after a temporary absence, he was precluded from subsequently rescinding the lease on the ground of alleged fraud.[512]

When a person in possession of land has by fraud been induced to accept a lease of it from one not the owner, such lease cannot be set up to create an estoppel against the defrauded tenant to deny his tenant's title.[513]

The waiver of a right to rescind a lease on the ground of a fraudulent representation in regard to the premises is a sufficient consideration for an undertaking by the lessor to remedy a defect. Under such circumstances the lessee has a well recognized right to rescind which he foregoes in reliance on the lessor's promise to set the matter right, and to allow the lessor to escape the binding force of such promise would be rank injustice to the lessee.[514]

§ 127. **In Missouri** the doctrine is that the defense of fraud to a demand at law, as in case of a demand for rent under a lease, is triable by jury, even though the defense concludes with a prayer for the cancellation of the instrument sued on, as that can be rejected as surplusage.[515] By the Missouri statute actions for the recovery of money only are triable by jury, and a suit for rent seeks the recovery

[508] Resser v. Corwin, 72 Ill. App. 625.

[509] Bell v. Baker, 43 Minn. 86, 44 N. W. 676.

[510] Campau v. Lafferty, 50 Mich. 114, 15 N. W. 40; Lynch v. Sauer, 16 Misc. R. (N. Y.) 1.

[511] Herrin v. Libbey, 36 Me. 350; Kiernan v. Terry, 26 Ore. 494, 38 Pac. 671.

[512] Blake v. Dick, 15 Mont. 236, 38 Pac. 1072.

[513] Johnson v. Chely, 43 Cal. 299; McDevitt v. Sullivan, 8 Cal. 592; Peralta v. Ginochio, 47 Cal. 459.

[514] Sisson v. Kaper, 105 Iowa 599, 75 N. W. 490.

[515] Rand &c. Co. v. Wickham, 60 Mo. App. 44.

of money. Besides, it has been repeatedly decided in that state that the defense of fraud against a legal demand is triable by jury,[516] and that, even where an equitable defense is interposed, the right of trial by jury still remains.[517] The mere fact that the answer concludes with a prayer for the cancellation of the lease, can make no difference. That is not the main relief asked by the defendant, but mere ancillary relief. It is only where matters of law and equity are so blended that the case could not properly be tried by a jury, that the action is triable by the chancellor.[518]

§ 128. **Election of remedies.**—Upon discovering a fraudulent representation after accepting a lease and entering into possession of the premises, a lessee is not compelled to give up the premises and rescind the lease, but in an action against him for rent may set up his damages from such fraudulent representations.[519] The lessee has this election of remedies or courses to pursue. He may recoup in damages when sued for rent; or if he has fully paid the rent he may recover the damages in an action instituted for that purpose, or on discovering the falsity of the representations he may rescind the contract of lease.[520]

In some western states it has been held to be the rule that where a contract of lease was vitiated by fraud on the part of the lessor, the lessee had his election either to abandon the lease entirely or to hold on for the term at what the premises were reasonably worth.[521] But the better view seems to be that until the lessee elects to rescind he holds under the agreement and on the terms expressed in it, even though he was induced to enter into it by fraud. The damages sustained by reason of the deceit would go to diminish the amount recovered under the agreement, and if they exceeded the rent reserved, the verdict would be for the defendant.[522] The same principle holds true of a lease under seal.[523] Until rescission recovery would be on

[516] Kitchen v. Cape Girardeau &c. R. Co., 59 Mo. 514; Earl v. Hart, 89 Mo. 263, 1 S. W. 238.

[517] Wolff v. Schaeffer, 4 Mo. App. 367, s. c. 74 Mo. 154.

[518] Kortjohn v. Seimers, 29 Mo. 271; Allen v. Logan, 96 Mo. 591, 10 S. W. 149.

[519] Dennison v. Grove, 52 N. J. Law 144; 19 Atl. 186; Pryor v. Foster, 130 N. Y. 171, 29 N. E. 123; Barr v. Kimball, 43 Neb. 766, 62 N. W. 196; Herrin v. Libbey, 36 Me. 350.

[520] Barr v. Kimball, 43 Neb. 766, 62 N. W. 196.

[521] Mitchell v. Zimmerman, 4 Tex. 75. See also, Blackman v. Kessler, 110 Iowa 140, 81 N. W. 185.

[522] Hall v. Ryder, 152 Mass. 528, 25 N. E. 970.

[523] Herrin v. Libbey, 36 Me. 350; McCarty v. Ely, 4 E. D. Smith (N. Y.) 375; Carhart v. Ryder, 11 Daly

the lease, subject to possible reductions by way of counter-claim or set-off in jurisdictions where the doctrine of counter-claim is in force.

In Illinois the doctrine is that if the lessees desire to rescind on account of fraud, it is their duty to do so promptly when they discover it. Failing to do so they elect to continue the lease in force and are liable on the covenants, and must be remitted to their remedy, if any they have, by action for deceit or by bill in equity.[524] A lessor in that jurisdiction is not, however, estopped to impeach the lease as for fraud on the part of the lessee because he has accepted rent where he did so without knowledge of the fraud.[525]

Where a lessee is entitled to obtain a renewal on payment of a sum equivalent to the best offer the owner obtains for the premises and is forced to pay more than he should by the false allegation of a large offer, the lessee is entitled to recover back the sum beyond the highest *bona fide* offer which the lessor received.[526] So, a misrepresentation as to a former rental can be set up as a defense in an action for rent, and the actual amount of the former rental only can be recovered.[527]

§ 129. **What constitutes fraud.**—A representation which merely amounts to a statement of opinion, judgment or expectation, or is vague, and indefinite in its nature and terms, or is merely a loose conjectural or exaggerated statement, is not sufficient to justify rescission.[528] The same is true where the proof fails to show that the representations were false or were made with a fraudulent intent to induce the defendant to lease the premises.[529] It is essential that the lessee should have entered into the contract in reliance on the false representations.[530] Alleged representations of a lessor as to the amount that certain crops would produce are a matter of opinion and cannot be regarded as fraudulent. A fraudulent representation as to the number of acres in a field is proper matter of counter-claim to reduce the stipulated rent; but if there is no allegation of damage by reason of the representations, the fraud is no defense.[531] It is the duty of every person, in transacting business, to use ordinary care and prudence, and whether a

(N. Y.) 101; Wallace v. Lent, 1 Daly (N. Y.) 481.

[524] Little v. Dyer, 35 Ill. App. 85; McCoull v. Herzberg, 33 Ill. App. 542; Johnson v. Wilson, 33 Ill. App. 639.

[525] United Order &c. v. Fitzgerald, 59 Ill. App. 362.

[526] Guffey v. Clever, 146 Pa. St. 548, 23 Atl. 161.

[527] Powell v. F. C. Linde Co., 49 N. Y. App. Div. 286, 64 N. Y. S. 153.

[528] Buschman v. Codd, 52 Md. 202, 207.

[529] Lewis v. Clark, 86 Md. 327, 37 Atl. 1035.

[530] Slyfield v. Cordingly, 72 Iowa 762, 34 N. W. 602.

[531] Holton v. Noble, 83 Cal. 7, 23 Pac. 58.

lessee acted with due care and prudence in relying on the statement of an agent of the lessor in regard to the number of acres under cultivation is a question for the jury and not for the court.[532]

Misrepresenting the legal effect of an instrument is not fraud when the defrauded party could or did read the instrument. So the fact that a signature to a lease was obtained by stating it to be a mere receipt in effect and legal import did not invalidate the lease.[533] A title under a lease is not defeated by fraud which is admittedly collateral to the demise. A lessor could not cancel a demise on the ground that the lessee falsely represented that he intended to put the premises to a lawful use when in fact he intended to use them for a brothel.[534] In accordance with the general principles of the rule of *caveat emptor,* which governs the liability for the condition of premises, a tenant is bound to inquire as to the means of access to leased land; and it does not constitute fraud on the part of the landlord, in the absence of misrepresentations, to lease property to which there is no means of access.[535]

The general rule that a fraudulent alteration of an instrument forfeits the rights of the holder does not apply to an indenture of lease executed in duplicate. An alteration of the counterpart retained by one party without the knowledge or consent of the other would not change the legal effect of the instrument. Furthermore, it does not affect the rights of the party making the alteration under the contract actually made by the parties, for the lease being executed in duplicate, there were two leases, and both were originals. Although the alteration of one annulled that, the lease retained by the other was sufficient to sustain the contract of the parties.[536]

VIII. *Collateral Parol Agreement.*

§ 130. "Contracts, if a statute does not intervene, may be expressed partly in writing and partly by parol. If the writing does not purport to set out the entire contract, if it purports to set out only the part of the contract which is obligatory on the party making it, there is no just objection to parol evidence of the distinct and separable parts of the contract, not reduced to writing, obligatory

[532] Ladner v. Balsley, 103 Iowa 674, 72 N. W. 787; Longshore v. Jack, 30 Iowa 298; Gee v. Moss, 68 Iowa 318, 27 N. W. 268.

[533] Fry v. Day, 97 Ind. 348.

[534] Feret v. Hill, 15 C. B. 207.

[535] Handrahan v. O'Regan, 45 Iowa 298.

[536] Jones v. Hoard, 59 Ark. 42, 26 S. W. 193; Lewis v. Payn, 8 Cow. (N. Y.) 71.

upon the other party."[537] On the same principle where a contract of lease, which would be valid if by parol, has been reduced to writing, a term of the contract which has been omitted from the writing may be supplied by parol evidence; as where the length of the holding is not stated, and oral testimony is received as to the duration of the term agreed upon. This testimony goes to supply an obvious omission.[538] But if a lease is complete in all its terms, the general rule is inflexible that it cannot be varied by parol evidence; and even where there is an obvious omission in an instrument, parol evidence to supply the omission is generally inadmissible because of the requirement for a written instrument to satisfy the statute of frauds. Yet under certain circumstances a collateral parol contract between parties to a written lease may exist concurrently with the lease.[539] To be binding such a contract must not come within the prohibition of the statute of frauds; it must be supported by an adequate consideration, and it must, furthermore, be sufficiently collateral to the subject-matter covered in the written lease so that the presumption would not apply that all previous oral negotiations had been merged in the written instrument as executed. For the general rule is well settled that a written lease having been executed, it must, in the absence of fraud or mistake, be deemed to embody the final determination of the parties.[540]

§ 131. Compliance with statute of frauds.—When an attempt is made to enforce an oral agreement collateral to a lease, the first inquiry is whether such agreement is within the statute of frauds. Thus, an agreement by the landlord to allow tenant to remove all temporary improvements he may erect might be valid although not in writing, and for that reason, the further question as to whether it would be merged in the written instrument becomes important.[541] An agreement outside the lease that a building to be erected shall be the personal property of the lessee is not in contradiction of the terms of a written lease which is silent on the topic of improvements. A covenant that, at the termination of the lease, the lessee shall deliver up the premises in as good order and condition as they then

[537] Vandegrift v. Abbott, 75 Ala. 487, 490, per Brickell, C. J.

[538] Reynolds v. Davison, 34 Md. 662.

[539] Graffam v. Pierce, 143 Mass. 386, 9 N. E. 819; Morgan v. Griffith, L. R. 6 Exch. 70; Welz v. Rhodius, 87 Ind. 1, 44 Am. R. 747; Chapin v. Dobson, 78 N. Y. 74; Erskine v. Adeane, L. R. 8 Ch. App. 756. But see Naumberg v. Young, 44 N. J. Law 331.

[540] Abbott v. 76 Land &c. Co., 101 Cal. 567, 36 Pac. 1.

[541] Powell v. McAshan, 28 Mo. 70.

were or should be put into by the lessor is not inconsistent with such an agreement. There is nothing which requires such an agreement to be in writing, and evidence tending to prove such an agreement is therefore admissible.[542] Where some of the stipulations in a contract are within the statute of frauds and others are not, if those which are within it have been performed, an action lies upon the other stipulations, if they are separate.[543] A promise to put in a new floor in connection with a general agreement to lease is a promise in its nature separable from the rest of the contract, and a promise to do something after the execution of the lease, and it relates to something distinct from anything contained in the lease. As the original contract was oral, the rule that no oral evidence of prior or contemporaneous agreements can be received to add to or vary the terms of a written contract has not its usual application. But as the performance of the oral contract consisted in part in the delivery of written contracts, if these contracts contained stipulations relating to the subject of the alleged promise, no prior or contemporaneous oral promise inconsistent with their terms could be received in evidence; nor could evidence of any prior or contemporaneous oral promise be received if the written contracts delivered appeared to contain all the engagements of the parties on the subject, or to have been intended as a complete statement or performance of the whole contract. The case at bar, however, is clearly within the cases where oral evidence of a collateral separate agreement has been received.[544]

It is not permissible to set up a parol agreement made the day a lease for a year was given, but entered into after it had been executed, to vary the terms of the lease and show that the term was to continue till certain affairs were settled. Such an agreement is within the statute of frauds.[545] But the principle seems to be established that a modification by parol of a written lease having less than a year to run is not within the statute of frauds.[546]

§ 132. Not only must the agreement stand the test of the statute of frauds, but it must be collateral to the lease. Where a written

[542] Ryder v. Faxon, 171 Mass. 206, 50 N. E. 631.

[543] Trowbridge v. Wetherbee, 11 Allen (Mass.) 361; Page v. Monks, 5 Gray (Mass.) 492; Lowman v. Sheets, 124 Ind. 416, 24 N. E. 351.

[544] Graffam v. Pierce, 143 Mass. 386, 9 N. E. 819; Rennell v. Kimball, 5 Allen (Mass.) 356, 364; Carr v. Dooley, 119 Mass. 294; McCormick v. Cheevers, 124 Mass. 262; Chapin v. Dobson, 78 N. Y. 74; Eighmie v. Taylor, 98 N. Y. 288.

[545] Wheeler v. Cowan, 25 Me. 283.

[546] Doherty v. Doe, 18 Colo. 456, 33 Pac. 165; Smith v. Devlin, 23 N. Y. 363.

lease is perfect and does not indicate that it is to be performed other than as it is written, all antecedent oral agreements on the subject are merged in the writing.[547] "A lease is, in itself, a contract prescribing the rights, duties and liabilities of the lessor and lessee, and when made pursuant to precedent negotiations is, in legal contemplation, the consummation of all preliminary propositions and agreements. It takes up all preceding negotiations and gives expression to the contract of the parties as finally consummated, and in absence of fraud or mistake, furnishes controlling evidence of the terms and conditions upon which the property is demised."[548] So a temporary practice permitting lessees to enter upon the demised premises through a lower tenement did not give them a right to continue so to enter, for the writing was presumed to express the entire agreement of the parties.[549] A parol agreement to abate rent in case of destruction by fire could not be set up to modify a written instrument. A general covenant to pay rent was adequate to govern the rights of the parties and bound the lessee to pay rent even though the premises were destroyed by fire.[550] It cannot be shown by parol evidence that an instrument in the form of a lease was intended as an assignment of an unexpired leasehold interest. Parol evidence is not admissible to show that the contract was different from that stated in the writing or was a contract to assign a lease instead of a contract to lease the premises described.[551] The contract expressed by the written instrument is the one adopted by the parties no matter what different stipulations they had under consideration during the negotiations. All topics covered by the written lease are presumed to be covered fully, and additional or contradictory terms under discussion during the making of the bargain do not constitute a part of the contract as finally adopted.[552] Such a presumption has been applied to an oral stipulation in regard to a further term after the end of a lease. The lease fixed the time for the continuation of the term, and any agreement for a further

[547] Kelly v. Chicago &c. R. Co., 93 Iowa 436, 61 N. W. 957; Steubben v. Granger, 63 Mich. 306, 29 N. W. 716; Stevens v. Haskell, 70 Me. 202; Abbott v. 76 Land &c. Co., 101 Cal. 567, 36 Pac. 1; Averill v. Sawyer, 62 Conn. 560, 27 Atl. 73.

[548] Phillbrook v. Emswiler, 92 Ind. 590.

[549] Ward v. Robertson, 77 Iowa 159, 41 N. W. 603.

[550] Stafford v. Staunton, 88 Ga. 298, 14 S. E. 479.

[551] Gardner v. Hazelton, 121 Mass. 494.

[552] Snyder v. County Com'rs, 8 Colo. 377, 8 Pac. 917; Randolph v. Helps, 9 Colo. 29, 10 Pac. 245; Wilgus v. Whitehead, 89 Pa. St. 131; Lerch v. Sioux City Times Co., 91 Iowa 750, 60 N. W. 611; Brigham v. Rogers, 17 Mass. 571.

holding was repugnant to the lease.[553] A factory with boiler and engine was leased without express covenants as to the capacity of the engine; it was held that there was no implied covenant that the boiler was capable of doing a work for which the factory was rented and oral testimony was inadmissible to prove that during the negotiations the landlord guaranteed the engine and boiler were in thorough repair.[554]

The basis of this rule of presumption is that the oral negotiations never were a part of the contract; and therefore the principle would not apply in case the preceding agreement is in writing. So, where an agreement under seal besides a covenant for a lease, contained certain independent stipulations, obviously not intended to be included in the lease but obligatory *in praesenti*, it was held that the latter were not merged in or superseded by the lease when executed. The stipulations in respect to the lease were not the sole purpose of the contract, and other provisions therein, including that in respect to the party wall, were clearly independent, and intended to survive the execution of the lease. It was competent for the parties to provide how the cost of a party wall should be paid, and to make the covenant to pay therefor a mere personal covenant with the covenantee and severable from his ownership of the land. This was clearly the intention of the parties as gathered from the language of the contract.[555]

§ 133. On the question what agreements are collateral there is a wide divergence of judicial opinion and no general rule can be laid down to govern all cases. Where the lease is silent in regard to repairs, the landlord's oral agreement to put the premises in repair before the commencement of the term can fairly be said to be collateral to the lease, as such an agreement creates an immediate, not a continuing liability. If the landlord does his duty it is *functus officio* before the term begins to run. It is widely different from an undertaking to keep the premises in repair during the continuance of the lease, for that would create a continuing liability and change the effect of the contract as expressed in the written instrument.[556] In regard to such a case, Brett, J., said: "This agreement was verbally arrived at before the execution of the lease in writing and before the entry of the plaintiff pursuant to the demise. It did not

[553] Keegan v. Kinnaire, 12 Ill. App. 484.

[554] Naumberg v. Young, 44 N. J. Law 331.

[555] Pillsbury v. Morris, 54 Minn. 492, 56 N. W. 170.

[556] Graffam v. Pierce, 143 Mass. 386, 9 N. E. 819; Mann v. Nunn, 43 L. J. C. P. (N. S.) 241; Clenighan v. McFarland, 16 Daly (N. Y.) 402. *Compare* Weil v. Kahn, 16 Daly (N. Y.) 286.

relate to things to be done from time to time during the term, but it was an independent verbal undertaking."[557] But if the subject of repairs is mentioned at all in the lease, the topic of repairing is no longer a collateral matter and the presumption would apply that all previous negotiations and stipulations as to repairs are merged in the written instrument when it is executed. Thus, where a lessee agreed to make repairs without specifying when they should be made, he has till the end of the lease to make them, and a verbal agreement to make the repairs sooner is inconsistent with the written contract and therefore does not come within the exception to the general rule that parol evidence is admissible to establish an additional consistent agreement. The fact that the time is fixed by law and not by express contract does not affect the rule of admissibility.[558] And in a case where a written lease was silent on the question of assignment, it was held that evidence of a parol agreement not to assign was inadmissible because the legal implications and incidents of a lease should be regarded as written out and incorporated in it. If this were done there would then be an express stipulation that the lessee might assign his term to whomsoever he pleased.[559]

But although an agreement to make improvements does not differ materially from one to repair, an attempt to defend an action for rent under a written lease on the ground of a breach by the lessor of his collateral parol agreement to make improvements was not allowed. Such a defense was held improper because it sought to change a written contract by a parol contract previously made.[560] A similar question arose in Connecticut on a collateral parol promise to improve the entrance of a leased store within a year. There had been a preliminary written agreement for a lease and a similar promise by parol. When the time for the execution of the lease arrived, the improvements had not been made and the lessee refused to sign the lease. Thereupon the lessor renewed his promise to make the improvements and the lease was executed. The court held that evidence of the parol promise could not be received. The ground for their decision was that even if the parol agreement could be considered collateral to the lease, it could not be considered collateral to the previous written agreement.[561] The Illinois court refused to enforce a parol agree-

[557] Mann v. Nunn, 43 L. J. C. P. (N. S.) 241.

[558] Colhoun v. Wilson, 27 Gratt. (Va.) 639.

[559] Nave v. Berry, 22 Ala. 382.

[560] Welshbillig v. Dienhart, 65 Ind. 94.

[561] Averill v. Sawyer, 62 Conn. 560, 27 Atl. 73. Judge Carpenter dissented, stating his grounds as

ment by the lessor to supply water to the demised premises. The lease itself contained covenants on the part of the lessor to repair fences and furnish wood for fuel. The parol agreement as to water added an additional stipulation to the lease and was not in regard to a collateral matter. Furthermore such an agreement was within the prohibition of the statute of frauds because it required a continuing act and it did not alter this result that pipes might be laid which would furnish a constant supply of water without further acts on the part of the lessor.[562]

The rule best suited to explain the decided cases in the United States is to make the test the time when the landlord's undertaking is to be performed. The collateral parol agreement cannot be enforced when it is not to put the premises in a certain condition previous to leasing or before the time fixed for the commencement of the term, but to do so at some indefinite time during the term. In one case the alleged parol agreement was to put water and gas into the leased building as soon as the mains were completed. The court said: "The intention was to let the premises, and they were let, just as they were, without the water or gas. The agreement referred to something to be done by the lessor during the tenancy in respect to the subject-matter of the lease, and as one of the considerations for the covenants in it on the part of the lessee,—as much so as any covenants on the part of a lessor usually inserted in leases. It is not collateral to the matter of leasing any more than would be a promise or covenant to keep in repair. It is to be presumed that the parties inserted in the lease all the covenants and promises on both sides and that what is not in it was purposely omitted. * * *"[563]

follows: "Nor can I agree that the lease excludes the evidence. The contract had no reference to the terms of the lease, although it did refer to the premises leased. It was not a stipulation to be embraced as a covenant in the lease, but was so far independent of it that it might legally exist contemporaneously with it and collateral to it. If the plaintiffs had also agreed to trade with the defendant at the store to the amount of $1,000 during the first year, the two contracts would have stood upon precisely the same footing. Surely it will not be contended that the lease would exclude parol evidence of such a contract . . . there can be no question about the consideration. There was a matter in dispute between the parties. No matter now which was right. It is enough for our present purpose that the plaintiffs yielded the point and promised that if the defendant would sign the lease the thing that he contended for should be done. He did so. The consideration for that promise, and its validity and effect, ought, it seems to me, to be beyond all question."

[562] Cooney v. Murray, 45 Ill. App. 463.

[563] McLean v. Nicol, 43 Minn. 169, 45 N. W. 15, per Gilfillian, J.

§ 134. **In England** the courts have gone a great ways in holding that agreements were collateral to a lease. A lease in one case reserved to the lessor the right of hunting on the premises and bound the tenant to use his best endeavors to preserve the game. Owing to the fact that the place was overrun with rabbits the tenant refused to sign the lease without the lessor's agreement that they would be exterminated. The lessor refused to put such an agreement in the lease, but promised faithfully that the rabbits should be destroyed and the tenant signed the lease. Although it had been held that rabbits could be included under a general description of game,[564] the court held that the undertaking to kill them off was collateral to the matters covered by the lease and could be enforced as a collateral parol agreement. It did not contain any terms which conflicted with the written document.[565]

§ 135. **A subsequent agreement reducing rent** made during the continuance of a written lease under seal is open to the objections that it is without consideration and that it operates to change a sealed contract by parol agreement. Thus, an agreement by a lessor to make

[564] Jeffryes v. Evans, 19 C. B. (N. S.) 346, 34 L. J. (C. P.) 261.

[565] Morgan v. Griffith, L. R. 6 Exch. 70; Erskine v. Adeane, L. R. 8 Ch. App. 756. These English decisions have been severely criticized by Justice Depue in the case of Naumberg v. Young, 44 N. J. Law 331. He said: "Morgan v. Griffith was decided upon little consideration. The ground of decision was that the verbal agreement was collateral to the lease, and did not affect the mode of enjoyment of the land demised. Erskine v. Adeane, was decided by two equity judges on the authority of Morgan v. Griffith, reversing the decision of Lord Romilly, M. R., who had excluded the evidence, for the reason that the alleged agreement was not a distinct agreement but an alteration of the original terms of agreement, and, to be binding, should have been inserted in the lease. . . . It must be borne in mind that we are not dealing with the question as to what promises and undertakings between the parties may, in themselves, be considered collateral or conditional the one to the other, but with the salutory rule of evidence that the written agreement shall be the only exponent of the contract, as finally concluded between the parties, and that proof by oral testimony of what was said or done during the negotiations shall not be received, either to contradict the written contract or to supply terms with respect to which the writing is silent. This rule of the common law may be traced back to a remote antiquity. It is a rule founded on obvious inconvenience and injustice that would result if matters in writing, made by advice and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke expressively calls 'the uncertain testimony of slippery memory.'"

a gift of certain personal property to the lessee in return for prompt payment of rent could not be enforced. It was not based on a sufficient consideration to be a valid contract and could not take effect as an executed gift.[566] Reducing the agreement to writing would not have changed the result. An indorsement in writing on a lease under seal, without any new consideration and not under seal, is not valid to reduce the amount of rent due under the terms of the lease. The agreement not being under seal would not be admitted in evidence to vary the terms of an instrument under seal. It was a mere *nudum pactum*. Payment and acceptance of the reduced amount would merely be an invalid ratification of the agreement.[567] The lessors had a right to repudiate it at any time and demand the full amount of rent provided for by the lease; but in so far as the oral agreement had been executed, as to the payments which had fallen due and had been paid and accepted in full, the lessor had no further claim. The reason of this rule is founded on public policy. It is not regarded as safe or prudent to permit the contract of parties which has been carefully reduced to writing and executed under seal to be modified or changed by the testimony of witnesses as to the parol statements or agreements of the parties.[568] There is, on the other hand, a line of cases holding that where a lessor agrees to a reduction of rent in consideration of his lessee's continuing to occupy the premises and such reduced amount is received in full satisfaction, this makes the agreement for reduction binding as to future rents.[569] This result is inconsistent with the decisions in New York and Illinois. It seems to be rested on the ground that the old contract was rescinded by mutual agreement and that the modified contract was substituted in its place. The agreement for reduction in these cases was in writing. In one of these cases it was said that "it would be a reproach to the law if any of its rules were so inflexible that in their application the courts could not find a way to refuse to lend their aid to such an inequitable demand as that of the" lessors for the full amount of the rent.[570]

[566] Bush v. Rawlins, 89 Ga. 117, 14 S. E. 886.

[567] Loach v. Farnum, 90 Ill. 368.

[568] McKenzie v. Harrison, 120 N. Y. 260, 24 N. E. 458; Munroe v. Perkins, 9 Pick. (Mass.) 298; Lattimore v. Harsen, 14 Johns. (N. Y.) 330; McCreery v. Day, 28 N. Y. St. 597.

[569] Jaffray v. Greenbaum, 64 Iowa 492, 20 N. W. 775; Sargent v. Robertson, 17 Ind. App. 411, 46 N. E. 925; Ten Eyck v. Sleeper, 65 Minn. 413, 67 N. W. 1026.

[570] Sargent v. Robertson, 17 Ind. App. 411, 46 N. E. 925.

That the acceptance of the reduced amount in full satisfaction of the full rental is a complete satisfaction during the time it is accepted was decided by the Massachusetts Supreme Court. The agreement was executed so no question could be raised on the statute of frauds, and the only point was the validity of the consideration. The court decided that the undertaking of the lessee, in return for the reduction, to put more money in his business and take in a new partner was an ample consideration.[571]

In California this question is settled by a statute which provides that a contract in writing cannot be altered, except by a contract in writing or by an executed oral agreement.[572] And the same is true in Montana.[573]

An unexecuted oral agreement between a lessor and lessee altering the terms of a written lease would not be binding upon a grantee of the lessor. At best such an agreement would be a mere personal undertaking between the lessor and lessee. It would not become a part of the lease so as to run with the land and bind an assignee without notice, particularly if the lease was one which had to be recorded to be valid.[574]

§ 136. In accordance with the general law regarding consideration for a contract, it has been soundly stated that a gratuitous parol promise to accept less rent than that stipulated for in a written lease cannot be enforced,[575] but this leaves open the question as to what contracts are to be considered gratuitous and what constitutes a valid consideration. On one hand it has been laid down as the rule that unless the acts of the parties amount to a surrender, a parol agreement changing the amount of rent and leaving the lease unchanged in other respects is not binding on the lessor.[576] Different considerations can be taken into account, however, where the tenant holds from year to year and not for a fixed term. The landlord might waive any notice to quit, in which case the tenant would have a right to vacate the premises at the end of the year. So the agreement of the tenant to

[571] Hastings v. Lovejoy, 140 Mass. 261, 2 N. E. 776. To same effect see Jaffray v. Greenbaum, 64 Iowa 492, 20 N. W. 775; Doherty v. Doe, 18 Colo. 456, 33 Pac. 165.

[572] Civ. Code, § 1698; Harloe v. Lambie, 132 Cal. 133, 64 Pac. 88.

[573] Civ. Code 2281; Armington v. Stelle, 27 Mont. 13, 69 Pac. 115.

[574] Taylor v. Soldati, 68 Cal. 27, 8 Pac. 518.

[575] Wharton v. Anderson, 28 Minn. 301, 9 N. W. 860; Wheeler v. Baker, 59 Iowa 86, 12 N. W. 767.

[576] Barnett v. Barnes, 73 Ill. 216, followed in Breher v. Reese, 17 Ill. App. 545.

remain in consideration of a reduction of rent would be based on a valid consideration.[577]

An oral agreement, subsequently made on a new consideration, and before a breach of the contract, in cases falling within the rules of the common law and not within the statute of frauds may have the effect to enlarge the time of performance specified in the contract, or may vary any of its terms, or may waive and discharge it altogether.[578] Thus, in a lease for crop rent a parol agreement changing the mode in which the crop was to be delivered was valid.[579] In a mining lease, the lessee was told that he would not be required to comply with a stipulation to take out ore within a given time but might wait till transportation facilities were furnished. This operated as an estoppel on the lessor and all claiming under him.[580] In accordance with these principles it has been held that an oral agreement not forbidden by the statute of frauds and based on a sufficient consideration is valid to alter the terms of an existing written lease.[581] Where crops on a leased farm had been destroyed by storms, it was agreed in return for the lessee's replanting the crop that he should pay as rent one-half the grain produced instead of a certain number of bushels per acre. This agreement was held to be supported by sufficient consideration, though both parties thought it less advantageous to the landlord.[582] Where tenant had leased a room in a building by a lease under seal and agreed to lease an adjoining room if the rent under the sealed lease be reduced, this was held to be a valid consideration for the reduction, even though the entire rent was less than that reserved in the original lease under seal.[583]

[577] Wilgus v. Whitehead, 89 Pa. St. 131. In Goldsborough v. Gable, 140 Ill. 269, a contrary result was reached on facts which cannot be distinguished. Because the landlord was not bound to waive notice to quit and could have held the tenant for the rent originally reserved till he received notice, the agreement for reduction of rent was regarded as a *nudum pactum*.

[578] Hastings v. Lovejoy, 140 Mass. 261, 2 N. E. 776; Blasdell v. Souther, 6 Gray (Mass.) 149; Barker v. Troy &c. R. Co., 27 Vt. 766; Lawrence v. Davey, 28 Vt. 264; Lattimore v. Harsen, 14 Johns. (N. Y.) 330; Wilgus v. Whitehead, 89 Pa. St. 131; Emerson v. Slater, 22 How. (U. S.) 28; Munroe v. Perkins, 9 Pick. (Mass.) 298.

[579] Evers v. Shumaker, 57 Mo. App. 454.

[580] Conley v. Johnson, 69 Ark. 513, 64 S. W. 277.

[581] Hastings v. Lovejoy, 140 Mass. 261, 2 N. E. 776; Jackson v. Patterson, 4 Harr. (Del.) 534.

[582] Raymond v. Krauskopf, 87 Iowa 602, 54 N. W. 432. See also, Hill v. Wilson, 15 Ky. L. R. 814.

[583] Horgan v. Krumwiede, 25 Hun (N. Y.) 116.

§ 137. The execution of a new lease to the same tenant for the unexpired term of an old lease operates as a surrender and extinguishment of the old lease so that the rights of the parties are to be governed by the new lease.[584] The question whether the transactions between the parties amounted to a surrender of the old lease and the making of a new one is one of fact. A tenant desired to leave during his term because of an insufficient water supply and the landlord agreed to release him on payment of back rent. Before the time to leave arrived, negotiations were begun between the parties which resulted in a verbal lease on new conditions. If the parties actually entered into a new oral lease containing different conditions from those in the original lease, it would amount to a cancellation or surrender of the original lease. It would then become immaterial as to whether there was a new consideration or not, and the lessor could not be heard to say that the oral agreement was within the statute of frauds, because it was in part executed.[585] These principles would seem to be broad enough to cover a case where nine months before the end of a lease, the lessor agreed to reduce the rent for the balance of the term and the lessee agreed to continue to hold the premises after the end of the lease and to give three months' notice of his intention to quit. The smaller payments of rent were accepted for several months, but the tenant vacated at the end of the term. The court held that the new agreement was not executed and that the lessor could recover on the original lease.[586] A parol agreement in regard to holding over after the end of a term created by a sealed lease is not open to the objection that it is changing a sealed instrument by parol. The new agreement does not take effect till the sealed lease has expired.[587]

IX. *Agreements to Lease.*

§ 137a. What constitutes a valid agreement.—Under the authorities, to create a valid contract of lease, but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and bounds of the property leased; second, a definite and agreed term; and third, a definite and agreed price of rental, and the time and manner of payment. These appear to be the only essen-

[584] Rollins v. Proctor, 56 Iowa 326, 9 N. W. 235.

[585] Evans v. McKanna, 89 Iowa 362, 56 N. W. 527.

[586] Watson v. Janion, 6 Ore. 137.

[587] West Chicago St. R. Co. v. Morrison &c. Co., 160 Ill. 288; 43 N. E. 393.

tials.[588] If the parties are fully agreed, there is a binding contract, notwithstanding the fact that a formal contract is to be prepared and signed; but the parties must be fully agreed and must intend the agreement to be binding. From the very nature of such an agreement, it is obvious that the parties contemplate the execution of a more formal instrument which may contain additional details as to the terms of the demise and the rights and obligations of the parties.[589] The mere fact that a written lease was in contemplation does not relieve either of the contracting parties from the responsibility of a contract which was already expressed in writing and a valid agreement for a lease may be made by letters and telegrams. When one party refuses to execute the lease according to the contract thus made, the other has a right to fall back on the written propositions as originally made. The absence of the formal agreement contemplated is not material.[590] But the agreement must contain all the ordinary terms in regard to time, amount of rent and so forth or the minds of the parties do not meet and it is not binding.[591] Yet an undertaking for a lease at a *fair rent* seems certain enough, as it may be reduced to certainty by recourse to extrinsic circumstances. The value of rents is not more variable than the price of goods or labor; and the action of *indebitatus assumpsit* for a *quantum valebant* is founded on a contract which leaves the price to the jury, yet it has never been objected that a contract of sale or for work and labor, in which the price is not stipulated, was invalid because the minds of the parties did not meet.[592] So the agreement is sufficient if it gives the data by which the amount of rent may be found by calculation. It is also sufficient to state a gross sum subject to correction which is supposed to represent the calculation.[593] A landlord may in an agreement bind

[588] Cochrane v. Justice Min. Co., 16 Colo. 415, 26 Pac. 780; Boston Clothing Co. v. Solberg, 28 Wash. 262, 68 Pac. 715.

[589] Boisseau v. Fuller, 96 Va. 45, 30 S. E. 457. In this case the clause, "The above to be covered by a regular lease subject to approval of all parties," was appended to a stipulation for a renting. This prevented the agreement from taking effect as a present demise, though there seems to be doubt as to whether it was intended to keep it from being a binding agreement. Yet such was the decision of the court.

[590] Post v. Davis, 7 Kan. App. 217, 52 Pac. 903; Bonnewell v. Jenkins, L. R. 8 Ch. Div. 70, 74.

[591] Disbrow v. Wilkins, 11 N. Y. App. Div. 628, 44 N. Y. 1115; Steinhardt v. Buel, 1 Misc. R. (N. Y.) 295, 48 N. Y. 668, 20 N. Y. 706; Sourwine v. Truscott, 17 Hun (N. Y.) 432. *Compare* Davis v. Thompson, 13 Me. 209.

[592] Weaver v. Wood, 9 Pa. St. 220.

[593] McFarlane v. Williams, 107 Ill. 33.

himself to lease for a certain time with an option to the lessee to choose between two periods. In such case the landlord's agreement to execute a lease for one or more years on certain specified terms binds him to execute a lease for at least two years at the option of the lessee.[594] But where the agreement provided that the covenant should be amplified and extended to the satisfaction of the lessor and should be such as were usual and customary in leases of like property for like terms it was held it could not be specifically enforced because it was too vague.[595]

§ 138. Specific performance of agreement.—Where a binding agreement for a lease has been made and one party refuses to perform his part of the contract, the remedy of the other party is not confined to his action at law for damages. Since the contract involves the transfer of rights in real estate, the general doctrine that equity will enforce specific performance in such cases may be invoked.[596] Selden, J., speaking for the New York Court of Appeals, said: "If two parties negotiate for a lease of certain premises, and they agree upon the terms and conditions of the lease and that a written lease shall be drawn and executed embracing those terms, this is not a lease but it is a contract which, whenever the statute of frauds does not interfere to prevent, can be enforced, and which the courts will compel the parties specifically to perform. The books are so full of such cases that it can hardly be necessary to refer to them at length."[597]

An agreement to execute a lease four years in the future has been specifically enforced against the executor of the lessor at that time, no change of position having been shown by reason of the *laches*.[598] But if the person having contracted for a lease upon certain stipulations enters upon the land and fails to perform the stipulations, he cannot compel a lease to be made to him either by the original lessor

[594] Boston Clothing Co. v. Solberg, 28 Wash. 262, 68 Pac. 715.

[595] Barnes v. Ludington, 51 Ill. App. 90.

[596] Cochrane v. Justice Min. Co., 16 Colo. 415, 26 Pac. 780; Clark v. Clark, 49 Cal. 586; Wharton v. Stoutenburgh, 35 N. J. Eq. 266; Blaney v. Hoke, 14 Ohio St. 292; Mackey v. Mackey, 29 Grat. (Va.) 158; Boston Clothing Co. v. Solberg, 28 Wash. 262, 68 Pac. 715; Seaman v. Ashchermann, 51 Wis. 678, 8 N. W. 818; Kennedy v. Lee, 3 Mer. 441; Fowle v. Freeman, 9 Ves. 351; Bonnewell v. Jenkins, L. R. 8 Ch. Div. 70, 74; Crossley v. Maycock, L. R. 18 Eq. 180; Thomas v. Dering, 1 Keen 729; Gibbins v. Board &c., 11 Beav. 1.

[597] Pratt v. Hudson River Co., 21 N. Y. 305.

[598] Ryder v. Robinson, 109 Mass. 67.

or his assignee. He who asks equity himself must do it.[599] So, where the holder of an agreement for a lease had committed such acts as would have amounted to a forfeiture had a lease been actually executed, with such covenants as were usually inserted in lease to other tenants of the same estate, it was held he could not have the aid of a court of equity to enforce a specific performance.[600]

§ 139. **Breach of agreement.**—After one party has refused for an unreasonable time to execute a lease, according to a previous agreement, the other party to the agreement is entitled to cancel the contract. A lessor's rights in this respect would not be altered by the fact that the lessee was in possession of the premises under a previous lease.[601] An offer to execute the lease which is not accepted relieves the party making it from further obligation. This holds good, although the refusal is not absolute but conditional on the possibility of finding a purchaser for the leasehold estate.[602] In case the agreement is to execute a lease upon the completion of a building, the owner is under no obligation to act until the building is completed. So a bill in equity to compel the specific performance of an agreement for the lease of a building, to commence at a future day on the completion of the building, is prematurely filed before that time, notwithstanding notice by the owner that he will not comply with his agreement.[603]

Where parties agree by parol to execute a lease, such instrument would contain in the absence of special agreement only the covenants which leases ordinarily contain and it is no breach for one party to refuse to execute an instrument containing unusual covenants.[604] But by refusing unconditionally to execute any lease at all, a party may waive strict compliance with the terms of the agreement. When defendants had made no objection to the lease sent them to execute and were not willing to accept a lease in any form, it was immaterial that the lease differed in several particulars from the form annexed to the agreement. They were under obligation either to execute the instrument sent to them for their signature or offer a valid reason for refusing to sign it and thus give the plaintiff an opportunity to remove the objectionable features.[605]

[599] Jones v. Roberts, 6 Call (Va.) 187. *Compare* Lenderking v. Rosenthal, 63 Md. 28.

[600] Jones v. Roberts, 3 H. & M. (Va.) 436.

[601] Griffin v. Knisely, 75 Ill. 411.

[602] Douglas v. Wilbur, 6 Phila. (Pa.) 540.

[603] Friedman v. McAdory, 85 Ala. 61, 4 So. 835.

[604] Hayden v. Lucas, 18 Mo. App. 325.

[605] Freeland v. Ritz, 154 Mass. 257,

§ 140. Measure of damages.—When an owner of premises refuses to carry out his agreement to grant a leasehold estate of them and the other contracting party resorts to an action at law to recover compensation for the loss entailed by this breach of contract, the measure of damages is the value of the contemplated leasehold estate in the open market, minus the rent reserved.[606] The measure of damages is the loss of the bargain, viz.: the difference between the rent agreed in the accepted proposition and the actual market value of the premises at the time the agreement was made.[607] If the leasehold estate has no general market value, its value should be ascertained from witnesses, whose skill and experience enables them to testify directly to such value in view of the hazards and chances of the business to which the land was to be devoted.[608]

The same damages can be recovered for breach of a covenant for quiet enjoyment by the lessor.[609] For a refusal by a purchaser of real estate to complete his contract, the seller can recover as damages the difference between the contract price and the market value.[610] Prospective profits from the lessee's use of the premises to be demised are too speculative to be recoverable.[611] Loss of profit is too remote a subject of damage to be allowed at all under any circumstances in such cases as these.[612] It has been held, however, that other damages than the loss of the bargain, which were the direct and natural consequences of the breach of contract complained of, could be recovered.[613] Thus, in an action for breach of contract to lease a hotel, the plaintiffs were held to be entitled to recover for their loss of time in waiting, and for their expenses in coming from a distant state, and for money paid under contract to a clerk whom they had employed

28 N. E. 226; Holdsworth v. Tucker, 143 Mass. 369, 375, 9 N. E. 764; Brewer v. Winchester, 2 Allen (Mass.) 389; Curtis v. Aspinwall, 114 Mass. 187, 193.

[606] North Chicago St. R. Co. v. Le Grand Co., 95 Ill. App. 435.

[607] Garsed v. Turner, 71 Pa. St. 56; Knowles v. Steele, 59 Minn. 452, 61 N. W. 557; Massie v. State Nat. Bank, 11 Tex. Civ. App. 280, 32 S. W. 797; Hall v. Horton, 79 Iowa 352, 44 N. W. 569; Alexander v. Bishop, 59 Iowa 572, 13 N. W. 714; Taylor v. Bradley, 4 Abb. App. Dec. (N. Y.) 363; Robinson v. Harman, 1 Exch. 850; Worthington v. Warrington, 8 C. B. 134, 65 E. C. L. 134.

[608] Rhodes v. Baird, 16 Ohio St. 573; Griffin v. Colver, 16 N. Y. 489; Giles v. O'Toole, 4 Barb. (N. Y.) 261; Newbrough v. Walker, 8 Grat. (Va.) 16.

[609] Buck v. Morrow, 2 Tex. Civ. App. 361, 21 S. W. 398.

[610] Kempner v. Heidenheimer, 65 Tex. 591.

[611] Rhodes v. Baird, 16 Ohio St. 573.

[612] Hanslip v. Padwick, 5 Exch. 615.

[613] Adair v. Bogle, 20 Iowa 238, 244.

and brought with them to aid in operating the hotel.[614] For a breach of an agreement to make or assign a lease, the intending lessee may recover as damages sums expended by him in examining the title and in drawing necessary papers.[615] But such items of damage as are incurred by the plaintiff by his own imprudence in beginning to act before he had ascertained whether the defendant could or could not complete his contract cannot be recovered.[616] In a case where there was a letting on the shares and the owner of the premises refused to let the other party into possession, the latter was allowed to recover the value of his contract, that is to say, what he could reasonably have made out of it, as his damages. To say that the plaintiff's damages should be measured by what he could have made on the farm is but another mode of saying he was entitled to the value of his bargain.[617] It amounts to the same thing to charge that the plaintiff is entitled to be put in the same position, pecuniarily, as if the bargain had been kept.[618] A different rule has been applied where the party contracting to grant a leasehold estate is unable to do so because of an unforeseen event for which he is not to blame, as where a life interest comes to an end. The damages would be the same as in the case of a breach of a contract to sell land, made without fraud or misrepresentation and which the vendor is unable to carry out because he cannot make a good title.[619] In such case the vendee cannot recover for the fancied goodness of the bargain.[620]

In one case there was no evidence of any pecuniary loss from the breach, or of any precise loss which could be ascertained in money, but the complaint was that the plaintiff was disappointed and put to trouble and inconvenience in procuring another house. It was held that a verdict giving actual damages could not be sustained.[621]

Where the owner of premises brings an action at law against an intended lessee for failure to carry out his agreement to lease premises,

[614] Hall v. Horton, 79 Iowa 352, 44 N. W. 569. To a similar effect is Driggs v. Dwight, 17 Wend. (N. Y.) 71.

[615] Hanslip v. Padwick, 5 Exch. 615; Richardson v. Chasen, 10 Q. B. 756, 59 E. C. L. 756.

[616] Hanslip v. Padwick, 5 Exch. 615.

[617] Hoy v. Gronable, 10 Casey (Pa.) 9; Wolf v. Studebaker, 65 Pa. St. 459.

[618] Garsed v. Turner, 71 Pa. St. 56.

[619] McClowry v. Croghan, 1 Grant Cas. (Pa.) 307.

[620] Sugd. Vendors (7 Am. ed.) Vol. I, p. 491; Flureau v. Thornhill, 2 W. Bl. 1078; Walker v. Moore, 10 B. & C. 416; Baldwin v. Munn, 2 Wend. (N. Y.) 399; Shannon v. Comstock, 21 Wend. (N. Y.) 457, 460; Peters v. McKeon, 4 Denio (N. Y.) 546.

[621] Hunt v. D'Orval, Dud. Law (S. Car.) 180.

the measure of the damages sustained by the plaintiff is the difference between the contract price of the leased premises as agreed upon and the amount that the plaintiff was able to realize out of the property after he had been notified that the defendant did not intend to take it.[622] However, the lessor will not be allowed to recover except for such loss, as he could not, by the use of reasonable effort and care and at a moderate expense, have prevented. If by ordinary effort and care, and at a moderate expense, he could have cultivated the land, or could have rented it, it was his duty to do so.[623] In determining the difference between the market value of the lease and the agreed rent, installments of rent not due at the time of the suit must be discounted at the legal rate.[624]

§ 141. Lease or agreement to lease.—"The general features of difference between a lease or present demise and a contract for a future letting are well understood, though the line of distinction is often too difficult to trace in its application to particular cases; and there is much conflict in the authorities. The question has generally arisen, as one purely of law upon the construction of the language of the written instrument, the distinction being often made to turn upon very slight differences in phraseology, though it is always a question of the intention of the parties."[625] It is a cardinal point in determining whether contracts between parties in regard to letting are leases or agreements for leases to seek the intention of the parties from the whole instrument.[626] Much discussion has arisen in the English courts, as to what is a lease and what is only an agreement for a lease, because if it be a lease, then a stamp of higher denomination is required. And Lord Ellenborough says that the rule to be collected from all the cases is, that the intention of the parties, *as declared by the words of the instrument, must govern construction.*[627] The question is one of construction to be determined from what appears to be the paramount intention of the parties as collected from the whole

[622] Post v. Davis, 7 Kan. App. 217, 52 Pac. 903; Cleveland v. Bryant, 16 S. Car. 634; Bacon v. Combes, 65 N. Y. S. 510.

[623] Stoker v. Wilson, 3 Willson Civ. Cas. (Tex.), § 10.

[624] Massie v. State Nat. Bank, 11 Tex. Civ. App. 280, 32 S. W. 797.

[625] Tillman v. Fuller, 13 Mich. 113, 119, per Christiancy, J.

[626] Thornton v. Payne, 5 Johns. (N. Y.) 74, per Spencer, J.; Colclough v. Carpeles, 89 Wis. 239, 61 N. W. 836.

[627] Poole v. Bently, 12 East 168, Lord Ellenborough; Stanley v. Hotel Corporation, 13 Me. 51; Weed v. Lindsay, 88 Ga. 686, 15 S. E. 836; Jackson v. Delacroix, 2 Wend. 433. South Dakota: Grigsby v. Western &c. Tel. Co., 5 S. D. 561, 59 N. W. 734.

tenor of the instrument.[628] Defects in the form of the instrument alone are not sufficient to change what would otherwise be a lease into an agreement for one. In holding an instrument defective in form alone was a lease, the Connecticut court said: "Here are all the elements of a valid lease, common parties, a subject-matter particularly described, a definite term, its beginning and ending fixed, and the amount of rent with terms of payment. The instrument is deficient only in matter of form."[629]

Although the line separating present leases from agreements for a future demise is often difficult to distinguish, there is a marked difference in the rights of the parties under the two contracts. By a lease the lessee acquires an estate in the land, by an agreement for a lease he merely acquires an executory right to have the owner convey him an estate for breach of which he has a claim for damages or a possible right to specific performance in equity. It constitutes an ambiguity for which a complaint will be bad on demurrer to allege an agreement for a lease and to state contracts which constitute an actual lease.[630]

§ 142. The test of intention in regard to making a lease or an agreement to lease is whether the agreement leaves anything incomplete. If it does not, it may operate as a present demise.[631] The law seems to be settled that when an agreement leaves nothing to be done and gives the lessee an immediate right to possession, it is a lease, passing a present estate in the land.[632] If the words used imply an immediate demise, with no stipulation for a further lease, the term, rent and manner of occupation being all explicitly stated, it confers all the rights of a lessee upon the contracting party. In every case where an agreement has been held not to operate by passing an in-

[628] **Connecticut:** Buell v. Cook, 4 Conn. 238, 242. **English:** Goodtitle v. Way, 1 Term R. 735; Roe v. Ashburner, 5 Term R. 163. **Illinois:** Griffin v. Knisely, 75 Ill. 411. **Massachusetts:** Bacon v. Bowdoin, 22 Pick. 401; Kabley v. Worcester &c. Co., 102 Mass. 392. **Missouri:** Western &c. Co. v. Gannon, 50 Mo. App. 642. **New York:** Hallett v. Wylie, 3 Johns. 44; Thornton v. Payne, 5 Johns. 74.

[629] Johnson v. Phœnix &c. Ins. Co., 46 Conn. 92, 102. Where an instrument purported to be a lease and contained a description of the premises occupied and fixed the rent, time of payment and length of term, it constituted a lease. Coyne v. Feiner, 16 N. Y. S. 203, 41 N. Y. St. 93.

[630] Crow v. Hildreth, 39 Cal. 618.

[631] Doe v. Ries, 8 Bing. 178.

[632] Staniforth v. Fox, 7 Bing. 590; Roe v. Ashburner, 5 Term R. 163; Jenkins v. Eldredge, 3 Story 325, 13 Fed. Cas. No. 7268.

terest but to rest in contract, there has been either an express agreement for a further lease, or construing the agreement to be a lease *in praesenti* would work a forfeiture, or the terms have not been fully settled, or something further was to be done.[633] On the other hand if the contracting parties intend to do something further after making an agreement for a lease, such as executing a formal lease with covenants, the earlier instrument is not a lease but merely an agreement for a lease.[634] As long as the parties do not consider the matter finished, it is not a completed lease.[635] Where there was a binding contract sufficient to satisfy the statute of frauds, the addition of the words "Notes and papers to be drawn as soon as convenient," showed that the parties considered the transaction as incomplete and the writing was only an executory agreement for a lease.[636] However, where there are apt words of present demise and the tenant goes into possession and occupies thereunder, an instrument will be construed as a present demise rather than as an agreement for a lease, even though it contains a covenant for the execution of a more perfect and formal lease.[637]

§ 143. Where there is no covenant for executing any further instrument, an agreement will take effect as a present lease, even though the term is not to begin until a future time.[638] In many cases where there were apt words for a present demise and the term was to commence *in futuro* at a day certain, it has been held that the parties intended to make a lease to begin in the future.[639] An instrument employing the language "hereby leases and demises" in

[633] Thornton v. Payne, 5 Johns. (N. Y.) 74; Colclough v. Carpeles, 89 Wis. 239, 61 N. W. 836.

[634] Goodtitle v. Way, 1 Term R. 735; Roe v. Ashburner, 5 Term R. 163; Doe v. Smith, 6 East 530; Morgan v. Bissell, 3 Taunt. 65.

[635] Harrison v. Parmer, 76 Ala. 157; Buell v. Cook, 4 Conn. 238; Martin v. Davis, 96 Iowa 718, 65 N. W. 1001.

[636] Harrison v. Parmer, 76 Ala. 157.

[637] Jackson v. Kisselbrack, 10 Johns. (N. Y.) 336, 6 Am. Dec. 341; Jackson v. Van Hoesen, 4 Cow. (N. Y.) 325; Jourgensen v. Fraitel, 20 N. Y. S. 33, 47 N. Y. St. 413.

[638] People v. Kelsey, 14 Abb. Pr. (N. Y.) 372, 38 Barb. (N. Y.) 269; Jenkins v. Eldredge, 3 Story 325, 13 Fed. Cas. No. 7268; Hallett v. Wylie, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457; Boisseau v. Fuller, 96 Va. 45, 30 S. E. 457.

[639] Bacon v. Bowdoin, 22 Pick. (Mass.) 401; Kabley v. Worcester &c. Co., 102 Mass. 392; People v. Kelsey, 14 Abb. Pr. (N. Y.) 372, 38 Barb. (N. Y.) 269; Trull v. Granger, 8 N. Y. 115; Becar v. Flues, 64 N. Y. 518, 520; Colclough v. Carpeles, 89 Wis. 239, 61 N. W. 836; Chapman v. Bluck, 4 Bing. N. C. 187, 196.

the present tense provided that the term was to begin in two months and last for ten years, and thereby created a present lease, it being no objection that the term was to begin in the future.[640] If a contract of letting is evidenced by letters in which the building, the commencement and length of the term and the rate of rent are distinctly described, so that no additional document is necessary to express the intent of the parties and there is no indication in the writing or in the conduct of the parties that any other or more formal instrument is intended to be made, there can be no doubt that the parties intended what the language clearly imports—namely, a present demise to commence in the future.[641] If there is anything conditional in regard to the state of the premises, such condition can be satisfied by performance before the day appointed for the commencement of the new term.[642] In a case strengthened by a formal instrument with words of present demise, the New York Supreme Court reached the opposite result and held the instrument under consideration to be a mere agreement for a future leasing.[643] The decision seems to rest on a misconception of the rule that to be a present demise the doing of nothing further shall be contemplated, which refers to the execution of other instruments and not to alterations or changes in the premises themselves. So there is sound reason for a decision that an instrument, with words of present demise, complete in itself and looking to no further deeds, took effect as a present demise, although the commencement of the term was not definitely fixed, and the lessor had no title to the premises when the contract was executed but merely an agreement for a future formal lease to be executed when a building was finished. The instrument was complete in itself; it fixed the term, rent and duty to repair; clearly no further lease was in the contemplation of the parties.[644] It furnishes no objection that the term is to commence upon the completion of a building.[645]

But where the owner of land agreed that a person should have a term in it beginning thirty days after owner's death and covenanted that he would make a provision in his will to carry out this agree-

[640] Weed v. Crocker, 13 Gray (Mass.) 219.

[641] Shaw v. Farnsworth, 108 Mass. 357; Chapman v. Bluck, 5 Scott 515, 531.

[642] Shaw v. Farnsworth, 108 Mass. 357; Bacon v. Bowdoin, 22 Pick. (Mass.) 401.

[643] Jackson v. Delacroix, 2 Wend. (N. Y.) 433.

[644] Western &c. Co. v. Gannon, 50 Mo. App. 642. See also, Steinfield v. Wilcox, 56 N. Y. S. 217, 26 Misc. R. 401.

[645] Colclough v. Carpeles, 89 Wis. 239, 61 N. W. 836.

ment, it was held that this was an agreement to lease merely and not a lease.[646]

§ 144. The words "agree to let" have for a long time been held to be apt words of present demise.[647] The form of expression "we agree to rent or lease" is not indicative of intention not to make a present demise but may take effect as a present demise, and does not necessarily import that a lease is intended to be given at a future day. On the contrary these words may take effect as a present demise, and the words "agree to let" have been held to mean exactly the same thing as the word "let," unless there be something in the instrument to show that a present demise could not have been in the contemplation of the parties.[648]

A lease for a year containing a clause "we further agree to lease to said tenant said premises for as long as he wishes to occupy them," was held to operate as a lease and not merely as an agreement for a lease, and the lease was valid in spite of the indefinite period for its continuance.[649]

§ 145. Agreements subject to a condition.—Where an agreement for leasing a building, in words sufficient to import a present demise, contained a proviso that a majority of the county court should agree to it, it was only an agreement for a lease on a condition precedent.[650] But where a tenant at will agreed to take a house for three years from a certain future date, if the owner would put in a new furnace, acceptance by the owner created a present demise and not a mere agreement to execute a lease at a future time.[651] An agreement to make a lease contained the clause "The $100 to be paid on signing of said lease is to apply on first month's rent," but there was no other reference to the $100 in the agreement. In the absence of other stipulations the making or tendering of payment was not a condition precedent to the right of the lessee to enforce damages for the non-execution of the lease.[652]

[646] Weld v. Traip, 14 Gray (Mass.) 330.

[647] Western &c. Co. v. Gannon, 50 Mo. App. 642; Averill v. Taylor, 8 N. Y. 44; Kabley v. Worcester &c. Co., 102 Mass. 392; Doe v. Benjamin, 9 A. & E. 644; Chapman v. Bluck, 4 Bing. N. C. 187.

[648] Kabley v. Worcester &c. Co., 102 Mass. 392; Doe v. Benjamin, 9 A. & E. 644.

[649] Holley v. Young, 66 Me. 520.

[650] Buell v. Cook, 4 Conn. 238.

[651] Shaw v. Farnsworth, 108 Mass. 357.

§ 146. Effect of possession by lessee.—An instrument which is in other respects a lease is not changed into a mere agreement for a lease because the lessee refuses to accept possession.[653] It is equally true that one having a landowner's agreement to lease does not obtain an estate in the land by going into possession. He would be a mere licensee.[654] So where a person was in possession as undertenant and made an executory agreement for a lease from the original lessor after the expiration of his existing term, this agreement did not entitle him to defend against an action based on a dispossessory warrant.[655] Furthermore, entry into possession under an agreement for a lease would not give the tenant such an estate in the land that he could recover damages when the premises were taken on eminent domain. The tenant in the case so holding had been ejected by the landlord before the proceedings to condemn the land were instituted. So long as he remained in possession, the agreement might be sufficient to protect him and to define the conditions of his occupancy. In equity he would be protected against ejection and might compel the execution of a lease which would confer on him the legal estate for the stipulated term. But he had not acquired the legal estate when he was virtually ejected from the premises, and he had ceased to be a tenant thereof before damages from the city became payable to anybody. His remedy would be an action at law against the landowner for breach of the executory contract.[656] "Where parties enter under a mere agreement for a future lease," explains Justice Littledale, "they are tenants at will, and if rent is paid under the agreement they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract."[657] Thus, in a case where one party entered into possession of premises under an agreement to take a lease of them but the parties could not agree upon the terms of the lease and defendant refused to vacate after notice to quit, he was liable to the owner in an action of trespass after the latter had resumed possession.[658]

But the tenant's possession is always available to show that there was an actual demise rather than a contract for future leasing.

[653] Hall v. Horton, 79 Iowa 352, 44 N. W. 569.

[654] Rice v. Brown, 81 Me. 56, 16 Atl. 334.

[655] Potter v. Mercer, 53 Cal. 667; Pulse v. Hamer, 8 Ore. 251.

[656] Gibson v. Needham, 96 Ga. 172, 22 S. E. 702.

[657] McGrath v. City of Boston, 103 Mass. 369.

[658] Hamerton v. Stead, 3 B. & C. 478, 483, per Littledale, J., quoted in Weed v. Lindsay, 88 Ga. 686, 15 S. E. 836.

[659] Welch v. Winterburn, 25 Hun (N. Y.) 437.

Transfer of possession is evidence throwing light on the intention of the parties when that is left obscure by the wording of the instrument.[659] Where the intention of the parties is not clearly expressed, the transfer of possession under the agreement will be a circumstance tending to show it was intended as a lease *in praesenti*.[660] An agreement in one case provided that premises should be surveyed and that then one party should take a lease. It was held after long possession and payment of rent that this took effect as a present demise rather than as an agreement for a future lease.[661] Moreover it has been held that an entry into possession under a mere agreement to lease may be sufficient proof of a waiver by the parties of the original intention to execute a formal lease.[662] For where an agreement for a lease contained a provision that formal leases should be executed on certain blank forms for leases in use in leasing rooms in a certain building before the lessee went into occupation, it was held competent for the parties to waive this provision, in which case the agreement constituted an actual demise of the premises and the provisions in the blank form became incorporated in the instrument by reference.[663]

X. *Statute of Frauds.*

§ 147. The English Act.—In all countries where the common-law system of jurisprudence prevails, the statute passed in the reign of Charles II, commonly known as the Statute of Frauds, furnishes the basis for subsequent enactments requiring that certain contracts and agreements must be proved by written instruments. Even where the exact words of the original act are not used, as is frequently the case, the construction of the statute of Charles II by English courts is an important aid in construing other statutes on the same topic. The parts of the English act, applicable to the making of leases, provide in effect that parol transfers of real estate, without

[659] Billings v. Canney, 57 Mich. 425, 24 N. W. 159; Shaw v. Farnsworth, 108 Mass. 357.

[660] Chapman v. Towner, 6 M. & W. 100; Jones v. Reynolds, 1 Q. B. 506, 41 E. C. L. 646; Doe v. Benjamin, 1 Perry & D. 440; Bacon v. Bowdoin, 22 Pick. (Mass.) 401; Jenkins v. Eldredge, 3 Story 325, 13 Fed. Cas. No. 7268; People v. Gillis, 24 Wend. (N. Y.) 201; Jackson v. Delacroix, 2 Wend. (N. Y.) 430.

[661] Jackson v. Kisselbrack, 10 Johns. (N. Y.) 336, 6 Am. Dec. 341.

[662] Culton v. Gilchrist, 92 Iowa 718, 61 N. W. 384; Neppach v. Jordan, 15 Ore. 308, 14 Pac. 353. *Compare* Cheney v. Newberry, 67 Cal. 125, 7 Pac. 444.

[663] People v. St. Nicholas Bank, 3 N. Y. App. Div. 544, 74 N. Y. St. 35, 38 N. Y. S. 379.

regard to the consideration paid, shall have the effect of creating estates at will merely. Then follows an exception to the above provision in section (2) in favor of all leases not exceeding the term of three years from the making thereof, where the rent reserved amounts to two-thirds part at least of the full improved value of the thing demised.[664] It is further provided in section (4) of the English act that no action shall be brought for the sale of any interest in land, or upon any agreement that it is not to be performed within one year from the making thereof unless the agreement be put in writing and duly signed. These sections soon received judicial construction and leases not exceeding three years have always been considered as excepted by the second section from the operation of the fourth * * * A parol lease warranted by the second section may be as special in its term as a written one.[665] The clause regarding parol agreements not to be performed within the space of one year does not apply to agreements regarding the sale or leasing of land, although in terms broad enough to cover such contracts. But from the grouping of the sections it is apparent that this section applies only to contracts regarding personal property, and agreements for work and labor.[666] The effect of this statute, so far as it applies to parol leases not exceeding three years, is that the leases are valid, and that whatever remedy may be had in their character of leases may be resorted to, but they do not confer a right to sue the lessee for damages for not entering on or occupying the demised premises.[667] As long as the parol lease is executory no action will lie on it; but after entry into possession an action will lie, if the lease be for three years or less, and all its provisions are as valid and binding as if it had been reduced to writing.[668]

§ 148. Form of statutes for the prevention of frauds and perjuries in the United States.—In the older states of this country, the English mode of expression is followed denying to parol transfers a greater validity than leases at will, while the exception in favor of short term parol leases is either lengthened, shortened, or omitted altogether. Another common form for such statutes, more usual in the west, is a provision that no action shall be brought on a contract "for the sale of land or for a leasing thereof for a longer period than one

[664] 29 Car. 2 c. 3.

[665] Bolton v. Tomlin, 5 A. & E. 856, 864, per Denman, C. J.

[666] Hollis v. Edwards, 1 Vern. 159.

[667] Inman v. Stamp, 1 Stark. 10; Edge v. Strafford, 1 C. & J. 391; Ryley v. Hicks, 1 Str. 651.

[668] Bolton v. Tomlin, 5 A. & E. 856.

year," unless the same is in writing subscribed by the party to be bound or his duly authorized agent.[669] The effect of the statute is the same whether it is worded that a parol lease creates merely an estate at will, or that no action shall be brought on a parol lease, or that a parol lease shall be void. These differences in phraseology are not material. Thus, in a jurisdiction where the statute read that every parol contract for a leasing for a longer period than one year shall be void, it was urged that a tenancy from year to year was not created by entrance and occupation under a parol lease for two years. The court said: "It will be observed that these provisions in regard to parol leases differ somewhat from the terms of the English statute of frauds, and from the statute as adopted in some of our sister states, which do not make verbal leases exceeding the prescribed period void, but allow them the effects of estates at will.[670] But the counsel does not contend even for such a literal and rigid construction of the above provisions of our statute as would make this parol lease for two years absolutely void—more especially when coupled with the facts of the lessee's entry under it, his holding possession of the premises for about a year and eight months and his payment of the stipulated rent for a year and a half. It surely would be difficult to find a case where the facts would more fully warrant the conclusion that a tenancy from year to year was created than the one before us."[671] No recovery

[669] The exception in favor of parol leases is put at one year in Alabama, Arkansas, Alaska, Arizona, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, Wyoming. At two years in Florida. At three years in Indiana, New Jersey, North Carolina, Pennsylvania. At five years in Virginia. At seven years in Maryland. In Delaware a contract for renting for a year, though respecting an interest in lands, is excepted by landlord and tenant act, and may be proved by parol. Himesworth v. Edwards, 5 Harr. (Del.) 376; In Louisana leases may be made either by written or verbal contract. Mercricks Rev. Civ. Code 1901; Art. 2683. But if the lease has not been reduced to writing a purchaser of the reversion cannot be compelled to give any indemnification for evicting the lessee. Ibid Art. 2741.

[670] Bolton v. Tomlin, 5 A. & E. 856; Ellis v. Paige, 1 Pick. (Mass.) 43; Davis v. Thompson, 13 Me. 209, 214; Barlow v. Wainwright, 22 Vt. 88; Browne on Frauds, ch. 3; Doe v. Bell and Clayton v. Blakey, 2 Smith's Lead. Cas. 119, 127.

[671] Koplitz v. Gustavus, 48 Wis. 48, 3 N. W. 754, per Cole, J. To same effect see Utah Optical Co. v. Keith, 56 Pac. 155, 18 Utah 464.

could be had, however, on the special agreement, as that is declared void by the express terms of the statute.[672]

Short term parol leases depend for their validity on the clause in the statute of frauds excepting them from the sweeping general provisions of the act; but this excepting clause is omitted from the statute, as reinacted in several of the states, so that in those states all parol leases without regard to the length of the term are rendered unenforceable.[673] Thus, in Massachusetts, a parol lease "for the season," though construed to be for a term less than a year, was held to create an estate at will only, although the parol agreement was for a greater estate.[674] Whether the omission of the excepting clause has any bearing on the doctrine of tenancies from year to year, has given rise to litigation and arrayed courts of great authority and learning on opposing sides.[675]

The provision in regard to contracts not to be performed within a year is found in the American statutes and, although unimportant in England because held not to apply to contracts regarding real estate, becomes an important factor here because it is sometimes held to apply to leases.

§ 149. **The requirement of the original English statute as to the value of the rent reserved** has not been incorporated in subsequent enactments, and in the United States the exception in favor of short period parol leases is not usually made dependent upon the reservation of any rent. Such a provision is found occasionally however. Thus, in New Jersey the exception in the statute of frauds does not save all leases for less than three years but only such whereupon the rent reserved shall amount to two-thirds, at least, of the full improved value of the thing demised.[676] And in South Carolina the exception is in favor of leases "not exceeding the term of one year from the time of entry, whereupon the rent reserved to the landlord during such term shall amount unto two-thirds part, at the least, of the full improved value of the thing demised."[677] In statutes where this requirement is made the clause is satisfied, according to the authorities, by showing that the rent reserved is at least two-thirds the *rental*

[672] Phipps v. Ingrahm, 41 Miss. 256.

[673] No exception is made in favor of short term parol leases in Hawaii, Maine, Massachusetts, Missouri, New Hampshire, New Mexico, Ohio, Vermont, Washington.

[674] Kelly v. Waite, 12 Metc. (Mass.) 300.

[675] §§ 192–214.

[676] Gano v. Vanderveer, 34 N. J. Law 293.

[677] Civil Code 1902, § 2650.

value of the demised premises. It need not be two-thirds of the improved value of the fee.[678]

§ 150. **In New Mexico** it is held that the common law, together with all British statutes of a general nature not local to that country, nor in conflict with the constitution and the form of government and institutions, passed prior to the separation of the colonies and in force at that time form a part of the law of the territory, except when the laws of congress or the local legislature had otherwise provided.[679] In accordance with this doctrine the English statute of frauds is regarded as in force in New Mexico.[680] On authority of the English cases which interpret the clause concerning the value of the rent reserved, it has been held that two-thirds the value of the thing demised means two-thirds the rental value and not two-thirds the value of the fee.[681] In other matters of interpretation it would seem that the courts in that jurisdiction would follow the analogy of the English rules, even if they did not feel bound by the English decisions as precedents.

§ 151. **Assignments.**—Specific provision is often made in the various statutes against frauds and perjuries against parol assignments of leases for more than a specified short term. Even without such a provision, it seems that a contract for the assignment of a lease for more than the permitted period for parol leases is within the statute.[682] Where there was no express provision in a statute requiring an assignment or underletting by a termor to be in writing, it was urged that a term which could only be created by writing could nevertheless be assigned by parol. The court replied that "The words of these statutes, in truth, embrace the transfer of terms as well as the creation of them. They are that all contracts to sell or convey land or any interest in or concerning it, shall, with one exception, be void unless in writing. Now a term for years is not only an interest but it is an estate in land; and therefore a contract to assign a term is a contract to sell and convey land. Besides it is a mistake to sup-

[678] Union Banking Co. v. Gittings, 45 Md. 181; Birckhead v. Cummins, 33 N. J. L. 44; Cody v. Quarterman, 12 Ga. 386; Childers v. Talbott, 4 N. Mex. 336, 16 Pac. 275.

[679] Browning v. Browning, 3 N. Mex. 659, 9 Pac. 677.

[680] Childers v. Talbott, 4 N. Mex. 336, 16 Pac. 275.

[681] Childers v. Lee, 5 N. Mex. 576, 25 Pac. 781.

[682] Benton v. Schulte, 31 Minn. 312, 17 N. W. 621; Kingsley v. Siebrecht, 92 Me. 23, 42 Atl. 249; Smith v. Smith, 9 Ky. L. R. 100.

pose that the statute, in respect to the creation of terms, embraces only those created immediately out of the inheritance. Therefore if a termor underlets the premises, so as to leave a reversion in himself, that is a new term created out of the former one and is within the words of the act."[683] This same point was raised in a Michigan case where it was urged that the original term was a chattel interest which could lawfully be assigned by parol. Cases were cited which hold that such an interest can be sold on execution as a chattel.[684] But it was held that the assignee did acquire an interest in land; and it was forbidden by statute that such an interest should be acquired by parol; therefore a parol assignment of a term for years would be invalid if the statute of frauds has been pleaded.[785] Although the subject-matter of the contract is the lease itself and not the land covered by the lease, still a contract for the assignment of a lease is for an interest "in or concerning" land, and hence is within the common wording of the statute of frauds.[686] It is none the less a lease of land, because the lessor himself has only a leasehold estate and therefore a sublease of premises must comply with the statute of frauds just as much as a lease which creates a term for years out of a fee.[687]

The rule that a transfer of possession will operate as a part performance sufficient to take a parol contract out of the statute of frauds has been applied in the case of a parol assignment. The assignee went into possession and paid rent, but subsequently vacated, and was sued for rent accruing during the balance of the term. It was held that part performance took the case out of the statute of frauds and that the landlord could recover the rent.[688]

§ 152. Leases for one year from future date.—Where the words of the statute are that parol leases for a period of more than one year *from the making thereof* shall be void, this clearly includes terms beginning *in futuro* which are to run for a year.[689] The same would

[683] Briles v. Pace, 13 Ired. L. (N. Car.) 279.

[684] Buhl v. Kenyon, 11 Mich. 249; Grover v. Fox, 36 Mich. 453.

[685] Fratcher v. Smith, 104 Mich. 537, 62 N. W. 832, construing How. St., § 6174.

[686] Kingsley v. Siebrecht, 92 Me. 23, 42 Atl. 249.

[687] Fratcher v. Smith, 104 Mich. 537, 62 N. W. 832; Freeland v. Ritz, 154 Mass. 257, 28 N. E. 226.

[688] Dewey v. Payne, 19 Neb. 540, 26 N. W. 248. But see §§ 159–161.

[689] Garner v. Ullman, 99 Ala. 218, 13 So. 382; Bain v. McDonald, 111 Ala. 269, 20 So. 77. An example of such a statute is found in Shan. Code Tenn., § 3142, sub sec. 4. It reads that "No action shall be brought: . . . Upon any contract for the sale of lands, etc., or the making of any lease thereof for a longer term than one year from

be true where the statute excepts parol leases for a period of three years and less. An oral lease for three years to commence in the future would create an estate at will only.[690] It is equally clear that where the exception is in favor of leases not exceeding the term of one year *from the time of entry,* a parol lease for a year is valid, though the term is to commence at a future date.[691] In other states the statute on this point merely provides that parol leases for one year shall be excepted without specifying whether the year is to be reckoned from the time of entry or from the time of making the lease. Where the words "from the making thereof" in an earlier act were omitted from a later one, it has been held that the prohibition against parol leases applied to the length of the term and not to the time of beginning. So that a verbal lease to begin *in futuro* but not to last more than a year from the time of beginning is not invalid.[692] Is a parol agreement to let real estate for the term of one year, to commence *in futuro,* valid in law? Yes, it is, because when the legislature reduced the parol lease period from three to one year, it took away the words "from the making thereof," and because the term does not begin till the lessee obtains a right of possession. So a parol lease or a parol agreement to lease for a term not exceeding one year is valid without regard to the time when the term is to commence.[693]

But in statutes against frauds and perjuries there is a further provision that agreements not to be performed within a year from the making thereof must be in writing. Such a provision would on its face render a parol lease for a year to commence in the future invalid and unenforceable. To obviate this difficulty it is necessary to follow the English doctrine that this clause does not apply to agreements in regard to the sale of real estate.[694] On this point, however, the authorities do not agree.[695] Such an interpretation is not usual,

the making thereof, unless the agreement shall be in writing."

[690] Jennings v. McComb, 112 Pa. St. 518. See also, Schmitz v. Lanferty, 29 Ind. 400.

[691] Hillhouse v. Jennings, 60 S. Car. 392, 38 S. E. 596.

[692] Young v. Dake, 5 N. Y. 463, overruling Croswell v. Crane, 7 Barb. 191; Goldberg v. Lavinski, 3 Misc. (N. Y.) 607, 22 N. Y. S. 552; Taggard v. Roosevelt, 2 E. D. Smith (N. Y.) 100; Becar v. Flues, 64 N. Y. 518; Ward v. Hasbrouck, 169 N. Y. 407, 62 N. E. 434, affirming 52 App. Div. 627. *Contra*, Beller v. Devoll, 40 Mo. App. 251, under an obsolete statute R. S. 1879, § 2513. Sears v. Smith, 3 Colo. 287; Huffman v. Starks, 31 Ind. 474; Sobey v. Brisbee, 20 Iowa 105; McCroy v. Toney, 66 Miss. 233, 5 So. 392.

[693] Young v. Dake, 5 N. Y. 463.

[694] Fall v. Hazelrigg, 45 Ind. 576; Cole v. Wright, 70 Ind. 179; Young v. Dake, 5 N. Y. 463; Lowman v. Sheets, 124 Ind. 416, 24 N. E. 351.

[695] Mackey v. Potter, 34 Minn. 510, 26 N. W. 906.

however, and in most states the provision against parol agreements not to be performed within the space of one year is held to apply whether the subject-matter be real or personal estate.[696]

Where the finding was that a lease was executed on or about April 1, and the term began on that date, it was held not to be objectionable as a lease for a year to commence at a future date.[697]

§ 153. Extent of validity.—Contrary to the rule in England, it seems that the short term parol leases excepted from the operation of the statute of frauds have been regarded by American courts as valid for all purposes. Thus it has been held that a parol lease vests a present interest in the term which is assignable before entry.[698] In an action for rent under such a lease, it is not necessary to show that the lessee occupied or used the demised premises.[699] The result of this doctrine is to allow a recovery of damages for failure to give or accept possession under a parol lease. "It is certainly as plain as anything can be," said Judge Frazer, "that, under the statute, a parol lease for a term not exceeding three years is valid, whether executed by taking possession or not. There is no room for argument about

[696] White v. Levy, 93 Ala. 484, 9 So. 164; Wickson v. Monarch &c. Mfg. Co., 128 Cal. 156, 60 Pac. 764; Warner v. Hale, 65 Ill. 395; Creighton v. Sanders, 89 Ill. 543; Brownell v. Welch, 91 Ill. 523; Greenwood v. Strother, 91 Ky. 482, 16 S. W. 138, 12 Ky. L. R. 352; White v. Holland, 17 Ore. 3, 3 Pac. 573; Jellett v. Rhode, 43 Minn. 166, 45 N. W. 13; Cram v. Thompson, 87 Minn. 172, 91 N. W. 483; Olt v. Lohnas, 19 Ill. 576; Wheeler v. Frankenthal, 78 Ill. 124; Wolf v. Dozer, 22 Kan. 436; Briar v. Robertson, 19 Mo. App. 66; Atwood v. Norton, 31 Ga. 507. **Michigan doctrine.** Parol letting for term not to exceed one year is valid in Michigan, even though the term is to commence *in futuro*, because it is a mere agreement to lease which is performed by the leasing, and so is not within a clause which declares that contracts not to be performed within a year must be in writing. It seems that under this rule the term must end with two years. Tillman v. Fuller, 13 Mich. 113; Whiting v. Ohlert, 52 Mich. 462, 18 N. W. 219. However, a parol lease of one year with a privilege of three was held invalid because of the statute of frauds. The court reject the argument that the contract might be performed within one year, and would therefore be valid for that period. It was "within the mischief which the statute is designed to prevent. The contract contemplated a lease for three years, and so far as the lessor is concerned it is absolute. . . . It follows that the agreement is void under the statute." Hand v. Osgood, 107 Mich. 55, 64 N. W. 867.

[697] Mackey v. Potter, 34 Minn. 510, 26 N. W. 906.

[698] Becar v. Flues, 64 N. Y. 518.

[699] Mayer v. Lawrence, 58 Ill. App. 194.

that proposition; and it follows that the lease stated in the complaint was a valid lease. By its terms, the lessee was to have possession of the premises, and the lessor would be entitled to the rents. If binding upon one party, it was likewise binding on the other. If valid as a lease, it must give the lessee the right to occupy the premises according to its terms and conditions, and a remedy of some kind for the privation of that right would follow. It is a solecism to say that the contract was obligatory, and yet that it cannot in any manner be enforced. What the remedy for its enforcement is, remains the only question, then, necessary to the decision of the case before us. It is a general proposition that one who is entitled to the possession of real estate may recover such possession by a suit for that purpose, and we know of no authority or reason for making a lessee an exception to that rule. Possession is the specific thing for which the lessee contracted and if the law will not give him that, or damages for its privation, it is not perceived how the contract can be held to be binding upon the lessor."[700]

The distinction made by the English courts as to parol leases not executed by transfer of possession has, however, been followed in South Carolina. A lessee brought an action on a verbal lease for a year to recover damages from his lessor for failure to carry out the agreement and put the lessee in possession according to the terms of the contract. It was held he could not recover.[701] Yet, after a lessee went into possession under a parol lease for a year and occupied and paid rent for several months, he was held liable for rent for the entire year, though he vacated the premises before the year expired.[702] The law is the same in Maryland where Judge Alvey stated the rule as follows: "The effect of the first, second and third sections of the Statute of Frauds, taken together, so far as they apply to parol lease not exceeding three years from the making thereof, is this, that the leases are valid and that whatever remedy can be had on them in their character of leases, may be resorted to but they do not confer the right to sue the lessee for damages for not taking possession. And until entry by the lessee the whole estate and right of possession remain in the lessor, the lessee having but an *interesse termini*, and nothing more."[703]

[700] Huffman v. Starks, 31 Ind. 474. Disapproving Stackberger v. Mosteller, 4 Ind. 461, where in such a case it was held damages could not be recovered.

[701] Davis v. Pollock, 36 S. Car. 544, 15 S. E. 718.

[702] Hellams v. Patton, 44 S. Car. 454, 22 S. E. 608.

[703] Union Banking Co. v. Gittings, 45 Md. 181, 196. Quoted with approval in Childers v. Talbott, 4 N. Mex. 336, 16 Pac. 275.

A case on the border line was that where a parol agreement was made to allow a tenant to enter after the expiration of his term to harvest crops planted the preceding fall. The court held that if the agreement was supported by sufficient consideration it was valid because the interest created was for less than a year.[704] After a lessee has been in occupation under a parol lease for a period permitted by the statute, an action can be brought to charge him on the lease.[705]

§ 154. Duration of term.—Where a parol lease gives the lessee a privilege of extension for a period beyond the statutory limit for parol leases to run, the entire agreement is void. The original term and the extension constitute but a single letting, and if the two exceed the prescribed period, the lease is invalid because not reduced to writing.[706] Still, in spite of previous decisions, the New York Court of Appeals held that a lease by parol for four months with an option for an extension for a period not exceeding three years at a stipulated rental was valid as a lease for four months. The existence of the option did not render this agreement a lease for a longer period than four months as it might not be exercised and it was entirely possible for the lease to terminate at the end of the definite period agreed upon.[707] The reason assigned by the court was that the statute does not include an agreement which is not likely or is not expected to be performed within a year, if, when fairly and reasonably interpreted, it admits of a valid execution within that time, although it may not be probable that it will be.[708] But the failure to notify in writing of an election to extend, given by a written lease, does not render the extension bad because of the Statute of Frauds. The theory is that the entire term, including the extension, is created by the original written instrument.[709]

A lease of real estate until such time as lessor pays lessee a certain

[704] Ladd v. Brown, 94 Mich. 136, 53 N. W. 1048.

[705] Lowman v. Sheets, 124 Ind. 416, 24 N. E. 351.

[706] Schmitz v. Lauferty, 29 Ind. 400; Hand v. Osgood, 107 Mich. 55, 64 N. W. 867; Holzderber v. Forrestal, 13 Daly (N. Y.) 34; Carling v. Purcell, 19 N. Y. S. 183, 46 N. Y. St. 287; Rosen v. Rose, 13 Misc. 565, 68 N. Y. St. 370, 2 Ann. Cas. 194, 34 N. Y. S. 467; Chretien v. Doney, 1 N. Y. 419; House v. Burr, 24 Barb. (N. Y.) 525; Kramer v. Cook, 7 Gray (Mass.) 550; Voege v. Ronalds, 83 Hun 114, 31 N. Y. S. 353.

[707] Ward v. Hasbrouck, 169 N. Y. 407, 62 N. E. 434, affirming 52 App. Div. 627.

[708] Warren &c. Mfg. Co. v. Holbrook, 118 N. Y. 586, 593, 23 N. E. 908; Kent v. Kent, 62 N. Y. 560.

[709] Zillig, Matter of, 13 N. Y. St. 891.

indebtedness, is neither an agreement that is not by its terms to be performed within a year from the making thereof, nor an agreement for a leasing for a longer period than one year and is not required to be in writing.[710] In another case the question arose whether a parol lease for one year, with an agreement that the tenant might sow the land in wheat, gave him the right to enter after the expiration of the year and harvest the crops. It was held that the right to enter and reap was an interest in lands and that to sustain the lease would be to extend a parol lease over a period of two years, which was forbidden by the statute of frauds.[711]

§ 155. Whether void only as to excess.—A parol lease for a period of so great duration that it is rendered unenforceable by the statute of frauds cannot be considered good for the period during which a parol lease would be valid and void only as to the remainder. However, where a tenant enters and occupies under a lease which cannot take effect because of the statute of frauds, it will usually result in a tenancy from year to year.[712] This distinction has an important bearing on the rights of the parties even where the period of parol leases is set at one year. In the face of specific statutory provision that certain parol leases are void, a court does not seem justified in saying that while such a lease cannot be enforced according to the terms agreed upon by the parties, it is a valid lease for one year, three years or five years, as the case may be. After the lessee enters into possession and pays some aliquot part of an annual rent, the general doctrine of tenancy from year to year is applicable.[713] Yet it has been held that such a lease is a valid demise for a year certain, being void only as to the excess of the term beyond the time permitted for parol leases by the statute.[714]

§ 156. Sufficiency of memorandum.—If a statute reads that no estate or interest in lands can be created or conveyed without writing but an estate at will, it is immaterial how the existence of a tenancy is shown, whether by parol evidence, or by written instruments, as receipts for rent, or the like; the right of the tenant, whatever might seem to be the actual contract of the parties, is nothing but a tenancy at will unless it can be shown that some other or higher interest or

[710] Raynor v. Drew, 72 Cal. 307, 13 Pac. 866.

[711] Carney v. Mosher, 97 Mich. 554, 56 N. W. 935.

[712] Carey v. Richards, 4 W. L. M. (Ohio) 251, 2 Ohio Dec. R. 630.

[713] Hosli v. Yokel, 58 Mo. App. 169.

[714] Friedhoff v. Smith, 13 Neb. 5, 12 N. W. 820.

estate, as a tenancy at life or for years, was created or conveyed by writing.[715] Thus written receipts for rent were held not to take a parol lease out of the statute of frauds because the statute required that the estate be created or conveyed by a writing and the rent receipts merely went to the matter of proof of the existence of the term. The natural interpretation of such words is that the writing required for the creation of an interest in land is more than a memorandum of the constituent act; that it is itself the constituent act. It seems clear that the writing must have a part at least in the creation of the estate. The statute is not dealing with promises, in which case it would naturally be directed only to the rights of the parties to the contract, but with estates, which are interests *in rem*, good against all the world. It therefore is dealing with the rights of all the world, and when it says that an estate created without writing shall have the effect of an estate at will only, it affects the reciprocal rights of the tenant and of any one else who may be concerned in the nature of that estate.[716]

In regard to all sections of the statute of frauds the general rule is that the memorandum in writing required to satisfy the statute must contain all the essential terms of the contract, so that the court can ascertain the rights of the parties from the writing itself without resorting to oral testimony. Therefore an auctioneer's memorandum in which the purchaser agrees to fulfil all the conditions of the sale, such conditions having been stated orally by the auctioneer, is not sufficient. The difficulty is that the contract is partly in writing and partly by parol. A memorandum which does not state the term or duration of a proposed lease does not satisfy the statute of frauds, because those omissions cannot be supplied by parol.[717] The date of a lease for years, the remaining time it has to run, is obviously an essential item in the description of the interest created by it. Without that being fixed, the whole interest under the lease is indeterminate. It is an essential element of the contract and must be completely stated in the memorandum.[718]

A ratification of a parol lease of land for a term of more than three years, to avoid the effect of the statute of frauds, must be signified by writing. This ratification cannot be made by the original lessor after he has conveyed his title to another. After the property

[715] Whitney v. Swett, 22 N. H. 10.

[716] Emery v. Boston Terminal Co., 178 Mass. 172, 59 N. E. 763.

[717] Parker v. Tainter, 123 Mass. 185.

[718] Riley v. Farnsworth, 116 Mass. 223; Kingsley v. Siebrecht, 92 Me. 23, 31, 42 Atl. 249.

had been disposed of, any act of the lessor would be ineffectual to create a term which did not previously exist.[719] It seems to be settled in England with regard to sales of chattels under the seventeenth section of the statute of frauds, that the memorandum does not retroact so as to affect third persons.[720] It does not effect this result that an act satisfying this section of the statute relates back to the date of the oral contract as between the parties.[721]

§ 157. Authority of agent.—The acts which require that certain interest in land shall only be created or transferred by writing usually provide further that agents who undertake to execute such contracts must be authorized in writing.[722] When this requirement for written authorization is omitted from the act, as was the case in an early statute in Illinois, since repealed, it seems that authority conferred upon the agent by parol would be valid, since the common law required no formalities for the creation of agents.[723] But if the lease itself need not be in writing, as where it is for a year only, the power of an agent to execute it need not be expressed in writing, because such a contract is not included in the terms of the statute.[724] It has been held, moreover, that an oral ratification is good though a previously conferred document must be by written instrument.[725] This decision was based on the proposition that a simple contract in writing made without authority is susceptible of oral ratification, which was laid down by Lord Chief Justice Best in an early case, as follows: "It has been argued that the subsequent adoption of the contract will not take this case out of the statute of frauds; and it has been insisted that the agent should have his authority at the time the contract is entered into. If such had been the intention of the legislature, it would have been expressed more clearly . . . in all other cases, a subsequent sanction is considered the same thing in effect as assent at the time. And in my opinion, the subsequent

[719] Dumn v. Rothermel, 112 Pa. St. 272, 3 Atl. 800; Emery v. Boston Terminal Co., 178 Mass. 172, 59 N. E. 763; Whiting v. Massachusetts &c. Ins. Co., 129 Mass. 240, 241.

[720] Coats v. Chaplin, 3 Q. B. 483, 486, 43 E. C. L. 831; Stockdale v. Dunlop, 6 M. & W. 224, 233; Felthouse v. Bindley, 11 C. B. (N. S.) 869, 877.

[721] Leadlay v. McRoberts, 13 Ont. App. 378, 383.

[722] Borderre v. Den, 106 Cal. 594, 39 Pac. 946; Judd v. Arnold, 31 Minn. 430, 18 N. W. 151; Hoover &c. Co. v. Pacific Oil Co., 41 Mo. App. 317; Folsom v. Perrin, 2 Cal. 603.

[723] Lake v. Campbell, 18 Ill. 106.

[724] Gilson v. Boston, 11 Nev. 413; Hoover &c. Co. v. Pacific Oil Co., 41 Mo. App. 317.

[725] Bless v. Jenkins, 129 Mo. 647, 31 S. W. 938.

sanction of a contract signed by an agent takes it out of the operation of the statute more satisfactorily than an authority given beforehand."[726]

On the other hand there are cases holding a ratification must be in writing to be valid. Where the owner of land ratified the unauthorized act of his agent in executing a lease for one year with option of four more by receiving rent paid under the terms of the lease, this did not render the term valid for five years, because the ratification, to be effective, must be in writing.[727] An estate at will only is created by such circumstances which becomes a tenancy from month to month upon payment of a monthly rent. Under such circumstances, however, a guarantor of rent has been held liable for payment of rent in the manner in which the lease eventually took effect.[728] Where an agent assumes to execute a lease in excess of his authority, and the principal enters and pays rent, this will create a tenancy from year to year.[729]

A lease, executed by agents without authority in writing, was held to be ratified by a subsequent conveyance of the property by the owners by a deed which excepted the outstanding lease. The language in question meant that the premises had come to the grantor and were conveyed by him, subject to a lease in favor of the person then occupying the premises. The terms of the deed and the relationship of the parties when it was executed, present substantial evidence of such affirmance of the lease as cured the want of written authority on the part of the agents who signed it.[730]

§ 158. **Leases by undisclosed principals.**—The rule that a principal may sue in his own name upon a contract made with his agent applies to cases of sales by written bills or other memoranda made by the agent, using his own name, and disclosing no principal, the same as in cases of oral contracts.[731] The statute of frauds does not change the law as to the rights and liabilities of principals and agents, either as between themselves, or as to third persons. The

[726] Maclean v. Dunn, 4 Bing. 722.

[727] Williams v. Mershon, 57 N. J. Law 242, 30 Atl. 619.

[728] Lehman v. Nolting, 56 Mo. App. 549.

[729] Hoover &c. R. Co. v. Pacific Oil Co., 41 Mo. App. 317.

[730] Christopher v. National &c. Co., 72 Mo. App. 121.

[731] Kingsley v. Siebrecht, 92 Me. 23, 42 Atl. 249; Tainter v. Lombard, 53 Me. 369; Eastern R. Co. v. Benedict, 5 Gray (Mass.) 561; Barry v. Page, 10 Gray (Mass.) 398; Winchester v. Howard, 97 Mass. 303; Sims v. Bond, 5 B. & Ad. 389, 393; Huntington v. Knox, 7 Cush. (Mass.) 371; Exchange Bank v. Rice, 107 Mass. 37; Byington v. Simpson, 134 Mass. 169.

provisions of the statute are complied with if the names of competent contracting parties appear in the writing, and if a party be an agent, it is not necessary that the name of the principal be disclosed in the writing. Indeed, if a contract, within the provisions of the statute, be made by an agent, whether the agency be disclosed or not, the principal may sue or be sued as in other cases.[732]

§ 159. Effect of part performance of a parol lease.—Without passing on the question as to what can be considered as part performance of a lease, the general distinction made between courts administering law and those governed by equitable principles should be noticed. According to the weight of authority, part performance by either party will not render a parol lease valid in a court of law; but courts of equity will take jurisdiction to enforce a parol lease when it would be fraudulent on the part of a defendant to avail himself of the statute.[733] However the point may be confused by the mingling of law and equity, the principle seems clear that a part performance of the contract does not, at law, take the case out of the operation of the statute of frauds.[734] In an early Iowa case this distinction between law and equity was brought out. "We are not required," said the court, "to state what a court of equity would do under the circumstances, but a court of law is confined to the provisions of the statute, with which it is not at liberty to dispense, unless the party brings himself clearly within some of the exceptions therein specified."[735] It was further held in that state that an express statutory exception of parol contracts to purchase under certain circumstances did not extend to parol leases.[736] The effect of this exception which

[732] Thayer v. Luce, 22 Ohio St. 62; Pugh v. Chesseldine, 11 Ohio 109; Dykers v. Townsend, 24 N. Y. 57; Kingsley v. Siebrecht, 92 Me. 23, 42 Atl. 249; Lerned v. Johns, 9 Allen (Mass.) 419; Hunter v. Giddings, 97 Mass. 41; Williams v. Bacon, 2 Gray (Mass.) 387; Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 446; Browne on Statute of Frauds, § 373; 3 Parsons on Contracts, 5 ed., p. 10, § 660.

[733] Morrison v. Peay, 21 Ark. 110; Brockway v. Thomas, 36 Ark. 518; Johnson v. Branch, 48 Ark. 535, 3 S. W. 819; McCarger v. Rood, 47 Cal. 138; Manning v. Franklin, 81 Cal. 205, 22 Pac. 550; Eaton v. Whitaker, 18 Conn. 222; Marr v. Ray, 151 Ill. 340, 37 N. E. 1029; Smelling v. Valley, 103 Mich. 580, 61 N. W. 878; Wallace v. Scoggins, 17 Ore. 476, 21 Pac. 558; s. c. 18 Ore. 502; Utah L. & T. Co. v. Garbutt, 6 Utah 342, 23 Pac. 758.

[734] Creighton v. Sanders, 89 Ill. 543; Brownell v. Welch, 91 Ill. 523; Warner v. Hale, 65 Ill. 395.

[735] Hunt v. Coe, 15 Iowa 197.

[736] Thorp v. Bradley, 75 Iowa 50, 39 N. W. 177; Burden v. Knight, 82 Iowa 584, 48 N. W. 985.

does not apply to leases has been held to be that even in equity the doctrine that part performance takes the case out of the statute cannot be recognized.[737] Such part performance of a parol agreement to lease that it could be enforced in equity does not furnish a defense at law in the absence of any such action by a court of equity.[738] A lessee is not without remedy, however, even though his parol lease is not rendered valid by part performance. If one party in consideration of an agreement which is within the statute of frauds, and which the other party declined to carry out, expends money in building on his land, the one building may maintain an action to recover the cost of such building.[739]

There are cases, however, which hold that part performance of a parol lease for more than the permitted period will make it valid at law. One of these cases was an action for rent during the unexpired term. The counsel did not bring out the difference in the tenant's rights in law and in equity but argued that part performance would not avail him in either tribunal, and the court cited as authority equity cases.[740] In another the action was forcible detainer by the landlord and it was probably open to the defendant to set up equitable defenses to such an action. The latter case was a strong one, as the tenant had made many valuable improvements and the landlord had recognized his right to the premises during the major part of the term.[741]

§ 160. In order to amount to part performance, an act must be unequivocally referable to the agreement; and the ground on which courts of equity have allowed such acts to exclude the application of the statute, is fraud. A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. That is the principle, but the acts must be referable to the contract. Between landlord and tenant, when the tenant is in possession at the date of the agreement and only continues in possession,

[737] Powell v. Crampton, 102 Iowa 364, 71 N. W. 579.

[738] Petsch v. Biggs, 31 Minn. 392, 18 N. W. 101.

[739] Parker v. Tainter, 123 Mass. 185; Kidder v. Hunt, 1 Pick. (Mass.) 328; White v. Wieland, 109 Mass. 291; Dix v. Marcy, 116 Mass. 416.

[740] Grant v. Ramsey, 7 Ohio St. 157; Wilber v. Paine, 1 Ohio 251.

[741] Bard v. Elston, 31 Kan. 274, 1 Pac. 565. In Wilber v. Paine, 1 Ohio 251, a parol lease was rendered valid by part performance so as to enable an assignee of the lessee to maintain an action of tort against the landlord for a conversion of the crop.

it is properly observed that in many cases that continuance amounts to nothing; but admission into possession, having unequivocal reference to contract, has always been considered an act of part performance. The acknowledged possession of a stranger to land of another is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract and as sufficient to authorize an inquiry into the terms.[742] In equity, therefore, leases may be taken out of the statute of frauds by part performance; and a transfer of possession may be such part performance.[743] This is strengthened where, in addition to a transfer of possession, rent is paid and accepted under the lease.[744] So it has been held that delivery of possession to a tenant, continued occupation by him and payment of rent according to terms of agreement, are sufficient to take an agreement to give a lease out of the statute of frauds.[745]

In reliance on an oral agreement for a five-year lease, tenants went ahead and made valuable improvements. This was such a part performance that the agreement could be enforced in equity.[746] It constituted a sufficient part performance to take a parol lease out of the statute of frauds for the lessee to clear a part of the land,[747] for him to enter upon and cultivate the land,[748] and for him to make permanent improvement on the leased premises,[749] such as planting shrubbery on the premises and fitting expensive carpets to the floors of the leased house.[750] Where one who is already in possession of land as tenant verbally contracts with the owner for a new term, his merely continuing in possession after the making of the alleged contract is not an act of taking possession within the meaning of the

[742] Morphett v. Jones, 1 Swanst. 172; Earl of Aylesford's Case, 2 Str. 783; Morrison v. Peay, 21 Ark. 110; Johnson v. Branch, 48 Ark. 535, 3 S. W. 819.

[743] Hodges v. Howard, 5 R. I. 149, 158; Simmons v. Simmons, 12 Jur. 8, 6 Hare 352; Wiley's Estate, 6 W. N. Cas. 208; Weddall v. Capes, 1 M. & W. 50; Huron v. Kerr, 15 Grant Ch. 265.

[744] Grant v. Ramsey, 7 Ohio St. 157; Butler v. Powis, 2 Coll. 156, 161; Wiley's Estate, 6 W. N. Cas. 208.

[745] Eaton v. Whitaker, 18 Conn. 222.

[746] Morrison v. Herrick, 27 Ill. App. 339.

[747] Smelling v. Valley, 103 Mich. 580, 61 N. W. 878.

[748] McCarger v. Rood, 47 Cal. 138; Manning v. Franklin, 81 Cal. 205, 22 Pac. 550.

[749] Morrison v. Peay, 21 Ark. 110; Johnson v. Branch, 48 Ark. 535, 3 S. W. 819; Brockway v. Thomas, 36 Ark. 518; Wilber v. Paine, 1 Ohio 251.

[750] Wallace v. Scoggins, 17 Ore. 476, 21 Pac. 558; s. c. 18 Ore. 502.

rule so as to justify a decree for a lease according to the contract.[751] It is a recognized principle in the doctrine of part performance of oral contracts that mere continuation in possession is not such part performance of an oral lease as will justify a court of equity in making a decree for specific performance.[752]

Part payment of purchase money does not take a parol agreement for a sale of real estate out of the statute. A sufficient reason for this is found in the fact that a provision to this effect in regard to sales of chattels is found in the statute of frauds; but is omitted from sections covering transfers of real property. It follows as a result of this doctrine that payment of rent or even prepayment will not take a parol lease out of the statute.[753]

§ 161. **In Alabama** the effect of part performance is regulated by statute. Part performance by transfer of possession and payment of rent in the manner stated in the statute will operate to save every parol lease of land, otherwise valid, from the vitiating effect of the statute, whether, by its terms, the enjoyment of the demised premises is to begin *in praesenti* or *in futuro,* and no matter whether the period of the lease be one year or twenty. It must be considered as definitely settled in that state that whether the parol be for more than one year or for a year to begin at a future date, taking possession under the contract and part payment of the rent will render the agreement in all respects as valid as if it had been reduced to writing and duly signed by the parties.[754]

§ 162. **There is a very obvious difference between a parol agreement to make a written lease and a parol lease** with a further or incidental agreement that it shall be put in writing. In one case the making of the writing is the subject of the agreement and only that can execute it; in the other the subject is the act or fact of present

[751] Wilmer v. Farris, 40 Iowa 309; Anderson v. Simpson, 21 Iowa 399; Mahana v. Blunt, 20 Iowa 142; Billingslea v. Ward, 33 Md. 48; Rosenthal v. Freeburger, 26 Md. 75; Cole v. Potts, 10 N. J. Eq. 67; Armstrong v. Kattenhorn, 11 Ohio 265; Greenlee v. Greenlee, 22 Pa. St. 225; Aitkin v. Young, 12 Pa. St. 15; Wilde v. Fox, 1 Rand. (Va.) 165; Johnston v. Glancy, 4 Blackf. (Ind.) 94.

[752] Spalding v. Conzelman, 30 Mo. 177.

[753] Brockway v. Thomas, 36 Ark. 518; Webster v. Blodgett, 59 N. H. 120; Townsend v. Sharp, 2 Tenn. 192.

[754] A. G. Rhodes &c. Co. v. Weeden, 108 Ala. 252, 19 So. 318; Shakespeare v. Alba, 76 Ala. 351; Martin v. Blanchett, 77 Ala. 288; Eubank v. May &c. Co., 105 Ala. 629, 17 So. 109.

leasing and its subsequent reduction to writing is incidental only.[755] A landowner agreed by parol to lease land to another for a term of years, to begin in the future, and agreed at the same time to put such parol contract in writing but no consideration passed between the parties. It was held that either party could disregard the parol contract. When the lessee went on the land at the commencement of the term named in the parol agreement without the request of the lessor, his possession thus obtained would not give him any rights under such parol contract. The parol contract was void, and unless it was partly performed by one of the parties at the request of the other it created no obligation.[756] The proposed lease was within the statute of frauds; hence the parol agreement to lease could give it no force, and to predicate anything whatever of that intended lease was error. Either party had a right to refuse its execution and the defendant was guilty of no fraud in availing himself of that right.[757] Not only was the lease within the statute of frauds but the agreement itself was within that statute because it purported to transfer an interest in land. When a party to a parol agreement for a lease seeks to enforce it specifically in equity, he can rely on the equitable doctrine of part performance to take the parol agreement out of the statute of frauds. The distinct ground upon which courts of equity interfere in cases of this sort is that otherwise one party would be able to practice a fraud upon the other. The property owner can enforce the agreement when he has been led to do acts upon the faith of it with the knowledge and acquiescence of the other party.[758] In one case the lessor explicitly refused to make a verbal lease, and it was mutually agreed that a lease on certain specified terms should be made in writing. Under these circumstances entry into possession by the lessee was not sufficient to show that the verbal agreement for a written lease was of itself a lease *in praesenti* which could be taken out of the statute by part performance. To give this construction to the agreement would be to bind the lessor by a verbal lease when he refused to make one. The verbal contract may be a valid agreement for a written lease, for a breach of which an action for damages might, under certain circumstances, lie, but it is not of itself a lease *in praesenti*.[759]

[755] Grigsby v. Western &c. Tel. Co., 5 S. Dak. 561, 59 N. W. 734.

[756] Pulse v. Hamer, 8 Ore. 251.

[757] Sausser v. Steinmetz, 88 Pa. St. 324.

[758] Seaman v. Ashchermann, 51 Wis. 678, 8 N. W. 818.

[759] Potter v. Mercer, 53 Cal. 667.

XI. *Recording.*

§ 163. Statutory provisions.—Statutes regarding the requirements for recording transfers of real estate vary in phraseology. A common form is to require that all transfers be recorded to be good against subsequent purchasers for value except leases for a short period. This period is usually fixed at one year, though an exception in favor of leases for a term of three years is not unusual and in some states the period is longer.[760] In other statutes no mention is made of leases *eo nomine* but the expression is that transfers of any interest in land must be recorded. Such general language seems to include leases without regard to the length of the term.[761] In California the form of the statute is that all conveyances of land must be recorded.[762] In construing this act it was held that a lease for five years was a conveyance of the land within the definition of the code and the interest in the land which was thereby created in the lessee, though limited to a right to take the profits of the land, was void as against a pur-

[760] Leases for more than one year are not valid without being recorded in California, Connecticut, Florida, Hawaii, Idaho, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Vermont. Leases for more than two years are not valid without being recorded in Rhode Island. Leases for more than three years are not valid without being recorded in Indiana, New York, North Carolina, Ohio, Tennessee, Wisconsin, Wyoming. Leases for more than five years are not valid without being recorded in Kentucky, Virginia, West Virginia. Leases for more than seven years are not valid without being recorded in Maine, Maryland, Massachusetts, New Hampshire. Leases for more than twenty-one years are not valid without being recorded in Delaware, Pennsylvania. A lease for less than twenty-one years, when accompanied by possession by the lessee, need not be recorded, Williams v. Downing, 18 Pa. St. 60. In Louisiana the rule is that an unrecorded act of lease of real estate produces no legal effect as to third persons. Anderson v. Comeau, 33 La. Ann. 1119. Formerly in North Carolina a lease of land for a term of years need not be registered. Burnett v. Thompson, 3 Jones L. (N. Car.) 113; Wall v. Hinson, 1 Ired. L. (N. Car.) 276. See, Rev. Code Ch. 37, § 26, requiring that leases which must be in writing must be registered. In Washington all deeds must be recorded (Ballinger's Am. Codes 1897, § 4535) and all conveyances of any interest in real estate shall be by deed (Ibid. § 4517) except that leases for any term not exceeding one year are valid without acknowledgement or seal.

[761] Such seems to be the case in Alabama, Arkansas, Arizona, Alaska, Colorado, Georgia, Iowa, Illinois, Kansas, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Mexico, Oregon, Texas.

[762] Garber v. Gianella, 98 Cal. 527, 33 Pac. 458.

chaser by reason of the failure to have it recorded as if it had been an unrecorded conveyance in fee.[763] The rule was the same though the lease was determinable on thirty days' notice by either party.[764] However, where the owner of land, after conveying the title to the fee leased it to a third person for a year, the lessee was not considered as a purchaser under it, without notice. This lease was not a conveyance within the meaning of the statute and the lessee could not acquire any better right to hold the premises than the lessor had.[765]

In New Jersey a lessee is given the privilege of recording certain leases, but is no worse off than he would be at common law if he fails to do so.[766] In Louisiana a lessee who has paid rent in advance must record his lease to protect himself against a transferee of the reversion. The latter would be entitled to collect the rent reserved.[767]

In Kentucky the period for which an unrecorded lease is valid is set at five years and a lease of land not exceeding five years is good without being recorded even against a judgment creditor of the landlord.[768] But an unrecorded lease for the term of ten years cannot be supported for five years on the ground that the statute only requires leases for more than five years to be recorded.[769]

The question suggests itself as to whether the exception in the statute of frauds in favor of short term parol leases would not operate as an exception from the requirement for recording even when no express exception is made in the recording statute. Such a question could only arise in a limited number of states. Some foundation for such an opinion is found in a case where an indictment was brought for failure to comply with a requirement as to the recording of a railroad lease. The indictment failed to allege that the lease was in

[763] Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130.

[764] Commercial Bank v. Pritchard, 126 Cal. 600, 59 Pac. 130.

[765] Topping v. Parish, 96 Wis. 378, 71 N. W. 367, Rev. St. of Wis., § 2242.

[766] New Jersey: The registry acts do not apply to leases. The first in date stands first in point of right. Leases under seal for a term not less than two years, acknowledged or proved, may be recorded (Rev. p. 157, § 19), but the statute which authorizes this to be done imposes no penalty for not doing it. Hodge v. Giese, 43 N. J. Eq. 342, 11 Atl. 484; Hutchinson v. Bramhall, 42 N. J. Eq. 372, 7 Atl. 873. See, Gen. St. of N. J. 1895, p. 857, § 19. By the P. L. of 1898, p. 670, leaseholds for not less than two years are authorized to be recorded. So a mortgage of a ten year leasehold should be recorded as a mortgage affecting real estate. Lembeck &c. Co. v. Kelly, 63 N. J. Eq. 401, 51 Atl. 794.

[767] Anderson v. Comeau, 33 La. Ann. 1119.

[768] Locke v. Coleman, 4 T. B. Mon. (Ky.) 315, 321; Casey v. Gregory, 13 B. Mon. (Ky.) 505.

[769] Clift v. Stockdon, 4 Litt. (Ky.) 215.

writing and was held bad in consequence because of the obvious impossibility of recording an oral lease.[770] Nevertheless it appears to be quite certain that the obligation to record a lease to affect the rights of a third person could not be avoided by leaving the lease in parol instead of reducing it to writing. It might very consistently be held that a lease which was good between the parties though not in writing, must be put in writing and recorded to be valid against a *bona fide* purchaser for value. Such seems to be the effect of the statutes in certain states.

The statutes which require that leases to run for more than a certain term shall be recorded, usually attach no condition as to transfer of possession in order that a lease for a shorter term shall be valid without being recorded.[771] So the requirement as to the value of the rent reserved which is sometimes made necessary to render a parol lease valid is not generally made a condition on which an unrecorded lease will take effect.[772]

A lease of growing trees for the purpose of gathering turpentine therefrom is a conveyance of an interest in real estate which must be recorded.[773]

§ 164. Validity of unrecorded instruments.—It is clear that an unrecorded deed or lease conveys a title as between the parties.[774] It has further been declared that the statutes relative to recording were not intended to protect persons who claim no right, title, or interest in the premises conveyed by the unrecorded instrument.[775] A lease in due form of law, and in all respects complete and perfect was objected to because it had not been recorded in the records of the town in which the premises lay. It was insisted that it was by the statute declared to be absolutely void except as to the lessors; the parties thus insisting claimed nothing under the lessors, and were not deceived or in any way injured by the lease, but asserted that it

[770] Commonwealth v. Chesapeake &c. R. Co., 101 Ky. 159, 40 S. W. 250.

[771] In Pennsylvania possession must accompany the unrecorded lease to render it valid. Pepper & Lewis Dig. of Laws of Pa., p. 1568, § 90.

[772] In Delaware a fair rent must be reserved and possession must be taken by the tenant in order that an unrecorded lease for twenty-one years be valid. Ch. 83, § 17, Laws of Del. Rev. Code 1852 as amended 1893.

[773] Milliken v. Faulk, 111 Ala. 658, 20 So. 594.

[774] Dole v. Thurlow, 12 Metc. (Mass.) 157; Earle v. Fiske, 103 Mass. 491; Smythe v. Sprague, 149 Mass. 310, 21 N. E. 383.

[775] Anthony v. New York &c. R. Co., 162 Mass. 60, 37 N. E. 780; Beach v. Morgan, 67 N. H. 529, 41 Atl. 349.

was imperfect and void. The answer was that the instrument was not imperfect and void. It had every legal requisite of a conveyance. Recording is no part of the conveyance itself and to allow a stranger who has no manner of interest in the question to set up a statute, which requires deeds and leases to be recorded, merely to give public notice that creditors and *bona fide* purchasers may not be deceived and cheated, is unreasonable and preposterous.[776] In one case an assignee of a lease brought an action of assumpsit for rent, notwithstanding the fact that the lease was a sealed instrument, his theory being that it was void as a lease except as between the immediate parties to it, because it was not recorded. But having notice of the lease before the assignment of the reversion, the statute in regard to recording had no application, and as a formal transfer of the lease had accompanied the assignment, the action should have been debt or covenant.[777] So in a jurisdiction where leases for more than one year were not valid without record, a lease for five years, unrecorded and unacknowledged, was held to be good between a lessee and the assignee of the lessor when the latter did not choose to avoid it.[778]

But the statute in Maryland provides that no deed of real property shall be valid for the purpose of passing title unless acknowledged and recorded.[779] A lease for more than seven years would pass no title, therefore, unless it was recorded, and so would not furnish any consideration for the covenants of the lessee to pay rent. Consequently it was held in that state that an action of covenant for rent could not be maintained by the lessor on an unrecorded lease. But an action for use and occupation could be brought for such period as the lessee was in actual occupation.[780] The effect of this doctrine is that an interest in land for a term exceeding seven years cannot be transferred by the owner otherwise than in the way provided in the act, and no acts *in pais* are competent for that purpose. The lessee's liability to pay rent would continue until some act was done by him legally operative to vacate the premises.[781]

The general doctrine seems to be that recording a lease is not neces-

[776] Barnum v. Landon, 25 Conn. 137; overruling French v. Gray, 2 Conn. 92.

[777] McCardell v. Williams, 19 R. I. 701, 36 Atl. 719; Anderson v. Harris, 1 Bail. L. (S. Car.) 315.

[778] Baldwin v. Walker, 21 Conn. 168, 182.

[779] Gen. Pub. Laws, vol. 1, p. 255.

[780] Anderson v. Critcher, 11 Gill. & J. (Md.) 450.

[781] Peter v. Schley, 3 Harr. & J. (Md.) 211; Mayhew v. Hardesty, 8 Md. 479, 495; Polk v. Reynolds, 31 Md. 106, 112.

sary, even against the claims of third parties, where the lessee goes into actual possession of the premises, for that is sufficient notice of his rights.[782]

§ 165. Place of record.—It has never been questioned but that a lease for a term should be recorded, when recording is required, among the real estate records. But the instrument of demise may be of a dual nature, for a reservation in a lease of a specific lien on personalty is equivalent to, and is, in effect, a chattel mortgage.[783] Even where the same instrument affects both real and personal property, a recording in the records of real estate has been held to be a sufficient recording of the instrument as a chattel mortgage. A lease while a chattel is a chattel real and there is a difference between it and chattels personal. A document demising land for a term of years is certainly an instrument which "affected" real estate in the sense of the recording statute. It was therefore necessary to the protection of the lessor that it should be recorded in the real estate records, and being thus recorded for that purpose, it made a proper recording of the lien upon the personal chattels covered by the lease.[784] The statute under consideration, while providing for separate registration, did not apply to cases where the instrument conveyed both kinds of property but only directed separate recording in a chattel record where the instrument conveyed "personal property *alone*."

§ 166. Record of sublease.—In general the same principles apply to a leasehold carved out of another leasehold estate as one granted by an owner in fee. It follows that a sublease must be recorded where an original lease of equal duration must be put on record to bind third persons, such as an assignee for value of the original leasehold who takes without notice. The assignee finding by the record a clear lease to the lessors ought not to be bound by any parol license from their lessors. Had the lessors given a deed of the premises before they conveyed to the assignee, still, without any notice of such a deed, and in the absence of any record of it, the assignee would

[782] Disbrow v. Jones, Harr. (Mich.) 48; Corey v. Smalley, 106 Mich. 257, 64 N. W. 13; Kittle v. St. John, 10 Neb. 605, 7 N. W. 271; Haworth v. Taylor, 108 Ill. 275; Chamberlain v. Collinson, 45 Iowa 429; Leebrick v. Stahle, 68 Iowa 515, 27 N. W. 490; Payson v. Holden, 4 Ky. L. R. 352.

[783] Jones on Chattel Mortgages, § 13; Attaway v. Hoskinson, 37 Mo. App. 132; Wright v. Bircher, 5 Mo. App. 322.

[784] Faxon v. Ridge, 87 Mo. App. 299; Jennings v. Sparkman, 39 Mo. App. 663. See also, Anthony v. Butler, 13 Pet. (U. S.) 423.

be protected, and surely a parol lease or license can have no greater effect than a deed not recorded.[785]

The obligation to record a sublease does not give to such record any effect on the original lease. No constructive notice is given of the rights of a lessee under an unrecorded lease by reason of the record of a lease from him to a second lessee, and a grantee of the original lessor is not affected with constructive notice of the rights of such first lessee, although her deed is expressly subject to the second lease.[786]

§ 167. Computation of time.—A lease for years, although the term thereby granted be for less than seven years, yet being made to commence at a future day, if it is to endure more than seven years from the making thereof, is within the requirements of a statute concerning the recording of leases for more than seven years.[787] So a lease for five years, with the right to have a renewal for five years more is as much within the mischief which the statute seeks to remedy as a lease for a term of ten years, and the reasons for requiring the latter to be recorded apply equally to the other, so far as the renewal term is concerned. It was enough for the purpose of deciding the case where this question arose to hold that as to any extension or agreement for renewal which would carry the possession of the lessee to more than seven years from the making of the instrument, such extension or agreement for renewal was within the meaning of the statute. The court found it unnecessary to decide whether such a lease would be wholly void as to a *bona fide* purchaser, or whether it would be good for the first term of seven years or less.[788]

[785] Burr v. Spencer, 26 Conn. 159.

[786] Garber v. Gianella, 98 Cal. 527, 33 Pac. 458.

[787] Chapman v. Gray, 15 Mass. 439.

[788] Toupin v. Peabody, 162 Mass. 473, 39 N. E. 280.

CHAPTER III.

KINDS OF TENANCY.

1. Estates for Years, §§ 168–173.
2. Tenancy at Will, §§ 174–191.
3. Tenancy from Year to Year, 192–214.
4. Tenancy from Month to Month, §§ 215–219.
5. Tenancy at Sufferance, §§ 220–230.
6. Statutory Provisions, §§ 231–250.

I. *Estates for Years.*

§ 168. The chattel interest known as a term for years is a familiar and common form which the relationship of landlord and tenant assumes. According to the common law notion, this was of less dignity than a life estate which was a freehold;[1] the term for years was not an interest in real estate, it was a mere chattel interest, known as a chattel real to distinguish it from chattels personal. The requisite of this kind of estate is definiteness of duration, while there is no requirement that it must last for at least a year. It has been declared to be common learning that a lease for a period of less than a year is to be ranked among leases for years.[2] So a lease for nine months, or any time certain less than a year, is a lease for one or more years within the meaning of a landlord and tenant law.[3] "Estates for years," said an eminent text writer, "embrace such as are for a single year, or for a period still less, if definite and ascertained, as a

[1] The doctrine of the common law that an estate in land for life is superior to an estate for years, no matter how long its duration may be, has no relation to a deed conveying the unexpired portion of a term of ninety-nine years, renewable forever, and reserving to the grantor the use and enjoyment of the property during his natural life. Such a gift would be governed by the rules of law in regard to future limitations of personal property. In this case it was held that the limitation was good. Culbreth v. Smith, 69 Md. 450.

[2] Casey v. King, 98 Mass. 503, citing Co. Lit. 52 b., 4 Kent. Com. 6th ed. 85.

[3] Shaffer v. Sutton, 5 Binn. (Pa.) 228, citing 2 Bl. Com. 140, where it is said that "if the lease be but for half a year, or a quarter or any less time, the lessee is respected as a tenant for years, and is styled so in some legal proceedings."

term for a fixed number of weeks or months, as well as for any definite number of years, however great."[4]

Where the term and duration of a tenancy is fixed and certain, it is an estate for years and not a tenancy from year to year. A lease for a definite term of three years, with a covenant by the tenant to surrender possession at the end of the term, contained a provision that if the tenant continued to occupy he should not be turned out until the end of a year, and then only on three months' notice. This did not entitle the tenant to three months' notice prior to the set limitation for the term. When the contract said "if the tenant should continue" it meant unquestionably a lawful continuance, and not in express violation of the covenant to surrender possession demanded by the landlord.[5]

§ 169. Term for years or from year to year.—A lease for a year certain provided that the agreement was to run as long as the parties agreed. If any force at all were to be given to this clause, it must be that the tenancy of one year might be continued if the parties agreed, for it could not be said that it limited the original term to less than one year. The meaning of the language was, in the first place, that when the stated term had expired, the tenant could continue to hold for an indefinite time, so long as he and the landlord agreed. On the other hand, the meaning was that if the tenant held over, it must be subject to a time limited by an agreement with the landlord, or if no agreement was made, then subject to the will of the landlord. In any event it was for no longer time than the landlord saw fit to make. It was not necessary that the landlord should give his tenant notice any definite length of time before his year expired that he could not remain longer. If the tenant held beyond the year, after receiving notice that he must give up possession, he held possession unlawfully.[6] A contrary result was reached by the Nebraska court in regard to a lease for a year certain which further provided that "if either party elects to discontinue the lease, the party electing so to discontinue shall give the other party six months' notice prior to the time of the expiration of the lease." The court held this created a tenancy from year to year. "Looking alone to the first paragraph, it would seem to have been the intention to limit the terms of the relationship to one year, but from the second paragraph, or regarding the two

[4] 1 Washburn on Real Estate, p. 291, quoted in Brown v. Bragg, 22 Ind. 122.

[5] MacGregor v. Rawle, 57 Pa. St. 184.

[6] Dunphy v. Goodlander, 12 Ind. App. 609, 40 N. E. 924.

together, we are all of the opinion that there is evidence of an intention on the part of the makers of the instrument that in order to terminate the lease at the end of the first, or of any subsequent year, by either party there should be six months' notice given to the other."[7]

A lease, to hold from the first day of April from year to year, so long as both lessor and lessee should agree, is not necessarily a lease for more than one year. Such a result follows only where from the whole lease it is apparent that the parties contemplated a lease of more than one year without specifying the whole duration of the lease. In such cases it is held that the lease would last at least two years. But the mere expression "from year to year" does not necessarily imply more than from the commencement of one year to the commencement of another.[8] Where premises are leased by a landlord until he can sell them, the lease ends upon such a sale, and a notice to quit is unnecessary.[9] It makes no difference by whose act the contingency was to arise. So where the tenancy was to continue at a monthly rent till the tenant found other quarters, the removal of the tenant to other premises ended the term and no notice to quit was necessary. The tenant could not be charged with liability for rent as a tenant from month to month.[10]

§ 170. A lease, on account of uncertainty of duration, might be inoperative for any other purpose than the creation of an estate at will. A lease to be valid for any greater estate must be certain as to its commencement and duration. So a lease to run until such time as the lessor is prepared to improve the ground with new buildings[11] or until the property is sold creates a tenancy at will.[12] It is unquestionably the law, however, that a term greater than an estate at will may be limited conditionally and yet the condition be uncertain. But in such case there must always be a term certain, though it may be terminated sooner by the happening of the contingency.[13] It has been suggested also that a tenancy at will could be a conditional estate to be terminated on the happening of an event without the giving of

[7] Brady v. Flint, 23 Neb. 785, 794, 37 N. W. 647, per Cobb, J.

[8] Fox v. Nathans, 32 Conn. 348, in the words of Dutton, J.

[9] Clark v. Rhoads, 79 Ind. 342.

[10] Hoffman v. McCollum, 93 Ind. 326.

[11] Corby v. McSpadden, 63 Mo. App. 648, supra §§ 111-119.

[12] Lea v. Hernandez, 10 Tex. 137; Murray v. Cherrington, 99 Mass. 229.

[13] Corby v. McSpadden, 63 Mo. App. 648; Shaw v. Hoffman, 25 Mich. 162, 172; Munigle v. Boston, 3 Allen (Mass.) 230; Miller v. Levi, 44 N. Y. 489.

notice, or by notice in the ordinary form.[14] In a lease of this nature a school teacher was engaged to teach a school, and he was given the use of a school building "so long as he kept a good school." This was held to be a tenancy at will with a conditional limitation. The court held that as the owners had ejected him before terminating the tenancy by giving the statutory notice provided for terminating tenancies at will, he could hold them liable in damages, unless they showed he had not taught a good school. The effect of the court's holding was that notwithstanding the limitation, the owners could terminate the tenancy at any time regardless of whether he was teaching a good school, by giving the statutory notice.[15] Where a tenancy at will is created by a parol lease and occupation thereunder, a conditional limitation in such lease will be valid and the happening of the contingency changes the tenancy at will into one at sufferance.[16]

One occupying as a servant was allowed to continue in possession on payment of rent until his wife was able to be moved. It was held this was not a tenancy at will but a tenancy till the happening of a future contingent event, and no notice to quit was necessary after the wife recovered.[17] It was not necessary to decide that there was no tenancy at will here. All that was necessary to the decision was to hold that the happening of the contingency ended the term without notice. In another case the agreement was that a servant should cease to occupy as tenant as soon as his employment ceased. It was urged that this created a tenancy at will, and that thirty days' notice to quit was necessary. Without passing on the question of tenancy, the court decided the question on a statute providing that when an express agreement was made, the tenancy should cease at the time agreed upon without notice.[18]

§ 171. **A lease for years is a chattel real only** and goes to the administrator and may be sold by him without an order of court as is required in cases of freehold and fee estates.[19] At common law there

[14] Goodenow v. Allen, 68 Me. 308.

[15] Ashley v. Warner, 11 Gray (Mass.) 43.

[16] Hollis v. Pool, 3 Metc. (Mass.) 350.

[17] Doyle v. Gibbs, 6 Lans. (N. Y.) 180.

[18] Grosvenor v. Henry, 27 Iowa 269.

[19] Lake v. Campbell, 18 Ill. 106; Mark v. North, 155 Ind. 575, 57 N. E. 902; Faler v. McRae, 56 Miss. 227; Smith v. Dodds, 35 Ind. 452, 456; Schee v. Wiseman, 79 Ind. 389, 392; Cunningham v. Baxley, 96 Ind. 367, 369; Warner v. Tanner, 38 Ohio St. 118; Gay, Ex parte, 5 Mass. 419; Chapman v. Gray, 15 Mass. 439, 445; Brewster v. Hill, 1 N. H. 350; Murdock v. Ratcliff, 7 Ohio 119, 122.

is no doubt upon this question, as the rule is universal that such leases would vest in the executor or administrator as personal property.[20] Except so far as they have been modified by express legislation, a leasehold interest, though a chattel real, is personal estate and subject to the rules governing that species of property.[21] The rent is personalty, also, and the right to collect and distribute it is in the personal representative of the decedent.[22] Leases for terms of years were of a very low degree of interest in their origin and subject to be destroyed at the pleasure of the lessor by suffering a common recovery until this was changed by an early English statute.[23] They grew into an estate of greater consequence after that statute and became a settled, permanent interest maintainable as other rights and interests by its appropriate remedies. Still it remains a chattel real only to this day.[24] An illustration of how a term for years is regarded as personal property is found in a case where an administrator was bringing a suit to set aside a lease executed by his decedent. It was held that the action could be brought in the county in which the defendant resided without regard to the location of the leased property, although in real actions respecting the title to real estate, venue would be determined by the *situs* of the property.[25]

Another respect in which the nature of a term for years as personal property rather than real estate is apparent is in regard to a lien for purchase money upon the assignment of such a leasehold interest. Even where such a lien is allowed on sales of real estate, it could not be set up after a sale of a leasehold. A lease for a term of years is regarded as personal property in such a case, and the vendor of personal property has no general lien for unpaid purchase money upon such property after he has parted with possession.[26]

The length of the term does not, moreover, change the nature of the leasehold as a chattel real. It is only personal estate if it be for a term of a thousand years. Falling below the character and dignity of a freehold, it is regarded as a chattel interest, and is governed and descendible in the same manner.[27] Thus it was held in one case that an administrator could sell land held by his intestate under a lease

[20] Mulloy v. Kyle, 26 Neb. 313, 41 N. W. 1117, holding common-law rule was unchanged by statute.

[21] Culbreth v. Smith, 69 Md. 450, 16 Atl. 112.

[22] Antrey v. Antrey, 94 Ga. 579, 20 S. E. 431.

[23] 21 Hen. VIII, cap. 15.

[24] Lake v. Campbell, 18 Ill. 106.

[25] Mark v. North, 155 Ind. 575, 57 N. E. 902.

[26] Cade v. Brownlee, 15 Ind. 369.

[27] 2 Kent. Com. 342, Co. Litt. 46 *a*; Flannery v. Rohrmayer, 49 Conn. 27.

for nine hundred and ninety-nine years as personal property,[28] and in another that a term for nine hundred and eighty-five years would pass by a will under the expression "personal estate."[29] Under a general devise of all manors, messuages, lands, tenements and hereditaments, leasehold messuages will not pass unless it appears to have been the evident intention of the devisor that they should pass, even though derived under leases for ninety-nine years renewable forever, and therefore partaking of the nature of perpetual interests. In the view of the testamentary and descent laws they are nevertheless personal estate.[30]

§ 172. **Sale on execution as a chattel.**—It has been held that a leasehold estate for a term of years may be sold on an execution issuing out of a justice's court which was only authorized to sell personalty. Every species of property comprehended under the general name of chattels was, by a statute, made liable to execution on a judgment rendered by a justice. A term for years was a chattel interest. In a division of property into real and personal it was to be classed among the latter.[31] The opposite result was reached in New York under a statute authorizing "goods and chattels" to be sold on an

[28] Gay, Ex parte, 5 Mass. 419.

[29] Brewster v. Hill, 1 N. H. 350.

[30] Taylor v. Taylor, 47 Md. 295; Thompson v. Lawley, 2 B. & P. 303; Rose v. Bartlett, Cro. Car. 292; Knotsford v. Gardiner, 2 Atk. 450; Chapman v. Hart, 1 Ves. Sr. 271; Pistol v. Riccardson, 1 H. Bl. 26 *n.* In Ohio the same rule was held: Reynolds v. Commissioners of Stark County, 5 Ohio 204; McLean v. Rockey, 3 McLean (U. S.) 238; Murdock v. Ratcliff, 7 Ohio 119. Doubts having arisen as to the correctness of this rule, the case of Loring v. Melendy, 11 Ohio 355, was reserved to the court in Bank for the purpose of settling the law. The case was finally decided upon another point; but the court, in delivering their opinion, declared the law to be, that permanent leasehold estates are lands subject to all the rules and laws which attach to lands, for all purposes, and that judgment liens attached to them as to lands. But Lane, C. J., in Boyd v. Talbert, 12 Ohio 212, expressed his apprehensions that Loring v. Melendy did not conclude the point; and declared his readiness to consider it when it became necessary. In the Northern Bank of Kentucky v. Roosa, 13 Ohio 334, the question was whether judgments were liens upon permanent leaseholds for one year without levy, and it was held that they were. Under the Ohio statutes, the court considered that for all purposes connected with the laws regulating judgments, executions, sales and descents, leasehold estates are to be regarded as if they were freeholds and not chattels. The court did not decide that they *were* realty, but only that for certain purposes they were to be *considered* such.

[31] Barr v. Doe, 6 Blackf. (Ind.) 335.

execution by a justice. It was decided that the legislature intended chattels personal only and did not wish to include chattels real. This was shown by the further provision that the sheriff levying the execution should take the chattels into his custody. Such a provision would clearly not apply to leasehold estates, and so the intention of the legislature to include chattels personal only was apparent.[32]

§ 173. **Curtesy and dower.**—At common law there could be no curtesy or dower in a leasehold estate, however long the term.[33] It has been expressly decided that an estate in land for the term of nine hundred and ninety-nine years, subject to the payment of an annual rent, is personal property, and that the widow of the tenant could not claim dower in it.[34] The same result was reached in regard to a husband's right to an estate of curtesy in his wife's leaseholds.[35]

II. *Tenancy at Will.*

§ 174. **An estate at will, in the primary and technical sense of that expression, is created by grant and contract,** whereby one man lets lands to another to hold at the will of the lessor.[36] In a tenancy of this kind both the entry and occupation are lawful but for no definite term or purpose, subject to be determined at common law by either party *instanter* and without notice, or at most by mere demand of possession by the landlord.[37] This kind of holding is distinguished on the one hand from a tenancy at sufferance or adverse possession by the fact that it is under an agreement from the landowner. In every case a tenancy at will rests on the actual or presumed consent of the owner of the premises.[38] On the other hand, a tenancy of this kind differs from terms for years or for life in that it may be brought to an end at any time at the whim of the parties, instead of continuing until the happening of a certain event or the lapse of a certain period of

[32] Putnam v. Westcott, 19 Johns. (N. Y.) 73; Merry v. Hallet, 2 Cow. (N. Y.) 497.

[33] Murdock v. Reed, 1 Disney (Ohio) 274. A statute in force at the time of this decision altered the result in this case.

[34] Goodwin v. Goodwin, 33 Conn. 314.

[35] Flannery v. Rohrmayer, 49 Conn. 27.

[36] Den v. Drake, 14 N. J. Law 523, citing Litt., § 28; 4 Kent Com. 100, 1st Ed.

[37] Brown v. Kayser, 60 Wis. 1, 18 N. W. 523; Webb v. Seekins, 62 Wis. 26, 21 N. W. 814.

[38] Gault v. Stormont, 51 Mich. 636, 17 N. W. 214; Ridgely v. Stillwell, 25 Mo. 570.

time. Moreover, it was determined at an early date that if an estate was at the will of one of the parties it was equally at the will of the other.[39] Speaking for the Indiana court, Downey, C. J., said in regard to this question: "It is a well-settled and well-known rule of law that a lease or estate which is at the will of one of the parties is equally at the will of the other party. One of them is no more and no further bound than the other. As the lessee in this case had the clear right, at his will, to terminate the tenancy at any time, so also had the lessor. It can not be otherwise."[40]

Where there was a written agreement for a tenancy providing for termination of renting by giving four days' notice and providing for the payment of rent in monthly or semi-monthly instalments, it was held that this created a tenancy at will and not a tenancy from month to month. Therefore such a term is ended by a transfer.[41] An agreement under seal by a tenant that he will surrender possession whenever a purchaser from the landlord requires it constitutes him a tenant at will.[42]

§ 175. Where a tenant occupies the premises without rent and without any time agreed upon to limit the occupation and without in any way binding himself to become a tenant for any definite time or at any agreed price, his occupation is that of a tenant at will.[43] It does not alter the result that the tenant's holding originates in a written demise. If the evidence shows no reservation of rent and no duration or limit of the term, it cannot be regarded as having created any greater estate than a strict tenancy at will. Although it is not the usual practice, there is no inconsistency or objection in creating such a holding by a written instrument.[44] A mere tenancy at will was created where a life tenant verbally leased the premises for the full term of his life in consideration of an agreement for his support.[45] And where the owner of land allowed some of his relatives to use and improve it without payment of rent, they became mere tenants at will.[46]

[39] Cowan v. Radford Iron Co., 83 Va. 547, 3 S. E. 120; Doe v. Richards, 4 Ind. 374.

[40] Knight v. Indiana Coal &c. Co., 47 Ind. 105. Blackstone says (Book 2, p. 135): "But every estate at will is at the will of both parties, landlord and tenant, so that either of them may determine this will, and quit his connection with the other at his own pleasure."

[41] Say v. Stoddard, 27 Ohio St. 478.

[42] Harrison v. Middleton, 11 Grat. (Va.) 527.

[43] Maher v. James Hanley &c. Co., 23 R. I. 323, 50 Atl. 330.

[44] Amick v. Brubaker, 101 Mo. 473, 14 S. W. 627.

[45] Barrett v. Cox, 112 Mich. 220, 70 N. W. 446.

[46] Ellsworth v. Hale, 33 Ark. 633.

In a case where no claim was made for a more permanent tenure, the occupant was held to be by implication a tenant at will, even without the reservation of any rent.[47] Although a householder permitted another to occupy rent free, the occupant was held to be a tenant at will.[48] Parol authority to a tenant to occupy premises as long as he lived, though without any requirement for payment of rent, made the occupant a tenant rather than a mere licensee, and entitled him to the statutory notice to quit provided for in such cases.[49] Loose expressions in a lease for a definite period will not change it into a holding at will. Thus a lease for one year provided for the payment of a certain rent per month, payable monthly "so long as the lessee shall occupy the said house." This did not make the lessee a tenant at will, but he was bound for the full year's rent.[50]

§ 176. **A parol gift of land creates merely an estate at will in the donee,** which he has no power to alienate by deed or lease, and any attempt to do so on his part terminates the will. He is not entitled to a notice to quit, except where such a right is conferred by statute.[51] If the donee leases and the donor does not ratify his act, mere permission to lessee to occupy will not prevent the donor from legally devising land, and his devisee may recover without notice to quit.[52]

§ 177. **The necessity for consent by the landowner** to create a tenancy at will is shown when a lessee continues in possession after the expiration of his term. It was argued that after the expiration of the term the lessee became a tenant at will, and as such was entitled to thirty days' notice to quit. There was nothing whatever in this claim. The lessee was not a tenant at will. A tenant who enters and continues in possession of the demised premises under a written lease until the expiration of the term, does not thereafter become a tenant at will by refusing to surrender that possession and by holding over without the consent of the lessor.[53] So where a subtenant held

[47] Larned v. Hudson, 60 N. Y. 102.

[48] Rex v. Collett, Russ. & Ry. 498; Jackson v. Bryan, 1 Johns. (N. Y.) 322.

[49] Allen v. Mansfield, 82 Mo. 688.

[50] Lane v. Nelson, 167 Pa. St. 602, 31 Atl. 864.

[51] Dossee v. East India Co., 1 L. T. (N. S.) 345, 8 W. R. 245; Jackson v. Rogers, 1 Johns. Cas. (N. Y.) 33. *Contra*, Kaufman v. Cook, 114 Ill. 11, 28 N. E. 378. In the latter case the fact that the gift was conditional would not seem to have any logical effect on the result.

[52] Jackson v. Rogers, 1 Johns. Cas. (N. Y.) 33.

[53] Perine v. Teague, 66 Cal. 446, 6 Pac. 84; Kuhn v. Smith, 125 Cal. 615, 58 Pac. 204; Canning v. Fibush, 77 Cal. 196, 19 Pac. 376.

over after a new lease had been executed to a different lessee, there was no tenancy at will because that requires the consent of the owner, and such consent could not be inferred.[54]

When a party remains in possession after the end of his term, and no new agreement is made, he becomes a tenant at sufferance. Only after a new contract, either expressed, or which may be fairly implied from the acts of the parties, and after the tenant occupies under it, does his tenancy become a tenancy at will, and subject to the statutory rules prescribed for terminating that kind of estate.[55]

§ 178. A landowner's mere consent to the occupation of his land by another does not necessarily imply consent to such occupation as tenant. While the agreement of the parties upon which a tenancy at will is founded will ordinarily be implied from their conduct in transferring the possession of the premises in question, such an inference is rebutted by the existence of a definite agreement to enter into contractual relations of a different nature, as to become grantor and grantee. If, after default in the contract under which entry was made, the occupant continues to hold possession with the consent of the owner, there is then no objection in explaining such possession on the assumption that the parties have agreed to the creation of a tenancy at will. In one case the entry had been made under an agreement for lease, which the occupant refused to carry out after receiving possession. Upon such refusal he became a tenant at will. There is no difference between entering under an agreement to purchase and under a contract to take a lease; therefore there would be a mere tenancy at the will of the lessor after refusal of the tenant to make a lease.[56]

But until a default occurs in the contract of sale there is no ground for implying a tenancy between the parties. In the absence of agreement a grantee has no right to possession of the premises covered by a contract of sale until the time for the transfer of legal title. No demise is created by the contract of sale; and the vendee holds possession of the premises only by permission of the owner. Although it be undoubtedly the intention of the parties that he shall remain in the undisturbed possession of the land, unless he neglects to make the stipulated payments, he has no title by which he can hold against the true owner for any fixed or definite length of time. Therefore the

[54] Smith v. Coe, 55 N. Y. 678.

[55] Doe v. Stennett, 2 Esp. 717, 5 R. R. 769; Emmons v. Scudder, 115 Mass. 367; Merrill v. Bullock, 105 Mass. 486.

[56] Dunne v. School Trustees, 39 Ill. 578.

r is the proper party to seek for a remedy for injuries to the ion.[57]

wever, the mere absence of express terms of renting does not nt the implication of a tenancy at will. If the tenant be placed e land without any term prescribed or rent reserved, and as a occupier, he is a tenant at will.[58] In accordance with this prin- it has been held that the pendency of negotiations between the es does not prevent an occupant of land from becoming a tenant ll of the owner during the meantime. One moving a building nd of another in expectation of its sale to such party becomes a t at will pending the negotiations, and in the event that no ment is made he becomes liable for rent. Had such negotia- ripened into a completed contract, then the tenancy at will would been merged in the executed contract, which would relate back e time when the building was first moved upon the land. But egotiations were never perfected, and the seller remained tenant ll to the buyer, and so liable in use and occupation.[59]

here a grantee allowed his grantor to continue in possession of ranted premises, there would be no basis for inferring that the or remained in possession as servant so that crops would belong e grantee and could be levied on as his property. The inference l rather be that the grantor was a tenant to the grantee, and fore the owner of the crops.[60]

79. The possession of a tenant at will is in contemplation of a complete and unqualified possession as long as it lasts. So, ugh an agent or servant in occupation of land can not maintain t for possession in his own name, a tenant at will has such a pos- on as will enable him to do so.[61] A tenant at will can undoubt-

oley v. Wyeth, 2 Allen (Mass.) In Jones v. Temple, 87 Va. 12 S. E. 404, the statement is that "upon familiar principles rson entering under a contract rchase, which he has not com- with, would be a tenant at will, he possession of the tenant is rtue of an entry by the consent e vendor; it is not adverse, but, e only other alternative, it is a ncy at the will of the vendor." criticism of this statement is a tenancy at sufferance seems to be a possible alternative. Furthermore, every holding which is not adverse is not a tenancy at will; a mortgagor in possession does not hold adversely to his mortgage, yet he is not a tenant at will.

[58] Sarsfield v. Healy, 50 Barb. (N. Y.) 245; Post v. Post, 14 Barb. (N. Y.) 253.

[59] Michael v. Curtis, 60 Conn. 363, 22 Atl. 949.

[60] Sherburne v. Jones, 20 Me. 70.

[61] Jones v. Shay, 50 Cal. 508.

edly maintain an action of ejectment because one having an even more precarious tenure than he can do so. It is held that "a tenant for years, a lessee at will and a tenant at sufferance may support this action against a stranger, or even against his landlord unless a right of entry be expressly or impliedly reserved." Many may be found in the occupancy of lands to which they can show no legal title, and unless prior peaceable possession gave a preference in the right of enjoyment, the peace and quiet of society would be constantly disturbed. This is the reason of the common law why any possession is sufficient to sustain trespass against a wrongdoer or a person who can not make out a title *prima facie* entitling him to possession.[62]

§ 180. Entry and occupation under a void parol lease creates a tenancy, which is either strictly at will or from year to year or from month to month, according to the circumstances of the case.[63] The wording of the English statute of frauds is that grants by parol of a greater interest than a three years' term shall only be deemed estates at will. Although the wording of some American statutes is that parol leases for more than a certain period are void, occupation under such an agreement nevertheless creates a tenancy. The occupier is not a trespasser; he is not a mere licensee. He may be compelled to pay for the use and occupation of the premises.[64] Yet a ruling that a parol lease for seven years, although invalid for the full term, was valid for the term of one year, seems not only unreasonable, "but it is difficult to perceive how such a contract, declared to be void by the statute, can be held to be valid for a single hour, or upon what principle a tenant entering under a void lease could be compelled by virtue of the lease to pay for a longer period than he actually occupied."[65]

[62] Duncan v. Potts, 5 Stew. & P. (Ala.) 82.

[63] California: Phelan v. Anderson, 118 Cal. 504, 50 Pac. 685. Connecticut: Lockwood v. Lockwood, 22 Conn. 425. Michigan: Huyser v. Chase, 13 Mich. 98. New Hampshire: Whitney v. Swett, 22 N. H. 10. Pennsylvania: Dumn v. Rothermel, 112 Pa. 272, 3 Atl. 800. Tennessee: Duke v. Harper, 6 Yerg. 280. Vermont: Sartwell v. Sowles, 72 Vt. 270, 48 Atl. 11. Washington: Dolan v. Scott, 25 Wash. 214, 65 Pac. 190.

[64] Schuyler v. Leggett, 2 Cow. (N. Y.) 660; People v. Rickert, 8 Cow. (N. Y.) 226; Anderson v. Prindle, 23 Wend. (N. Y.) 616; Lounsbery v. Snyder, 31 N. Y. 514; Greton v. Smith, 33 N. Y. 245; Lockwood v. Lockwood, 22 Conn. 425.

[65] Thomas v. Nelson, 69 N. Y. 118, per Earl, J. There is authority for the doctrine that a parol lease is invalid only as to the excess of the term beyond the time permitted by the statute of frauds. Such is the rule in Nebraska. Maxwell, J., says: "Here was a lease for twenty-four months, under which the tenant took possession. The parties had authority to make a lease for twelve

lanation to remove this objection is that the tenancy from year arises from the entry and payment of rent, and not from the lease. The lease is not treated as valid for a year; it is simply e to the extent that it shows the occupation is permissive and erse. The agreement for a periodic tenancy arises by pre- n of law out of the continued occupation and the payment of lic rent. This was aptly illustrated by a case where the very ment which the parties could not make by parol arose by in- nt of law. Thus a parol agreement that a tenant holding over cupy as a tenant from year to year creates a tenancy at will but this becomes a tenancy from year to year by continued ion for a year and payment of annual rent.[66]

e a party enters into possession of premises under a parol lease nty months he becomes at first a tenant at will, but if a r rent is paid and accepted, a tenancy from month to month is [67] Where an annual rent is reserved and has been paid by ant in possession, there is a tenancy from year to year.[68] So and was occupied several years with no written agreement it d to be a letting from year to year which commenced at the hen it was usual to rent such premises in the county.[69]

. **Unauthorized lease.**—The rule that occupation under a void eates a tenancy at will applies only in the case of leases granted

and it is only the excess void, and it is void only be- f the limitation upon the o make the contract, but to nt of the authority the lease . The lease therefore was or one year." Friedhoff v. 13 Neb. 5, 12 N. W. 820, with approval in Nickolls v. 39 Neb. 103, 57 N. W. 990.

sden v. Atwood, 68 Vt. 322, 311.

erson v. Prindle, 23 Wend. 616. But see, Friedhoff v. 13 Neb. 5, 12 N. W. 820.

fornia: Phelan v. Anderson, 504, 50 Pac. 685. Kentucky: v. Romer, 4 Ky. L. R. 815; ad v. Watkyns, 5 B. Mon. ichigan: Coan v. Mole, 39 54. Missouri: Hammon v. , 50 Mo. 434 (prior to Mo. Rev. St. 1889, § 6371). New Hampshire: Tuttle v. Langley, 68 N. H. 464, 39 Atl. 488. New York: Reeder v. Sayre, 70 N. Y. 180; Lounsbery v. Snyder, 31 N. Y. 514; Kernochan v. Wilkens, 3 N. Y. App. Div. 596. Ohio: Baltimore &c. R. Co. v. West, 57 Ohio St. 161, 49 N. E. 344. Oregon: Williams v. Ackerman, 8 Ore. 405; Garrett v. Clark, 5 Ore. 464; Rosenblat v. Perkins, 18 Ore. 156, 22 Pac. 598. Tennessee: Shepherd v. Cummings, 1 Coldw. 354. Vermont: Barlow v. Wainwright, 22 Vt. 88; Blanchard v. Bowers, 67 Vt. 403, 31 Atl. 848. Wisconsin: Koplitz v. Gustavus, 48 Wis. 48, 3 N. W. 754. English: Clayton v. Blakey, 8 Term R. 3; Thunder v. Belcher, 3 East 449; Doe v. Amey, 12 A. & E. 476.

[66] Hearn v. Gray, 2 Houst. (Del.) 135.

by the owner of the premises which can not be enforced because of a failure to comply with some statutory requirement as to execution. It does not hold true of a demise made without authority from the owner, for such a lease does not show the owner's consent to the occupation, which is essential to the creation of a tenancy at will. The rule that a void lease and entry thereunder will create a tenancy at will entitling the tenant to notice to quit does not apply to a case of entry under a lease made by an agent acting entirely without authority. Not only was the lease executed by the agent void, but any possession given under it or right of tenancy conferred by it was entirely unwarranted. There could be no tenancy at will created by means of the possession so obtained.[70] The same result would follow from incapacity created by a statute forbidding a husband to execute a lease as agent in behalf of his wife. Such a lease made by a husband would be absolutely void and no action could be maintained upon it. The lease attempted to be made would be incapable of ratification in any legitimate sense. Its provisions might be adopted by the wife, but as the term exceeded one year, this could not be done by parol. Parol adoption by the wife would create a tenancy at will, but an action solely upon the void lease could not be maintained.[71] However, while the statute of frauds makes leases for more than one year invalid if the agent is not authorized in writing to execute them, yet where the lessee has been put into possession and has enjoyed the premises for a full year, the executed agreement is good for that period, at least, is not within the statute, and the authority of the agent may be shown by parol.[72]

A distinction exists where the person executing a lease is not entirely without authority, but merely exceeds his authority in respect to the length of the term for which he leases. Thus in one jurisdiction the statutory authority to executors to lease lands of their testator limits the duration of such leases to a single year. Therefore a two-year lease by executors was held to be invalid because in excess of their authority, but a valid tenancy at will was created by the entry of the tenant. Occupation and payment of rent would have the effect of changing this into a valid year to year tenancy which could only be terminated by notice in the required statutory form.[73]

§ 182. Determination of tenancies at will.—In the absence of statutory requirements the mode of terminating a tenancy at will is

[70] Yellow Jacket &c. Co. v. Stevenson, 5 Nev. 224.

[71] Sanford v. Johnson, 24 Minn. 172.

[72] Toan v. Pline, 60 Mich. 385, 27 N. W. 557.

[73] Grady v. Warrell, 105 Mich. 310, 63 N. W. 204.

landlord to enter, use words declaring the tenancy at an end, n notify the tenant of his action.[74] At common law a tenant was not entitled to notice to quit; a mere demand on him for ion was all that the law required.[75] Tenancies at will may be ated by any act or declaration inconsistent with the voluntary n of landlord and tenant; as notice to quit; threat of legal to recover possession; anything that amounts to a demand for ion; the bringing of an action to recover possession which fails, ssibly, a notice to the tenant that if he continue in possession ter he must pay an increased rent, terminates the tenancy.[76] ly is the interest of a tenant at will determined *instanter* by a l for possession, but if he does any act which amounts to a dis- of his landlord's title, it operates as a forfeiture, and no de- or notice to deliver possession is necessary.[77] Moreover, an y the landlord upon his tenant at will, of which the tenant is otified, vests the possession in the landlord without an expulsion tenant. An expulsion of the tenant is not necessary in order ne landlord become lawfully possessed of the premises, and not be justified until a reasonable time had been allowed the to remove his belongings.[78]

he other hand, a tenant at will could put an end to his holding *er* at common law and avoid further liability for rent. Al- he cannot terminate a valid contract by simply giving notice intention to do so, it is unnecessary to cite authorities to the hat the law does not imply an agreement to pay for that which s not received. After the tenant at will abandoned the prem- could only be claimed that he was in constructive possession. e were no statute requiring notice, such tenant could not be held t after such time; he could in any event only be held liable for es which might result to the property, or for loss thereof by rea- his abandonment without notice.[79]

3. Yet until a termination of the will the possession of a ten- will is lawful and until some act is done which terminates the

k v. Cook, 28 Ala. 660.
l v. Lowell, 19 Pick. (Mass.)
ss v. Campbell, 89 Ill. App.
ss v. Garrison, 1 Dana (Ky.)
sden v. Blaisdell, 60 Vt. 386, 332.
e v. Edmonston, 1 Ired. L. (N. Car.) 152; Howell v. Howell, 7 Ired. L. (N. Car.) 496.

[75] Curl v. Lowell, 19 Pick. (Mass.) 25.

[76] Dolan v. Scott, 25 Wash. 214, 65 Pac. 190, holding rule was unchanged by statute.

tenancy, the landlord can not recover possession by suit. Entry unde a parol agreement to lease for four years creates only a tenancy a will, but if that tenancy be not determined before the day of th demise laid in the declaration, the landlord could not recover in eject ment.[80] In accordance with these principles it has been held tha a tenant at will has a right to have reasonable notice of his landlord' intention to terminate the estate before an action can be brough against him for possession.[81] Furthermore, it has been uniformly held that a vendor, having placed his vendee in possession, can no without a demand of the possession and a refusal by the vendee, o some wrongful act by him to determine such possession, treat th vendee as a wrongdoer and a trespasser. The vendee is not liable t be turned out of possession by ejectment without previous demand and notice by the vendor.[82]

§ 184. **Death of parties and destructon of subject-matter.**—It i a general doctrine of the law of landlord and tenant that a total de struction of the subject-matter of a lease ends the tenancy and termi nates the relation of landlord and tenant. So if premises are occu pied by a tenant at will, the tenancy ceases when the property is de stroyed and the tenant is ousted.[83] Besides being terminated by a de struction of the subject-matter, a tenancy at will is, at common law determined by the death of either of the parties. In determining th validity of a bequest of a leasehold interest it was held that to mak out the legatee's case it must be contended that the testator wa tenant from year to year, "for if he was tenant at will the genera doctrine is that the death of either party determines the will, and i would follow that no interest passed by the bequest."[84]

§ 185. **Notice to tenant at will.**—In a lease for a definite term, th parties know beforehand the time when the holding will come to an end, and it is only fair to insist that the tenant make his plans accord ingly and vacate immediately upon the expiration of the term. The same is true of a periodic tenancy when due notice has been given that the arrangement will come to an end upon the expiration of one

[80] Goodtitle v. Herbert, 4 Term R. 680; Denn v. Rawlins, 10 East 261; Doe v. Jackson, 1 B. & C. 448; 1 Just. 57, Lit. S. 68 Lom. Dig., I, 192.

[81] Blum v. Robertson, 24 Cal. 127; Frisbie v. Price, 27 Cal. 253.

[82] Right v. Beard, 13 East. 210; Birch v. Wright, 1 Term R. 378, 381 Twyman v. Hawley, 24 Grat. (Va.) 512; Jones v. Temple, 87 Va. 210, 1 S. E. 404.

[83] O'Brien v. Cavanaugh, 61 Mich 368, 28 N. W. 127. See also, § 474.

[84] James v. Dean, 11 Ves. 383, 391.

ecurring periods of the tenancy. But since a tenant at will is itled to any prior notice to bring his holding to an end, such ix months' notice which must be given a tenant from year to is required that he be given a reasonable time after the termi- of the tenancy to remove his effects. This is really after his has been brought to an end, but the rule is commonly ex- by saying that a tenant at will is entitled to reasonable notice more.[85] The true cause and explanation of the rule is that ant is entitled to a reasonable time for the removal of his and property.[86] Upon the termination of his tenancy, he has it of ingress and egress so far as may be necessary to remove cts.[87] Even if one is occupying a house as a mere tenant at e landlord has no right to lock up the house with the property enant in it. The landlord can not act in such a manner and hat he is bound to no diligence whatever for the preservation enant's property. Upon a termination of the tenancy due care e exercised to prevent injury to the tenant.[88]

is reasonable notice is a question of law and fact to be deter- by the particular circumstances of each case. The time must cient to enable the lessee to take the emblements, and to re- is family, furniture, and other property.[89] In case none of the ere in dispute, the question as to what was a reasonable time ightly be treated as a question of law for the court to decide.[90] tenant, who had been allowed to build a small house on land occupy the premises at will, was notified to vacate immediately, thin four days suit was brought, it was held that this was not it notice to terminate the tenancy.[91]

3. **An estate at will is uncertain and defeasible, and is de- by the alienation of the premises by either party.**[92] The in case of an alienation by the owner of the estate, becomes a enant at sufferance; for the estate at will is terminated by its gal limitation, it not being the subject of alienation.[93] In the

h v. Bolton, 46 Vt. 84, 88; n v. Middleton, 11 Grat. 27.

is v. Thompson, 13 Me. 209; v. Moore, 19 Me. 252; Simp- Rogers, 15 Ill. 397.

som v. Moore, 19 Me. 252; ps v. Rogers, 15 Ill. 397.

ss v. Hays, 73 Tex. 515, 11 S.

[85] Currier v. Earl, 13 Me. 216.

[86] Ellis v. Paige, 1 Pick. (Mass.) 43, 50; same case 2 Pick. 71, *n.*, Co. Litt. 56 b.

[87] Boudette v. Pierce, 50 Vt. 212.

[88] Co. Litt. 55 b. 57 a.; Jackson v. Aldrich, 13 Johns. (N. Y.) 106, 109; Disdale v. Iles, 2 Lev. 88.

[89] Joy v. McKay, 70 Cal. 445, 11 Pac. 763; Esty v. Baker, 50 Me. 325;

language of the old law, conveyance of the premises terminated th will. The entry of the tenant under the former landlord had bee without wrong, but he continued to hold without any consent, expre or implied, from the new owner so that he became a tenant at suffe ance. This effect of a transfer operated to deprive the tenant of th benefit of the statutes requiring notice from the landlord to termina a tenancy at will. As a tenant at will he would be entitled to a noti to quit, but after a conveyance of the premises by the landlord, th tenant could be evicted even without the notice provided for b statute. He could only claim the protection extended to a tenant sufferance.[94] But in some jurisdictions this is by statute made th same as that given to a tenant at will. However, in others, as i Massachusetts, the old common law distinction is made betwee estates at will and at sufferance in the statutes regarding notice quit. Thus in the jurisdiction mentioned a tenant at will, aft conveyance of the reversion, was held liable to the grantee, witho notice to quit, to the process given by statute respecting forcible ent and detainer, tenants at sufferance not being entitled to notice und any of the provisions of that statute.[95]

The general doctrine that any transfer of the estate of a lessor will determines the will and makes the former tenant at will a tena at sufferance to the grantee of the reversion, applies with equal for to an involuntary transfer taking effect by operation of law. Th vesting of title in the assignee upon the insolvency or bankruptcy of landlord at will operates to terminate the estate and makes the less at will a tenant at sufferance.[96] The effect of a transfer of the lan lord's interest upon a tenancy at will is the same, although the co veyance is against the will of the owner. Thus a sale of the lan lord's interest on execution will have the effect of converting a tenan at will into a tenancy at sufferance.[97]

§ 187. **Purpose and mode of transfer immaterial.**—A lessor at wi need not make a conveyance in fee in order to bring the tenancy an end. It is a fixed rule that if the owner of the land, which is i

Robinson v. Deering, 56 Me. 357; Reed v. Reed, 48 Me. 388; Hammond v. Thompson, 168 Mass. 531, 47 N. E. 137; Lash v. Ames, 171 Mass. 487, 50 N. E. 996; Ball v. Cullimore, 2 C. M. & R. 120, 1 Gale 96.

[94] Seavey v. Cloudman, 90 Me. 536, 38 Atl. 540; Lash v. Ames, 171 Mas 487, 50 N. E. 996.

[95] Benedict v. Morse, 10 Met (Mass.) 223; Curtis v. Galvin, Allen (Mass.) 215.

[96] Doe v. Thomas, 6 Exch. 854.

[97] Marsters v. Cling, 163 Mass. 47 40 N. E. 763.

ecupation of a tenant at will, makes a feoffment, or a lease for to commence immediately, the estate at will is thereby deter-l.[98] A written lease for years from the landlord to a third per-as the same effect as a conveyance in fee. In this connection a "for the season," being a demise for a certain time, though it be construed to be for a term less than a year, is technically a for years.[99]

e purpose of the parties in executing the written lease is imma-. The express object may be to get rid of the tenant. So that vision in the written lease that no rent shall be paid till the lessee possession does not affect the result.[100] A tenant at will can not ain an action against his landlord for advising and procuring son to whom he has given a lease of the premises to eject the t. The landlord has a legal right to terminate the tenancy at y giving a lease, and after the lease is given, the lessee has the right, after due notice, to eject the tenant in a peaceable man-It is immaterial what his motives are. An action can not be ained against him, or against any person acting with him, or ad-or procuring him to act, unless either the act complained of e means by which it was accomplished are shown to be unlawful. enant can not maintain an action against the landlord for ad-and procuring the lessee to assert and enforce his legal rights, f the landlord is actuated by malice, because the tenant's rights ot invaded, and he sustains no legal injury.[101]

88. **Notice of the transfer of the landlord's title** must in some e brought home to the tenant for it to have the effect of bringing ancy at will to an end. The law upon the subject is, that if an ment or conveyance of the reversion takes place behind the back e tenant, it does not affect him till he has notice of it; but if he nowledge from the assignee of the reversion or has himself ac-d the same information, it is a determination of the will.[102] form of expressing the will to end the tenancy, taking place off nd and in the absence of the other party, must be made known n, in order to give effect to the intention and actually terminate enancy, although no particular form of notice is necessary."[103]

ratt v. Farrar, 10 Allen (Mass.) Hildreth v. Conant, 10 Metc. s.) 298; Kelly v. Waite, 12 (Mass.) 300; 2 Bl. Com. 146. elly v. Waite, 12 Metc. (Mass.) 2 Bl. Com. 140.

[100] Pratt v. Farrar, 10 Allen (Mass.) 519.

[101] Groustra v. Bourges, 141 Mass. 7, 4 N. E. 623.

[102] Doe v. Thomas, 6 Exch. 854.

[103] Pratt v. Farrar, 10 Allen

The lessor may by actual entry upon the ground determine his wil in the absence of the lessee; but by words spoken off the land, th will is not determined till the lessee has notice.

§ 189. **Recovery of rent till time of alienation.**—Where a tenanc at will is determined between rent days by a transfer of the premises rent can not be recovered for the portion of the period the tenant wa in occupation. The landlord can not recover it from the occupier a tenant at will because he has determined this tenancy between tw rent days, and the rent can not be apportioned. He can not recove it from the occupier as tenant at sufferance, because during that tim the occupier was tenant at will.[104] This rule has been applied agains a landlord suing for rent in a case where the conveyance which termi nated the tenancy at will was made on the last day of a monthly term The tenant at will was not turned out, and there was an agreemen that he should not be turned out without a month's notice. The ren was not due till sunset, and the transfer was made before that time It was argued that the law did not regard fractions of a day. Th court replied that when it was important for the rights of parties t determine which of two events happening on the same day is to hav priority over the other, the law does not hesitate to pass upon the ques tion.[105] In this case the tenancy at will was not changed to a tenanc at sufferance by the conveyance, but remained a tenancy at will unde the new landlord, so that he could recover rent for the entire month In Massachusetts, after the tenancy at will has been terminated by written lease, the former tenant at will becomes liable for rent unde the statute applicable to tenants at sufferance. The right of actio to sue for such rent is in the lessee taking under the written lease, an it is improper to join the owner of the premises in such a suit.[106]

§ 190. **The estate of a tenant at will is not an interest capable o bargain and sale.** It cannot be assigned without the landlord's con sent. An unauthorized transfer gives the transferee no right that h can hold against the will of the landlord.[107] Not only can the tenan

(Mass.) 519, per Gray, J.; Furlong v. Leary, 8 Cush. (Mass.) 409; Mizner v. Munroe, 10 Gray (Mass.) 290; Doe v. Thomas, 6 Exch. 854, 857; Pinhorn v. Souster, 8 Exch. 763, 770.

[104] Emmes v. Feeley, 132 Mass. 346, citing Fuller v. Swett, 6 Allen (Mass.) 219, *n.*; Dexter v. Phillips, 121 Mass. 178, and Nicholson v Munigle, 6 Allen (Mass.) 215.

[105] Hammond v. Thompson, 16 Mass. 531, 47 N. E. 137.

[106] Cofran v. Shepard, 148 Mass 582, 20 N. E. 181.

[107] **Alabama:** Cook v. Cook, 28 Ala 660. **California:** McLeran v. Ben

r no rights on his assignee, but by his attempted transfer he for-
his own rights and relinquishes his estate.[108] If a tenant at will
ns his estate to another who enters upon the land, the latter is a
sor, and the landlord may have an action of trespass against
[09] So in case a lessee at will makes a mortgage to a stranger
e the lessor may have trespass forthwith against the mortgagee.
it is no bar to such action that the mortgagee has been put into
ssion by the sheriff under a writ of *habere facias*.[110] Not only
tenant at will precluded from assigning his interest without the
nt of his landlord, but he can not even grant a sublease out of
state. The sublessee would not succeed to the rights of his lessor
would be a mere tenant at sufferance to the original landlord and
be ousted without notice.[111]

owever, although a tenant at will has no assignable estate, yet if
tempts to make an assignment and the landlord recognizes the
nee as a tenant, the latter becomes a tenant at will just the same
s predecessor.[112] The assignee entering into possession may, at
lection of the owner of the leased premises, be treated either as a
t or as a trespasser.[113] Accordingly, the general doctrine, that
naking of a lease by a tenant at will terminates his tenancy and
erts him into a disseisor, must be understood with this qualifica-
that it has this effect only at the election of the landlord, and
the tenant can not avail himself of it to avoid the payment of
[114]

makes no difference whether the tenant's transfer is voluntary or
untary as far as the effect in determining the estate at will is
erned, for such an interest is not the subject-matter of a judicial

73 Cal. 329, 14 Pac. 879. **Geor-** Atlanta &c. R. Co. v. McHan, Ga. 543, 35 S. E. 634. **Massa-** tts: Cooper v. Adams, 6 Cush. **Maine:** Cunningham v. Holton, e. 33; Dingley v. Buffum, 57 Me. **North Carolina:** Howell v. ell, 7 Ired. L. 496. **New Hamp-** : Wittemore v. Gibbs, 24 N. H. Austin v. Thomson, 45 N. H. 117. **Rhode Island:** McCann v. bone, 8 R. I. 403.

Cook v. Cook, 28 Ala. 660; Mc- n v. Benton, 73 Cal. 329, 14 Pac. Cooper v. Adams, 6 Cush. s.) 87; King v. Lawson, 98 Mass. 309; Howell v. Howell, 7 Ired. L. (N. Car.) 496; McCann v. Rathbone, 8 R. I. 403.

[109] Cooper v. Adams, 6 Cush. (Mass.) 87; Cunningham v. Holton, 55 Me. 33.

[110] Little v. Palister, 4 Me. 209.

[111] Meier v. Thiemann, 15 Mo. App. 307.

[112] Landon v. Townshend, 129 N. Y. 166, 29 N. E. 71, 41 N. Y. St. 419, affirming 38 N. Y. St. 714, 14 N. Y. S. 522.

[113] McCann v. Rathbone, 8 R. I. 403.

[114] Cook v. Cook, 28 Ala. 660.

sale.[115] So even where a tenant at will assented to a levy on the lan as his property, this determined the tenancy, and the landlord coul bring trespass against the judgment creditor for his entry.[116]

§ 191. **Notice to the landlord is essential** in order that an assign ment by a tenant at will shall determine the estate. Parke, B., afte reserving this question for consideration, pronounced his opinio thus: "It, however, now seems clear, from a case in Yelverton, tha the assignment by the tenant at will of his interest to a third part is no determination of the tenancy, unless the lessor at will hav notice. That was so decided by the members of the court in *Carpen ter* v. *Colins*;[117] . . . the principle laid down in that cas clearly is that a tenant at will can not determine his tenancy by trans ferring his interest to a third party without notice to his landlord."[11

III. *Tenancy from Year to Year.*

§ 192. **Rests on judicial not statutory authority.**—The law re specting tenancies from year to year is not of statutory but judicia creation, whereby certain restraining limitations were placed upo both landlord and tenant where the holding was at will. Statutes o the subject were merely declaratory of those rules.[119] The origin o estates of this kind has been well stated by Wilmot, J., who said: "I the country leases at will, in the strict legal notion of leases at will being found extremely inconvenient, exist only notionally, and wer succeeded by another species of contract which was less inconvenient At first it was indeed settled to be for a year certain, and then th landlord might turn the tenant out at the end of the year. It is no established that if a tenant takes from year to year, either party mus give a reasonable notice before the end of the year, though that rea sonable notice varies according to the customs of different coun ties."[120]

It thus appears that a tenancy from year to year is a qualifie tenancy at will introduced to obviate the inconveniences of that kin of estate; and the qualification requires the determination of the wil to be prospective, to take effect at the end of a current year of th

[115] Atlanta &c. R. Co. v. McHan, 110 Ga. 543, 35 S. E. 634.

[116] Campbell v. Procter, 6 Me. 12.

[117] Yelv. 73.

[118] Pinhorn v. Souster, 8 Exch. 763, 772.

[119] Hauser v. Romer, 4 Ky. L. R 815.

[120] Timmins v. Rowlinson, 3 Burr 1609, quoted in Goddard v. Soutl Carolina R. Co., 2 Rich. L. (S. C.) 346.

y.[121] There is another view of the nature of a year to year
y. This is that it is dependent on a presumed oral agreement
n the parties which is valid because of the exception in the
of frauds in favor of parol leases for three years or less. If
the true theory it follows that in those jurisdictions where no
on is made in favor of short term parol leases, this doctrine of
year tenancy is illogical. Some courts have, in the absence of
cepting clause in the statute, refused to recognize such tenan-
but it would seem without sound reason; because the doctrine

awford v. Morris, 5 Grat.
90. "At common law estates
are of two classes; estates at
ictly, and estates from year
. They differ chiefly, if not
, in this. The former may be
ated by either of the parties
pleasure; the latter can be
ated against the will of the
arty only at the expiration of
ar, month, etc., as the case
, by a notice to quit, except
one of the parties has failed
orm his part of the contract.
st class of tenancies is so
nore favorable to the tenant
e strict tenancy at will that
rts have, from a very early
leaned strongly in favor of
ng every tenancy, the terms
h do not show a strict ten-
will, or which is not created
ritten instrument, as a ten-
om year to year." Currier v.
24 N. H. 219, 222, citing 2
Com. 147; 1 Cruise Dig. 260;
Com. 111; 2 Greenl. Ev.,
325.

mmon v. Douglas, 50 Mo. 434,
Ellis v. Paige, 1 Pick. (Mass.)
llis v. Pool, 3 Metc. (Mass.)
Kelly v. Waite, 12 Metc.
300, and Bennock v. Whip-
Me. 346. In the course of the
the Missouri court say:
irst section of the English
(29 Car. I, ch. 3) has been
in Missouri as well as in the
other states, but the exception in favor of leases not to exceed three years is omitted in this state. So we have simply the provisions without the exceptions, that all leases, etc., made by parol, and not put in writing, shall have the force and effect of leases at will only. It is difficult to see, under this section, how any other lease than at will can be created by parol. The language seems to be clear and specific, and to hold that a tenancy from year to year can be created by a verbal permission to hold over under a former lease would seem to create a lease other than at will, which is not reduced to writing. Under the exception in the English statute, which has been adopted along with the first section in most of the states, there is no inconsistency in this view; for as in all leases for less than three years the law stands as before its adoption, and a verbal lease from year to year, which can in no case exceed two years, is as valid as though there were no statute of frauds."

Further comment on this question was made by Judge Bennett in the case of Barlow v. Wainwright, 22 Vt. 88. He said: "It is true the English statute of frauds has an exception, as to leases not exceeding the term of three years; and this is dwelt upon by the court of Massachusetts as a reason why the de-

of notice to quit for the purpose of increasing the stability of th tenant's tenure is a very ancient one. It existed before the passag of the English statute of frauds. Nothing in that statute forbids th continued enforcement of the established rules in regard to notic The presence of the exception in favor of short term parol leases ca be accounted for on other grounds than for the purpose of preservin periodical tenancies. The conclusion seems justified, therefore, tha the saving clause for short term parol leases was not put into th statute of frauds for the purpose of preserving year to year tenancies and that the doctrine of tenancies at will for periodical terms woul have been valid even if there had been no such saving clause in th statute of frauds as originally in force in England.

§ 193. Applicable to conditions in this country.—In view of th nature of the origin of periodic tenancies in a species of judicial legis lation, it has been argued that the law regarding them was not ap plicable to the changed conditions existing in the colonies, and tha therefore it was not adopted in this country as a part of the commo law. This argument was answered by Judge Bell, of the New Hamp shire Supreme Court, in the middle of the last century. He said "We are aware of nothing which tends to show that the rules of th common law, relative to estates from year to year, are in any way no applicable to our institutions or to the circumstances of the country The general system of the common law relating to real estate wa beyond question 'adopted and approved and commonly practice upon' in the transactions of business and 'in the courts of law' fron the foundation of the province, and we can see no reason to doub that this portion of it, founded as it is upon much clearer principle

cisions of the courts of England, under this statute, should not furnish a rule for them. I must confess that I do not see the force of the reasoning of the court, which would prevent an estate at will from being turned into a tenancy from year to year in Massachusetts, and allow it under the English statute. In the case of Hanchet v. Whitney, 2 Aik. 240, it was not supposed that our statute of 1797 would have any other or greater effect than the English statute, and [it was supposed] that both alike, in the first instance, declared that the estate created by verbal lease was only an estate a will, unless it came within the ex ception of the English statute, an that under our statute it might b turned into a tenancy from year t year as well as in England. Th court of Maine, in the case of Davi v. Thompson, 13 Me. 209, 214, unde a similar statute followed the Mas sachusetts cases; but no new view of the question are presented, an for myself I cannot coincide wit those cases."

ity and justice than many other parts of it, was adopted with t."[123]

4. The expression tenant at will from year to year exactly ex- the old common law idea of periodical tenure and in view of ture and origin of the doctrine is the most natural and appro- term to describe such holdings. Where the law would not raise plication of recurring periodical terms, the distinguishing mode ression was to call such relation *a tenancy strictly at will.* Thus erfectly accurate and consistent to say that one occupying, under l agreement for a written lease, a yearly rent being reserved, is nt at will from year to year and must give a notice to quit.[124] ncy from year to year or a tenancy from month to month is a ed tenancy at will. The modification did not alter the essential ts of the tenure, but only set up certain restrictions as to the ation of the will. For the sake of convenience, a period of is required before either party can terminate the will, and in n the holding can only be brought to a close at the end of a In a case where there was a letting for an indefinite period at thly rent an express agreement by the tenant to give up posses- hen it was required did not relieve the landlord from the ty of giving a full month's notice prior to one of the monthly s.[125]

5. Similarity to estates for term of years.—In certain respects ncy from year to year resembles a holding under a lease for a e term of one year. The tenant from year to year is bound for ll year's rent even though he abandons the premises. If the rd choose to hold him, a tenant from year to year is in no better n in regard to escaping liability for rent than is a lessee who nd by express covenants.[126] Parties have repeatedly been held

rrier v. Perley, 24 N. H. 219,

ntington v. Parkhurst, 87 38, 49 N. W. 597; Tuttle v. y, 68 N. H. 464, 39 Atl. 488. istorical origin of periodical ies is sometimes lost sight of, is leads to such a mistake as w York Supreme Court made following quotation: "The tion between a tenancy at nd one from year to year, is as well defined as that between one for life and one for years. There is no such estate as one 'at will from year to year.' The assertion that there is such a tenancy as one 'at will from year to year,' is a solecism." Park v. Castle, 19 How. Pr. (N. Y.) 29.

[125] Woodrow v. Michael, 13 Mich. 187.

[126] Lockwood v. Lockwood, 22 Conn. 425; Currier v. Perley, 24 N.

liable in actions for use and occupation, although there has not be an actual occupation, for the whole term in respect to which t actions were brought.[127] And if during the continuance of a te ancy, the tenant abandons the possession of the premises he is as muc liable for the rent as though he had continued his occupancy.[128] S in accordance with the general rule regarding leases for fixed term unless there is an agreement to the contrary, rent on a yearly tenan is not due till the end of the term, and a suit to recover it prior that time is premature.[129] But the rent does become due at the en of every year, so that the right of action for the rent accrues then, an the statute of limitations against such right of action begins to ru at the same time.[130]

The general rule is that a grant of the reversion has no effect upo the validity of an outstanding term of years, and the same hol true of a grant of the reversionary interest after a tenancy from ye to year. Unlike a strict tenancy at will, a term from year to year not changed by a conveyance of the reversion, and the holding ca only be terminated by a notice in the ordinary form. By the sale an conveyance of the real estate and the recognition of such sale b the tenant and the payment of rent to the grantee, the tenant b comes the tenant of the grantee, but this does not change the natu of the tenancy or give the tenant any greater rights than he otherwi had. If the grantor had leased the real estate for one year, and withi the year had conveyed the premises, it certainly would not be co tended that the lease was extended, or that the lessee would have an greater right by reason of such sale. The rights of the lessee remai the same; the sale of the real estate did not add to or take away an thing from the tenancy.[131] A tenancy from year to year is to be co sidered as recommencing every year.[132]

§ 196. Statutory modifications.—The entire topic of estates at wi and from year to year is rather generally covered by statutes, whic prescribe the form of notice, the length of time it must cover and th

H. 219; Tanton v. Van Alstine, 24 Ill. App. 405.

[127] Pinero v. Judson, 6 Bing. 206, 19 E. C. L. 100.

[128] Bacon v. Brown, 9 Conn. R. 334; Lockwood v. Lockwood, 22 Conn. 425.

[129] Indianapolis &c. R. Co. v. First Nat. Bank, 134 Ind. 127, 33 N. E. 679.

[130] Cowan v. Henika, 19 Ind. App 40, 48 N. E. 809.

[131] Swope v. Hopkins, 119 Ind. 12 21 N. E. 462; Kellum v. Berkshi &c. Ins. Co., 101 Ind. 455.

[132] Tomkins v. Lawrence, 8 C. P. 729; Gladwell v. Holcomb, 6 Ohio St. 427, 54 N. E. 473.

serving it in order that a holding of this kind may be brought nd. In view of the fact that the doctrine of tenancy from year originated in a kind of judicial legislation, a doubt has sed as to whether it could be regarded as still existing when ters of notice and so forth were regulated by statute. The best that tenancies from year to year continue to exist until ex- abolished by statute. Judge Mitchell said in regard to this n: "While tenancies from year to year are the creation of decisions, based upon principles of policy and justice, out of ere anciently tenancies strictly at will, terminable at any time r party without notice, yet such tenancies had become so well ned and so fully recognized in the common law that it would ly be supposed that, if it had been intended to convert them re tenancies at will, it would have been done by express and nguage, and not left to mere inference and implication."[183]

. **An estate at will is converted into an estate from year to the payment of rent**; the conversion is wrought, not by the of time of the holding, but by the fact that the tenant entered n agreement to pay an annual rent and pays accordingly.[184] ral occupancy by one other than the owner of land will be as a tenancy from year to year whenever the reservation of other circumstances plainly indicate an agreement for an holding.[185] On the tenant's first going into occupation he s a tenant at will and his tenure becomes a year to year hold- the lapse of time and the payment of rent. Although it is nes laid down without qualification that occupation under a se creates a tenancy from year to year, regardless of whether ual rent is received or paid,[186] this is not true of an occupation payment of rent and with no agreement as to time of hold- ich creates but a strict tenancy at will.[187] Entry under a lease cause of the statute of frauds and occupation by the tenant t of itself make him a tenant from year to year; he is a tenant

nter v. Frost, 47 Minn. 1, 49 27.

by v. Allen, 43 Vt. 172.

ley v. McKeegan, 48 Neb. N. W. 161; Judd v. Fairs, 53 18, 19 N. W. 266.

kin v. Avery, 23 Conn. 304, nt v. Morton, 18 Ill. 75; Kerr k, 19 Mo. 132; Ridgley v. Stillwell, 28 Mo. 400; Rogers v. Wheaton, 88 Tenn. 665, 13 S. W. 689; Indianapolis &c. R. Co. v. First Nat. Bank, 134 Ind. 27, 33 N. E. 679.

[187] Kankakee &c. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621; Johnson v. Johnson, 13 R. I. 467; Braythwayte v. Hitchcock, 10 M. & W. 494; Doe v. Wood, 14 M. & W. 682.

at will merely. In order to create a tenancy from year to year some acts must occur from which a new agreement can be inferred, such as the payment of some aliquot part of a yearly rent. Without evidence to the contrary, such payment is controlling evidence of a year to year tenancy.[138] When the entry into occupation has been under a void parol lease, which reserves an annual rent, the payment of any aliquot part of such rent will have the effect of creating a tenancy from year to year, or at least for one year.[139] Where land has been occupied on shares, a verbal agreement that the tenant should have it three years more on shares, although within the statute of frauds, will support a holding from year to year until ended by notice.[140]

The leading circumstance which turns parol leases for uncertain terms into tenancies from year to year is the reservation of an annual rent.[141] And it has been held that the reservation of an annual rent is essential to the creation of this kind of holding. Mere length of acquiescence in the tenants would not ripen into a tenancy from year to year in the absence of this essential element of annual rent. Thus there is a decision that the letting of a shed to be used as a stable, for the dung as compensation, created a tenancy at will, and not from year to year, because there was no reservaiton of rent referable to a year or to some aliquot part of a year.[142] On the other hand, it has

[138] Barrett v. Cox, 112 Mich. 220, 70 N. W. 446; Williams v. Deriar, 31 Mo. 13; Richardson v. Langridge, 4 Taunt. 128; Braythwayte v. Hitchcock, 10 M. & W. 494, 497; Talamo v. Spitzmiller, 120 N. Y. 37, 23 N. E. 980; Doe v. Wood, 14 M. & W. 682. Where a landlord had broken his covenant to supply a stairway to a tenant who had a four-years' lease, but allowed him to use another stairway and some floor space, it was held that since tenant had entered and paid rent, it created a tenancy from year to year. Blumenthal v. Bloomingdale, 100 N. Y. 558, 3 N. E. 292, affirming 30 Hun 382. As a matter of fact, no rent was paid for the stairway and floor space; the only consideration was the implied agreement not to sue the landlord for breach of covenant. This was not an annual payment. The only theory on which to support the case is that the lease was surrendered *in toto* and replaced by a new verbal letting.

[139] Steketee v. Pratt, 122 Mich. 80, 80 N. W. 989; Huntington v. Parkhurst, 87 Mich. 38, 24 Am. St. 146.

[140] Coan v. Mole, 39 Mich. 454.

[141] **Alabama:** Duncan v. Potts, 5 Stew. & P. 82. **Illinois:** Packard v. Cleveland &c. R. Co., 46 Ill. App. 244; Herrell v. Sizeland, 81 Ill. 457. **Kentucky:** Squires v. Huff, 3 A. K. Marsh 17. **Missouri:** Williams v. Deriar, 31 Mo. 13. **New York:** Jackson v. Bradt, 2 Caines 169. **Rhode Island:** Johnson v. Johnson, 13 R. I. 467. **English:** Doidge v. Bowers, 2 M. & W. 365; Pope v. Garland, 4 Y. & C. 394.

[142] Rich v. Bolton, 46 Vt. 84, 88; McIntosh v. Hodges, 110 Mich. 319, 68 N. W. 158; Richardson v. Langridge, 4 Taunt. 128; Roe v. Lees, 2 W. Bl. 1171.

ld that such a tenancy at will may be changed into a tenancy
ear to year by other circumstances indicating that to be the
on of the parties, as well as by the acceptance of annual rent.[143]
ing to this doctrine, where the tenant was to pay his rent for five
y putting the premises in repair,[144] and where certain debts
be paid by the tenant out of the proceeds of the income from
perty,[145] it was held a sufficient reservation of an annual rent
titute the holding a year to year tenancy.
e land was mistakenly supposed to have been included in a
essees occupying it become, by payment and acceptance of rent,
from year to year of such land.[146]

. The receipt of rent by a landlord from which a tenancy ear to year is inferred may be explained on other grounds.
rinciple, that the payment of rent may be explained, for the
e of protecting parties from the legal consequences which
otherwise follow from such payments, has been recognized in
s cases,[147] and it is consistent with the general principles of
In one case the landowner gave evidence for the purpose of
g that his receipt of rent had taken place under a mistake of
respect of the determination of the lease, which had improperly
oncealed from him. Upon that explanation, the question was
er what was the legal presumption from the unexplained pay-
f rent, but whether the evidence offered to explain the receipts
part of the lessor did establish, that, in point of fact, the rent
en received in relation to the old lease, and not upon a new
ent. Such a ruling is not inconsistent with the principle, that,
ne payment of rent, unexplained, the law will imply a tenancy
ear to year.[149]
ne doctrine of tenancy rests on the presumption of an actual
ent of the parties to that effect, it naturally follows that the
y continues to be at will when the parties expressly so stipulate
ere is a case supporting this view;[150] but if the doctrine is an

mn v. Rothermel, 112 Pa. St. Atl. 800.
ant v. Vincent, 100 Mich. 9 N. W. 169; Thomas v. , 9 S. & R. (Pa.) 87.
avitt v. Leavitt, 47 N. H.
ckson v. Wilsey, 9 Johns. (N. .
lliams v. Bartholomew, 1 B. & P. 326; Rogers v. Pitcher, 1 Marsh. 541, 6 Taunt. 202.

[146] Gravenor v. Woodhouse, 1 Bing. 38, 43, 7 Moore 289, 299; Fenner v. Duplock, 2 Bing. 10, 9 Moore 38.

[149] Doe v. Crago, 6 C. B. 90, 60 E. C. L. 89.

[150] Sullivan v. Enders, 3 Dana (Ky.) 66.

arbitrary rule of law, enforced without regard to the actual wishes o the parties, such an agreement would not control the ordinary conse quence flowing from possession and payment of an annual rent.

§ 199. Where a tenant enters and occupies under an invalid parc lease, the agreement governs the terms of the holding as to th amount and time for payment of rent and as to other matters, bu not as to the duration of the term.[151] In an early English case tenant was let into possession under an agreement which gave th parties a right to go into equity to compel the execution of a forma lease. The court decided under such circumstances that the tenan would hold on the terms of the intended lease. One of the terms wa that the lessee should not take successive crops of corn, and that th lessor should have power to reënter on the breach of such agreement This agreement and proviso would apply to the yearly tenancy cre ated. It was argued that the terms of the lease could not be applie to the parol tenancy, inasmuch as some of them, such as the agree ment for repairs, were not usually considered as applicable to suc tenancy. Although it might be questionable whether an obligation t repair could be enforced under such circumstances, at all events th agreement as to cropping the land was one which was consistent wit a yearly tenancy. There is no reason why an agreement regardin the rotation of crops cannot be engrafted on a yearly tenancy, and condition for reëntry is also applicable to this tenancy.[152] The specia provisions in a parol lease for more than a year are valid to the ex tent that they will prevent the lessee from making any use of the pos session not contemplated by the parties or any use of it that will b detrimental to the landlord.[153] So after a tenant had enjoyed th term under a parol lease he would be liable for a breach of collatera covenants in regard to the mode of cultivation.[154] A lease void unde

[151] **Connecticut:** Larkin v. Avery, 23 Conn. 304, 316. **Indiana:** Railsback v. Walke, 81 Ind. 409; Nash v. Berkmeir, 83 Ind. 536. **New York:** Laughran v. Smith, 75 N. Y. 205; Reeder v. Sayre, 70 N. Y. 180; Kernochan v. Wilkens, 3 N. Y. App. Div. 596; Schuyler v. Leggett, 2 Cow. 660. **North Dakota:** Peoples v. Evens, 8 N. Dak. 121, 77 N. W. 93. **Ohio:** Baltimore &c. R. Co. v. West, 57 Ohio St. 161, 49 N. E. 344. **Rhode Island:** Thurber v. Dwyer, 10 R. I. 355. **Tennessee:** Shepher v. Cummings, 1 Coldw. 354. **Illi nois:** Donohue v. Chicago &c. Co 37 Ill. App. 552; Field v. Herrick 14 Ill. App. 181. **Vermont:** Barlo v. Wainwright, 22 Vt. 88. **England** Doe v. Bell, 5 Term R. 471.

[152] Doe v. Amey, 12 A. & E. 476.

[153] Phillips v. Robertson, 4 Hayw (Tenn.) 153, 158, citing Doe v Amey, 12 A. & E. 476.

[154] Bridgman v. Wells, 13 Ohio 43 citing Doe v. Amey, 12 A. & E. 476

te of frauds because not in writing will nevertheless regulate
s of the tenancy as respects the rent.[155] Thus the time for
of rent and the amount thereof will be regulated by the oral
nt.[156] And a parol agreement for setting off expenses in-
y a lessee in making improvements against the amount of rent
n him by virtue of the same parol agreement is valid.[157] If
enter under an invalid agreement, or under an agreement
unting to a demise, he shall still hold subject to the terms of
eement, so far as they are not at variance with the species of
which the law under the circumstances creates.[158] A landlord
r rent must proceed, either upon an express contract made
tenant or upon a contract which the law will imply from the
subsisting between them, and where there is an express con-
ween the parties none can be implied.[159] If a tenant, after
occupied property, under a parol demise, can turn around
to his landlord, you cannot recover the rent, for I object to
l evidence of my agreement to pay it, it might well justify a
made by Chief Justice Best: "This is one of the most in-
objections ever made."[160] The statute of frauds would then
rted into an instrument to protect fraud instead of operating
nt it.

arily the time when a year to year tenant entered into pos-
determines the time when his holding must be brought to an
t it seems that this might be modified or changed by agree-
tween the parties. Lord Kenyon in deciding such a case said:
agreed that the defendant should quit at Candlemas, and
he agreement is void as to the number of years for which the
nt was to hold, if the lessor choose to determine the tenancy
ne expiration of the seven years, he can only put an end to it at
nas."[161] The view of Lord Kenyon has not, however, been sus-
y authority, and the present rule is that "in all cases the cur-
r refers to the time of entry rather than to the time of year

h v. Berkmeir, 83 Ind. 536; v. Tennell, 3 T. B. Mon. 47, 253; Evans v. Winona Co., 30 Minn. 515, 16 N. W. eele v. Anheuser-Busch &c. 7 Minn. 18, 58 N. W. 685; v. Shakelford, 49 Ark. 503, 887.
ohue v. Chicago &c. Co., 37 Ill. App. 552; Barlow v. Wainwright, 22 Vt. 88.

[157] King v. Woodruff, 23 Conn. 56.

[158] Berrey v. Lindley, 3 M. & G. 498, 42 E. C. L. 263.

[159] Hall v. Burgess, 5 B. & C. 332, 11 E. C. L. 485.

[160] Seago v. Deane, 4 Bing. 459, 13 E. C. L. 588.

[161] Doe v. Bell, 5 Term R. 471.

when the invalid parol lease would terminate by its own limitatio unless the parties stipulate to the contrary."[162]

Actual occupation under a parol lease gives ample notice of th lessee's rights to a purchaser as much as occupation under a vali lease would do.[163]

§ 200. The form of action to recover rent when occupation ha been under a void agreement is one for use and occupation. Afte some controversy in the English cases, the question was put at re there by statute.[164] In the United States the courts, disregarding th opposing decisions of the English courts, held without the aid of statute that an action of *indebitatus assumpsit* might be maintaine even upon an implied promise arising from the permitted use an occupation of real estate.[165] Although the action is not based on th void agreement, reference may be made to it to determine the amou of rent. Chief Justice Gibbs said in an early *nisi prius* case, where was attempted to hold a tenant for rent on a parol lease: "The agre ment is void by the statute of frauds; but I am of opinion that yo may still resort to it to calculate the amount of rent. In case the te ant under such an agreement should take possession, he would be tenant at will."[166] Where the right of the landlord is made to depe on the wording of the statute, that "no action shall be brought" o such contracts,[167] a change in the statute to the effect that such co tracts are void would change the law. So the Kentucky court hel that the parol agreement could not be referred to to determine th amount of rent. The reason for the decision is stated as follow "And as the contract was non-enforceable, by reason of the statu of frauds, the contract price was also non-enforceable; for to allow th recovery of the price agreed upon by the contract, but deny an actio on the contract itself, would be equivalent to granting and denyin the remedy in the same action."[168]

[162] Doe v. Dobell, 1 A. & E. (N. S.) 806, 41 E. C. L. 786; Berrey v. Lindley, 3 M. & G. 498, 42 E. C. L. 263; Coudert v. Cohn, 118 N. Y. 309, 23 N. E. 298.

[163] Sheets v. Allen, 89 Pa. St. 47.

[164] 11 Geo. 2 ch. 19, § 14. See also, Cocking v. Ward, 1 M. G. & S. 858, 50 E. C. L. 858; Price v. Leyburn, 1 Gow 109.

[165] Gunn v. Scovil, 4 Day (Conn 228; King v. Woodruff, 23 Conn. 5

[166] De Medina v. Polson, Holt 1 P. 47.

[167] Roberts v. Tennell, 3 T. B. Mo (Ky.) 247, 253.

[168] Ragsdale v. Lander, 80 Ky. 6 64.

01. Yearly tenancy created by holding over.—One of the most on ways in which a tenancy from year to year originates is for a rd to allow his tenant for years to hold over after the expiration term. In all jurisdictions where the doctrine of tenancy from o year is recognized, the rule is universal that if a tenant con- in possession after the end of his term, the landlord may charge n the contract as yearly tenant.[169] As far back as the case of t v. *Darby*,[170] decided in the eighteenth century, Lord Mans- said: "If there be a lease for a year, and by consent of both s the tenant continue in possession afterwards, the law implies t renovation of the contract. They are supposed to have renewed d agreement, which was to hold for a year." Where a party over after his lease has expired, the inference that the parties nt to a continuation of the same term is so strong that it is ed as a rule of law.[171]

hough the tenant has no intention of entering into an agree- for another year, the landlord has the option to charge him as t for a full year by reason of his holding over, or the landlord

labama: Ames v. Schuesler, 600; Crommelin v. Thiess, 412. **Arkansas:** Belding v. Produce Co., 61 Ark. 377, 33 421. **Colorado:** Burkhard v. ll, 16 Colo. 376, 26 Pac. 657; v. Smith, 3 Colo. 287. a: Roberson v. Simons, 109 60, 34 S. E. 604. **Illinois:** v. Myers, 96 Ill. App. 217. a: Kleespies v. McKenzie, 12 App. 404, 40 N. E. 648. s: Adams Express Co. v. Mc- l, 21 Kan. 680; Wheat v. , 3 Kan. App. 431, 43 Pac. **Maryland:** Hall v. Myers, 43 46; Hobbs v. Batory, 86 Md. Atl. 713. **Minnesota:** Gard- Board of Com'rs, 21 Minn. **Missouri:** Stoops v. Devlin, 16 62; Finney v. St. Louis, 39 77; Quinette v. Carpenter, 35 02. **Nebraska:** Critchfield v. ey, 21 Neb. 178, 31 N. W. 687; omery v. Willis, 45 Neb. 434, W. 794; Bradley v. Slater, 50 82, 70 N. W. 258. **New Jer-** Yetter v. King &c. Co., 66 N. J. Law 491, 49 Atl. 678. **North Carolina:** Harty v. Harris, 120 N. Car. 408, 27 S. E. 90. **Oregon:** Parker v. Page, 41 Ore. 579, 69 Pac. 822. **Pennsylvania:** Phœnixville Borough v. Walters, 147 Pa. St. 501, 23 Atl. 776; Harvey v. Gunzberg, 148 Pa. St. 294, 23 Atl. 1005. **South Carolina:** State v. Fort, 24 S. Car. 510. **South Dakota:** Banbury v. Sherim, 4 S. Dak. 88, 55 N. W. 723. **Texas:** Shipman v. Mitchell, 64 Tex. 174. **Vermont:** Amsden v. Atwood, 67 Vt. 289, 31 Atl. 448. **Virginia:** Emerick v. Tavener, 9 Grat. 220; Peirce v. Grice, 92 Va. 763, 24 S. E. 392. **West Virginia:** Allen v. Bartlett, 20 W. Va. 46. **Wisconsin:** Ganter v. Atkinson, 35 Wis. 48; Peehl v. Bumbalek, 99 Wis. 62, 74 N. W. 545. **England:** Right v. Darby, 1 Term R. 161.

[170] 1 Term R. 161, quoted in Roberson v. Simons, 109 Ga. 360, 34 S. E. 604.

[171] New York &c. R. Co. v. Randall, 102 Ind. 453, 26 N. E. 122.

may expel him as a trespasser. The law fixes the tenant's liabilit for holding over without regard to his wishes in the matter.[17] After a landlord gives the proper notice to bring a tenancy to a end and withholds his consent to a renewal of the agreement, the ten ant continuing in occupation after the expiration of the term, stand in the position of a trespasser. During such time as he continues t occupy he is liable not for rent at the rate reserved in the lease, bu for the value of the use of the property or the mesne profits.[172] Fur thermore, the judgment in forcible detainer proceedings being con clusive evidence that the tenants were treated by the landlord a trespassers, it was therefore proper for the court to direct the jur that they might allow interest on the rental value of the premise wrongfully withheld.[174] It is not necessary in order to charge a ten ant for another year that the act of remaining in possession after th termination of his lease should be done by him personally. A holdin over by a sub-tenant is in legal contemplation a holding over by th lessee, and has the same effect.[175]

A new tenancy arising by implication from a holding over is no by virtue of the original lease. This question was brought befo the court in determining the validity of a reduction in rent during period of holding over. It was argued that the original lease bein under seal could not be changed by parol, but the court replied th the new tenancy was one created by operation of law and was in th nature of a parol agreement between the parties.[176]

§ 202. The terms of a year to year holding are the same as tho of the lease which preceded it in the absence of any agreement chan ing them.[177] The presumption of law is that the tenant holds th

[171] **Illinois:** Clinton &c. Co. v. Gardner, 99 Ill. 151; Goldsborough v. Gable, 140 Ill. 269, 29 N. E. 722; Keegan v. Kinnare, 123 Ill. 280, 14 N. E. 14. **Indiana:** Tolle v. Orth, 75 Ind. 298. **Nebraska:** Bradley v. Slater, 50 Neb. 682, 70 N. W. 258. **Pennsylvania:** Hemphill v. Flynn, 2 Pa. St. 144. **Rhode Island:** Providence &c. Bank v. Hall, 16 R. I. 154, 13 Atl. 122. **Tennessee:** Noel v. McCrory, 7 Coldw. 623. **West Virginia:** Voss v. King, 38 W. Va. 607, 18 S. E. 762. **Wisconsin:** Gilman v. City of Milwaukee, 31 Wis. 563.

[173] Keegan v. Kinnare, 123 Ill. 28 14 N. E. 14.

[174] Lambert v. Borden, 16 Ill. Ap 431.

[175] Berkowsky v. Cahill, 72 I App. 101; Roberson v. Simons, 1 Ga. 360, 34 S. E. 604.

[176] Goldsbrough v. Gable, 36 I App. 363.

[177] **Alabama:** Ames v. Schuesl 14 Ala. 600; Crommelin v. Thie 31 Ala. 412. **Arkansas:** Belding Texas Produce Co., 61 Ark. 377, S. W. 421. **Colorado:** Sears Smith, 3 Colo. 287; Burkhard Mitchell, 16 Colo. 376, 26 Pac. 6

s subject to all the covenants contained in the original lease
re applicable to his present situation.[178] This general rule
e qualified where the written lease for the first year contained
collateral matters to be done by each party, which could be
ed in the first year only.[179] When the case is of such a nature
e facts plainly revolt against material provisions in the old
when, according to the evidence, there is not only no right
the assent of the parties, but positive proof that the landlord
fiedly dissents, there is no authority for holding that the par-
subject as matter of law to the old provisions.[180] In a case
ne rent reserved in the original lease consisted in the perform-
labor of such nature that, being once performed, it cannot
n done during the period of holding over, there was no room
application of the general rule.[181] However, a stipulation in a
ving the tenant the right to remove fixtures would continue to
the rights of the parties during the time the tenant held
A lessee on shares holding over for another year is liable on
ied agreement for rent upon the terms of the prior lease.[182]
even been held that a conditional limitation in the original
owing the tenant to terminate it on the happening of a certain
ould be implied in the year to year tenancy. Such a provision,
mutandis, was applicable to the new tenancy and the contin-
having occurred, the tenant had a right to terminate the

cut: Bacon v. Brown, 9 35. **Kentucky:** Whittemore re, 9 Dana 315. **Maine:** v. Cowan, 25 Me. 283. d: Hobbs v. Batory, 86 Md. Atl. 713. **Missouri:** Hunt y, 39 Mo. 257. **Nebraska:** v. Slater, 50 Neb. 682, 70 58. **New York:** Webber v. an, 3 Hill 547. **Oregon:** v. Page, 41 Ore. 579, 69 Pac. Pennsylvania: Harvey v. g, 148 Pa. St. 294, 23 Atl. South Carolina: Dorrill v. s, 4 McCord 59. **Texas:** San v. French, 80 Tex. 575, 16 440. **Virginia:** Peirce v. 92 Va. 763, 24 S. E. 392. irginia: Voss v. King, 38 607, 18 S. E. 762. **English:** Digby v. Atkinson, 4 Camp. 275; Dougal v. McCarthy, L. R. (1893), 1 Q. B. 736; Roe v. Ward, 1 H. Bl. 97.

[179] Phillips v. Monges, 4 Whart. (Pa.) 226; Laguerenne v. Dougherty, 35 Pa. St. 45; Vrooman v. McKaig, 4 Md. 450.

[180] Diller v. Roberts, 13 S. & R. (Pa.) 60.

[181] Ives v. Williams, 50 Mich. 100, 15 N. W. 33.

[182] Martin v. Hamersky, 63 Kan. 360, 65 Pac. 637.

[183] Lewis v. Perry, 149 Mo. 257, 50 S. W. 821.

[184] Yates v. Kinney, 19 Neb. 275, 27 N. W. 132.

[185] Gardner v. Board of Com'rs, 21 Minn. 33.

Where a tenant holds over after the expiration of his year, and t landlord elects to treat him as a tenant rather than as a trespass by demanding rent, the tenant cannot thereafter, in the course the payment of his rent, create a different tenancy by accompanyi such payment with conditions.[185] Yet if the tenant continues to ho over after being notified that the landlord would require an increas rent, he thereby assents to the increase of rent, and to this extent t terms of the old lease do not apply.[186] Mere negotiations and una cepted offers are not, however, to be considered as altering the ter of the leasing. The rental can only be changed by a definite new co tract.[187]

§ 203. Option as to yearly tenancy rests with landlord.—Up the expiration of a lease for years, the law fixes on the tenant the du of vacating the leased premises and turning them over to the lan lord, and this duty is usually reinforced by express covenants in t lease itself. It follows that mere holding over by a tenant does not itself renew the tenancy. It only gives the landlord an option to r new the term.[188] A tenant who wrongfully holds over after the e of his term does not immediately become entitled to notice to qu and a short delay in commencing proceedings against him cann confer any such right. He cannot acquire such equities by a me wrongful holding over.[189] In order that a lessee holding over aft the expiration of his term may claim the privileges of a tenant, t landlord must in some manner recognize the tenancy as existi Where the lessor does no act recognizing a continued tenancy, t tenant holding over is but a tenant at sufferance and not entitled notice to quit.[190] The covenants in the lease may have a bearing the effect of a holding over. Thus in one case the lessee had co nanted to "deliver up possession at the expiration of the term *witho*

[185] Scott v. Beecher, 91 Mich. 590, 52 N. W. 20.

[186] Hunt v. Bailey, 39 Mo. 257; Despard v. Walbridge, 15 N. Y. 374; Gardner v. Board of Com'rs, 21 Minn. 33.

[187] Holley v. Metcalf, 12 Ill. App. 141.

[188] Condon v. Brockway, 157 Ill. 90, 14 N. E. 634, affirming 50 Ill. App. 625.

[189] Benfey v. Congdon, 40 Mich. 283.

[190] Cairo &c. R. Co. v. Wiggi Ferry Co., 82 Ill. 230; Jackson Salmon, 4 Wend. (N. Y.) 327; Jac son v. McLeod, 12 Johns. (N. Y 182; Wilde v. Cantillon, 1 John Cas. (N. Y.) 123; Emerick v. Ta ner, 9 Grat. (Va.) 220, 236; Har ing v. Crethorn, 1 Esp. 57; Doe Stennett, 2 Esp. 717; Bishop Howard, 2 B. & C. 100; Digby Atkinson, 4 Camp. 275; Hutton Warren, 1 M. & W. 466.

r notice," and the landlord reserved the right to "enter and re- the premises at the end of the period, or *at any time there-* It was held that no year to year tenancy could be inferred the landlord's failure to eject the tenant at the end of the [91]

4. The landlord's act of receiving rent implies such assent on t to the holding over as will create a tenancy for another year.[192] not permitted that the landlord should shift his position and an inconsistent attitude. So that after he has accepted rent ng during the period of the holding over, he cannot repudiate nancy and exact a penalty from the tenant for his failure to der possession according to the covenants in the lease.[193] How- acceptance of rent due under the lease does not to any extent de the landlord. And even though the payment is made and ed while the tenant is holding over, no presumption of a year r tenancy arises from it.[194] In most instances a demand for the ccruing after the lease would be a clear recognition of the ten- nd would establish the landlord's acquiescence. It would be the xpression of the landlord's election.[195]

5. It is not necessary for the landlord to indicate his assent olding over by overt acts. Time only is necessary, in the ab- of other evidence, to establish the consent or acquiescence of the rd in a case where the landlord, himself, is relying on the re- agreement.[196] As a matter of fact very slight acts on the part landlord, or a short lapse of time, are sufficient to conclude his n and make the person holding over his tenant.[197] But wrong- olding over will not by its long duration create a tenancy. the holding over by a lessee is admittedly wrongful and without ndlord's consent, no year to year tenancy is created, no matter

cCanna v. Johnston, 19 Pa. 4.

oberson v. Simons, 109 Ga. 4 S. E. 604; Critchfield v. ey, 21 Neb. 178, 31 N. W. 687; ry v. Sherin, 4 S. Dak. 88, W. 723; Gardner v. Board of s, 21 Minn. 33; Amsden v. At- 67 Vt. 289, 31 Atl. 448; Golds- h v. Gable, 140 Ill. 269, 29 N. .

oard of Directors v. Chicago &c. Co., 94 Ill. App. 492; Hately v. Myers, 96 Ill. App. 217.

[194] Vanderford v. Foreman, 129 N. Car. 217, 39 S. E. 839.

[195] Scott v. Beecher, 91 Mich. 590, 52 N. W. 20.

[196] Scott v. Beecher, 91 Mich. 590, 52 N. W. 20.

[197] Kelso v. Crilly, 85 Ill. App. 568; Clinton &c. Co. v. Gardner, 99 Ill. 151, 159.

how long the holding over continues.[198] The mere fact that the lan lord takes no steps, after the lease expires by its own terms, to rega the possession cannot be regarded as an act from which an inference a new tenancy can be drawn.[199] A tenant holding over does not ha the same right of election to be regarded as a tenant for the ensui year or as a trespasser which is accorded to his landlord. The ve circumstance that the landlord possesses such a power of election pr cludes the exercise of a similar right by the tenant.[200]

§ 206. **Dissent on part of tenant.**—It does not prevent an implic tion of a tenancy from year to year, by reason of a holding over, show that the tenant did not intend to incur such an obligation, b cause the tenant's intentions in the matter are immaterial.[201] If tenant from year to year holds over after his tenancy has been te minated by notice to quit, it is optional with the landlord either follow up the notice by ejectment or to waive the notice and hold t tenant for another year, whether the tenant actually agrees to it not. "This statement of law is supported by many American cases.[2] Some of them are very strong. Thus, in *Conway* v. *Starkweather*,[2] the tenant held over fourteen days, having refused to renew the te ancy before his term expired; in *Schuyler* v. *Smith*,[204] tenants of wharf held over twenty-one days while another wharf was prepari for them, they having given notice before their lease ended that th should not continue the tenancy; in *Wolffe* v. *Wolffe and Bro.*,[205] t

[198] Chicago &c. R. Co. v. Perkins, 12 Ind. App. 131.

[199] Cairo &c. R. Co. v. Wiggins Ferry Co., 82 Ill. 230.

[200] Keegan v. Kinnare, 123 Ill. 280, 14 N. E. 14; Clinton &c. Co. v. Gardner, 99 Ill. 151; Condon v. Brockway, 157 Ill. 90, 14 N. E. 634, affirming 50 Ill. App. 625.

[201] Chicago, City of v. Peck, 196 Ill. 260, 63 N. E. 711, affirming 98 Ill. App. 434; Quinlan v. Bonte, 25 Ill. App. 240; Goldsbrough v. Gable, 49 Ill. App. 554; Berkowsky v. Cahill, 72 Ill. App. 101.

[202] Alabama: Schuisler v. Ames, 16 Ala. 73; Wolffe v. Wolff, 69 Ala. 549. Connecticut: Bacon v. Brown, 9 Conn. 334. Illinois: Clinton &c. Co. v. Gardner, 99 Ill. 151. Indiana: Tolle v. Orth, 75 Ind. 298. Minn sota: Smith v. Bell, 44 Minn. 5 47 N. W. 263. Nebraska: Bradl v. Slater, 50 Neb. 682, 70 N. W. 2 Michigan: Mason v. Wierengo Estate, 113 Mich. 151, 71 N. W. 4 New York: Conway v. Star weather, 1 Denio 113; Schuyler Smith, 51 N. Y. 309, 10 Am. R. 60 Adams v. City of Cohoes, 127 N. 175, 28 N. E. 25; Haynes v. Aldric 133 N. Y. 287, 31 N. E. 94. Pennsy vania: Hemphill v. Flynn, 2 P St. 144; Graham v. Dempsey, 1 Pa. St. 460, 32 Atl. 408. Tennesse Noel v. McCrory, 7 Coldw. 623.

[203] 1 Denio 113.

[204] 51 N. Y. 309.

[205] 69 Ala. 549.

nt held over ten days after his term expired, under notice pre-
ly given that he could not quit at once, but would pay a reasona-
ent for the unavoidable occupancy; and in *Clinton Wire Cloth Co.*
ardner et al.,[206] the tenants held over eleven days under notice that
should not remain without a reduction of rent, their holding
being in part the result of expectation that rent would be re-
d. It is true that in the cases cited the tenant was in for a
ite term; but so long as the letting is terminated, we do not see
it matters whether it be terminated by effluxion of time or notice
uit. In *Schuyler* v. *Smith*, the tenant contended that the relation
ndlord and tenant could only be created by agreement and there
l be no agreement without mutuality. The court replied that the
nt held over at his peril, the landlord having the option to treat
as trespasser or tenant for a year longer on the terms of the
lease so far as applicable, the tenancy arising by operation of
regardless of the tenant's assent. . . . The doctrine is
ntly defended on the ground that the tenant being in possession
he landlord at disadvantage, and can greatly embarrass or defeat
arrangements for a new letting by holding over, and therefore
ld not do so without risk of being held himself."[207] Even
e there is an express contract that a tenancy shall continue from
to year till the tenant gives three months' notice to quit, his con-
ance in possession after giving a notice to quit would continue the
ncy. "That actions speak louder than words is sound law as well
roverbial wisdom."[208] A mere threat of a month to month tenant
uit the premises unless the landlord repaired a leaky roof would
ut an end to the tenant's liability for rent as long as he continued
ccupy. If the tenant intended to remove, he should have done so
he end of the month. Having entered upon another month's
pancy he must be deemed to have made his election to become a
nt for another month, and the landlord had a right to treat him as
.[209]

207. **Rule in England.**—The English doctrine is more lenient to
enant and holds that his liability for a year's rent can only rest
is implied consent to enter into such an agreement. Continuance
ossession would raise an inference that he intended to take the

99 Ill. 151.

Providence &c. Bank v. Hall, t. I. 154, 13 Atl. 122, in the s of Durpee, C. J.

[208] Graham v. Dempsey, 169 Pa. St. 460, 32 Atl. 408.

[209] Flint v. Sweeney, 49 Minn. 509, 52 N. W. 136; Roach v. Peterson, 47 Minn. 291, 50 N. W. 80.

premises for another year, and he cannot set up a secret intentio which would belie his apparent intent. Nevertheless, on first holdi over the tenant would, according to the English rule, become simp a tenant at sufferance and could not be held for another year term, without his assent, express or implied, the question of asse being a question of fact for the jury.[210] The English rule is reco nized in Massachusetts, in Missouri, and, it seems, in California.[2] In *Edwards* v. *Hale*[212] the Massachusetts court, *per* Chapman, J., sa "The doctrine that the lessor may at his election consider one wh holds over as a tenant at will which is stated in *Conway* v. *Star weather*[213] is contrary to the decision in *Delano* v. *Montague*[213a] and w do not find it well sustained by any authority. In order that a ne estate at will shall exist, there must be a new contract either expre or inferable from the dealings of the parties." Mere non-delive of the keys for five days after the end of a term would not raise a implied promise to pay rent for another month. There must b something else to show the existence of a new contract. If the me non-delivery of the keys raised any implied contract, it would be pay for use and occupation for the time the premises were actual held. The statutory provisions as to agreements being tenancies fro month to month is a provision of law and not to be confused wi such facts as raise an implied contract.[214]

§ 208. **Surrender rendered impossible by act of God.**—The fa that a tenant for a term of years becomes seriously ill shortly b

[210] Ibbs v. Richardson, 9 A. & E. 849; Jones v. Shears, 4 A. & E. 832; Waring v. King, 8 M. & W. 571.

[211] Delano v. Montague, 4 Cush. (Mass.) 42; Edwards v. Hale, 9 Allen (Mass.) 462; Emmons v. Scudder, 115 Mass. 367; Neumeister v. Palmer, 8 Mo. App. 491; Skaggs v. Elkus, 45 Cal. 154. In the case last cited the Supreme Court of California use the following language: "The implication of a new term created by the payment of rent after the expiration of the first term is an implication of fact only. It it evidence from which an agreement for a new or further term may be inferred or presumed. If it be shown that, in point of fact, a new agreement was made, such ne agreement would destroy the i plication of a different term, whi might otherwise be presumed fro the subsequent payment of re So if as here the evidence offer on the part of the defendant we to show that he had expressly r fused to accept a term for o year, that fact would tend to ove throw and destroy the mere pr sumption drawn from the subs quent payment of rent that he w to continue to hold thereafter f the space of one year."

[212] 9 Allen (Mass.) 462.

[213] 1 Denio (N. Y.) 113.

[213a] 4 Cush. (Mass.) 2.

[214] Neumeister v. Palmer, 8 M App. 491.

e expiration of his term and after removal operations have y begun, does not deprive the landlord of his right to treat ant's failure to complete the removal before the lease expires newal of the lease for another year.[215] This is the logical out- f the doctrine that the right of a lessor to treat a lessee holding a tenant is not affected by the fact that the lessee had no in- of renewing his lease. And the court remarked, in the course opinion: "We think that there is uniformity in the decisions the contention that the intention to vacate as soon as possible ect the right of the landlord to elect to treat the holding over enewal of the lease for a year. It requires some express or l consent upon his part to a holding over upon other condi- In another place it is said: "If it is contended that the act excuses one from the performance of his express contract to possession at the expiration of the lease, we are unable to ce in the contention. It is only in those contracts which the God renders impossible of performance—as where the subject- of the contract dies, or is destroyed, or where personal labor racted for and the person dies or becomes incapacitated through God—that a party is excused from performance."

he other hand, the New York Court of Appeals held, reversing ision below, that inevitable accident or the act of God excuses nt's omission to surrender the premises, at least so far as it a liability for a year's rent which is implied by law.[216] The relies for authority on a case[217] decided in England where an edly contrary doctrine as to the inference from holding over rogue. The circumstance preventing a removal at the proper as the illness of a member of the tenant's family. And the argue that acts under such stress of circumstances could not l to proceed from the own volition of the tenant. The tenant t a trespasser during the fifteen days he held over because it t his voluntary act. And therefore the rule that the landlord treat him as a tenant or a trespasser could not be applied. The agrees that the tenant would be liable for breach of his cove- n the lease to surrender the demised premises at the expiration term. It is said that a duty or obligation imposed by law and reated by contract or covenant stand upon different grounds

ason v. Wierengo's Estate, 53 N. E. 700, reversing 9 App. Div. ich. 151, 71 N. W. 489, per 593.
r, J. [217] Jones v. Shears, 4 A. & E. 832.
erter v. Mullen, 159 N. Y. 28,

when the party seeks to be excused by the act of God or unavoidal accident, or stress of circumstances.

Three of the seven judges taking part in the decision dissent from the views of the majority and stood for affirmance of the jud ment below. The three dissenting justices considered that the qu tion was settled on the authority of two recent cases[218] decided on son what similar facts. The decision will doubtless stand in New Yo though it may well be questioned whether it would be more wide followed than the opposite conclusion reached from identical circu stances by the Supreme Court of Michigan.

§ 209. Necessary length of tenant's holding over.—Since the o ject of the rule charging a tenant holding over with the obligation pay rent for an entire year is to compel a prompt surrender of t leased premises at the end of the term, it follows that a short peri of holding over will incur the obligation. Thus, holding over thr days has been held to make the tenant liable for a full year's rent, while a great deal of the litigation on the point is over cases whe the tenant held over from ten days to two weeks. Such a length holding is enough to charge the tenant for an entire year.[220] Ho ever, a slight default on the part of the tenant in failing prompt to vacate the premises is waived if the landlord subsequently accep a surrender of possession. Where a tenant brought in the keys ten da

[218] Adams v. City of Cohoes, 127 N. Y. 175, 28 N. E. 25; Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. 94. In the latter case Finch, J., in speaking of the rule that holding over creates a new tenancy for a year, said: "The appellant does not deny the rule, seeks to qualify it so as to mean that it is only where the tenant holds over voluntarily and for his own convenience that the landlord's right arises, and that it does not arise when the tenant holds over involuntarily and not for his own convenience, but because he cannot help it. I am averse to any such qualification. It would introduce an uncertainty into a rule whose chief value lies in its certainty. The consequent confusion would be very great. Excuses would be forthcoming, and the sufficiency be subject to the doul ful conclusions of a jury, and lessor would ever know when could safely promise possession a new tenant. . . . I reser the question, also, whether the might not be an unavoidable del in no manner the fault of the te ant, directly or indirectly, whic would serve as a valid excuse."

[219] Tolle v. Orth, 75 Ind. 29 Haynes v. Aldrich, 133 N. Y. 28 31 N. E. 94.

[220] Wolffe v. Wolff, 69 Ala. 54 Clinton &c. Co. v. Gardner, 99 I 151; Conway v. Starkweather, Denio (N. Y.) 113; Schuyler Smith, 51 N. Y. 309; Herter v. Mu len, 159 N. Y. 28, 53 N. E. 700, r versing 9 App. Div. 593.

he term expired and the landlord said "all right," this ended ancy.[221]

9a. If the landlord is in any way responsible for the holding e cannot insist that the tenant be held for another year. This tempted where the only occupancy of the leased premises by the after the expiration of the term of the lease was that his house-oods remained in the house packed up ready for removal for ays after the end of the term. The landlord was away and his refused to receive either the key or the rent, but directed the to wait. In concluding its decision in favor of the tenant urt said: "The evidence establishes the fact that before the re-f the plaintiff the goods of the defendant had all been removed he premises, and that defendant promptly surrendered the key premises to the plaintiff on his return and that the plaintiff ed the same."[222]

Kentucky a statute[223] regulates cases where a tenant for a year or holds over after the termination of a lease which is to expire on in day. The effect of this statute is that the first ninety days lding over gives the tenant no rights and imposes no liabilities n; during that period he may be evicted without notice. After piration of ninety days, the tenant becomes bound for another nd entitled to a term for another year. A tenant holding over an ninety days does not become liable for an entire year's

0. Rebutting presumption of year to year tenancy.—As has y been seen, the implication of a year to year tenancy from con- occupation after the expiration of a fixed term does not de- on the actual assent of the tenant to enter into such an agree- At least such is the prevailing American doctrine. Yet the s always qualified by the proviso that there must be no incon- agreement between the parties. This is stated in the form that

alls v. Preston, 28 Cal. 224. ller v. Mendelson, 74 Wis. 464, W. 505. To same effect see u v. Michell, 103 Mich. 617, W. 890. In the latter case urt states its conclusions as s: "We think, in this case, cts found by the court below very clearly the intent of the ant to vacate, and that he would have vacated but for the interposition of plaintiff's agent. If the landlord should be permitted to prevail under these circumstances, it would be permitting him to have advantage of the wrongful acts of his own agents.

[223] Kentucky St., § 2295.

[224] Mendel v. Hall, 13 Bush (Ky.) 232.

a contrary agreement between the parties rebuts the presumption o a year to year tenancy arising from the continued occupation. Bu in reality the presumption is one of law which cannot be rebutted The Supreme Court of Michigan has attempted in an excellent state ment of the law on this point to reconcile this inconsistency. I *Scott* v. *Beecher*[225] this statement occurs: "The law presumes a intention by the tenant to continue the yearly tenancy from the hold ing over. An agreement that such holding over should not be so re garded might be shown to rebut the presumption, or there might b such clear indications of an intention to vacate that a holding over fo a day would not support the presumption. But in the absence o such agreement or such indications, the holding over is the legal ex pression of the tenant's intention, and all that is necessary to com plete the contract is the consent or acquiescence of the landlord." The more scientific and accurate way of stating the proposition is tha there is a positive rule of law which entitles a landlord to charge tenant holding over as a tenant for the ensuing year. But when th landlord has by his conduct led the tenant to believe that he will no be charged as tenant for the entire year, it is axiomatic that th landlord cannot change his position and fix an unexpected burden o liability upon the tenant. So it follows that any new agreement be tween a landlord and tenant relative to the continued occupancy o leased premises after the termination of the term precludes the land lord from charging the tenant with liability for a full year's rent b reason of such continued occupancy.[226]

This result is not contingent on the fact that the new agreement i valid and capable of enforcement; it rests on an estoppel against th landlord for inducing the tenant to act on his representations. An it matters not that the new contract was invalid under the statut of frauds because not in writing.[227] The continued payment and re ceipt of rent after the expiration of the term is not necessarily incon sistent with the existence of a new agreement between the parties

[225] 91 Mich. 590.

[226] **Alabama**: Singer Mfg. Co. v. Sayre, 75 Ala. 270; Crommelin v. Thiess, 31 Ala. 412. **Illinois**: Secor v. Pestana, 37 Ill. 525; Johnson v. Foreman, 40 Ill. App. 456. **Indiana**: Hoffman v. McCollum, 93 Ind. 326. **Iowa**: Dubuque, City of, v. Miller, 11 Iowa 582. **Maryland**: Biggs v. Stueler, 93 Md. 100, 48 Atl. 727. **Nebraska**: Bradley v. Slater, 5 Neb. 682, 70 N. W. 258. **New York** Smith v. Allt, 7 Daly 492. **North Carolina**: Harty v. Harris, 120 N Car. 408, 27 S. E. 90. **Texas**: Shi man v. Mitchell, 64 Tex. 174.

[227] Singer Mfg. Co. v. Sayre, 7 Ala. 270; Crommelin v. Thiess, 3 Ala. 412. *Contra*, Parker v. Hollis 50 Ala. 411.

uch payment is evidence of a year to year tenancy rather than usive proof of it.[228]

211. **A covenant to pay rent at the same rate for such further as the lessees or persons claiming under them shall hold the ises** or any part thereof does not, in the face of an express cove- to deliver possession, give the lessees any right to continue in ession after the end of the term. Still though it does not enlarge tend the term, it is nevertheless a valid contract and the law will it effect. The effect of the covenant is to fix the amount of rent h the tenant shall pay for his holding over. A clause respecting payment of a *pro rata* rent in case the lessee holds over is very enient. It often happens that a tenant who intends to quit at the of his term is not able to complete his arrangements promptly, desires to remain for a short time after the term has expired. It ten convenient to the landlord to permit him to do so, provided he ires no rights thereby, and can be turned out without notice. covenant for the payment of rent during such holding over pre- all disputes in respect to that matter, and the landlord may for- to exercise his rights without losing them. If a holding over is short time, a full quarter's rent would make an unreasonable pensation. Where the tenants holding over refused to become ten- at will and claimed to be tenants at sufferance, the mere act of ining for two months and a half after their term expired did not the landlord a right to hold them as tenants at will. Such period olding over did not change the character of their occupation.[229]

212. **Where there is an express renewal of a lease** for a year at end of the preceding term, the tenant holds for the definite period year and not as a tenant from year to year. If, at the expiration e original lease, the tenant remains in possession under a renewal e lease, he does not thereby become a tenant from year to year, for the definite period set forth by the terms of the lease and stip- on. In such case the tenancy would be one for years and not a ncy from year to year. As long as the tenant holds over under essive renewals he is a tenant for years.[230] A tenancy from year ear will not be created against the contrary intention of both par- landlord as well as tenant. So where evidence is introduced from

[228] Wilcox v. Montour &c. Co., 147 St. 540, 23 Atl. 840. Edwards v. Hale, 9 Allen ss.) 462.

[229] Biggs v. Stueler, 93 Md. 100, 48 Atl. 727; Secor v. Pestana, 37 Ill. 525.

which a contract or agreement for a definite time at the same ren may be inferred, the question must be determined as one of fact whether the holding over is under such agreement. If a tenant for year says to his landlord at the end of the year that he will stay an other year, and the landlord assents to it, and rent is paid at th former rate, it amounts to a leasing for a year, and does not create tenancy from year to year.[231] It is not necessary that the new agree ment shall be for a definite term. In case the tenant agreed to pay ren only so long as he saw fit to occupy the premises, and the landlor acquiesced in this and received rent as such under this agreement, th tenant was at liberty to terminate the lease at any time by surrender ing the possession.[232]

Where a tenant holds over pending a treaty for another lease, h cannot be held accountable as a tenant from year to year, but is tenant at will merely.[233] It was ruled by Lord Kenyon at the be ginning of the last century that "if a tenant whose lease is expired, i permitted to continue in possession, pending a treaty for a furthe lease, he is not a tenant from year to year, but so strictly a tenant a will, that he may be turned out of possession without notice."[234] So a lessor's agreement to execute a new lease on payment of a cash rental, prevents him from charging the tenant holding over with full year's rent.[235]

§ 213. **Changes in the amount of rent.**—It is not essential that th same amount of rent should be paid every year under a yearly tenanc extending over a considerable period of time. As the parties coul terminate it altogether, so they can change various terms of the con tract without altering the nature or breaking the continuity of th holding. It is equally true that the holding over after a term fo years which creates a tenancy from year to year, need not be at th same rental as that reserved in the lease. A change in the rental i not in itself a new agreement creating an estate for years. So, if th only change made is in the amount of rent to be paid and the othe terms remain the same as in the original lease, the tenure is one fro

[231] Johnson v. Foreman, 40 Ill. App. 456.

[232] Montgomery v. Willis, 45 Neb. 434, 63 N. W. 794.

[233] Grant v. White, 42 Mo. 285; Fall v. Moore, 45 Minn. 515, 48 N. W. 404. The case of Wilgus v. Lewis, 8 Mo. App. 336, qualifies this rule at least to the extent that periodical tenancy will arise wher no new lease is agreed upon an the tenant continues to remain i possession and pay rent.

[234] Doe v. Stennett, 2 Esp. 717.

[235] Dubuque, City of, v. Miller, 1 Iowa 583.

year and not for a definite period of one year.[236] A new stipu-
is to the amount of rent to be paid can have no effect upon
ns of the holding in regard to right of tenant to notice to
A change in the mode of paying rent during the period of
ding over, as where a partial crop rent was to be paid wholly
does not prevent a year to year tenancy from arising.[238] It
new bargain for a definite time, but merely a variation of the
ance of the previous agreement.
ew tenancy is created by a mere agreement for an increase of
the middle of the year of the tenancy. The term stands un-
l by a promise to pay, for a balance of a term, more rent than
t is required to pay by the contract under which he entered into
on. Such change does not terminate the tenancy at the time
h the increase was to begin, and a new year does not begin
then.[239]

. **Where a lease provided for a penalty of double rent** in case
held over, the rights of the landlord were either to regain
on in the ordinary way or to recover double rent for such
they held over; and he could not charge the lessees as tenants
onth to month.[240] But a periodic tenancy would be created by
dlord's acceptance of rent at the former rate after the lease had
and while the tenant was holding over.[241]

IV. *Tenancy from Month to Month.*

. **The reservation and payment of rent at stated periods** of
r or month is, in the absence of express agreement, the prin-
iterion to determine the duration of the successive terms of a
e tenancy.[242] If the term is for a shorter period than a year,

par v. Reppy, 15 Colo. 260, 164; Rand v. Purcell, 58 . 228; Second Nat. Bank v. Merrill Co., 69 Wis. 501, 34 514; Doe v. Geekie, 5 Q. B. E. C. L. 841, 1 C. & K. 307. ter v. Bower, 2 Wkly. N. a.) 408.
en v. Bartlett, 20 W. Va. 46.
vlor v. Winters, 6 Phila. 26, 5 Am. L. Rep. (N. S.)

[240] Green v. Kroeger, 67 Mo. App. 621; Deaver v. Randall, 5 Mo. App. 297.
[241] Wilgus v. Lewis, 8 Mo. App. 336.
[242] Blumenberg v. Myres, 32 Cal. 93; Skaggs v. Elkus, 45 Cal. 154, 158; Coffin v. Lunt, 2 Pick. (Mass.) 70, 76; Rich v. Bolton, 46 Vt. 84, 14 Am. R. 615; Hurd v. Whitsett, 4 Colo. 77; Prickett v. Ritter, 16 Ill. 96.

according to the current of authorities, the holding over is implied to be for a like term and the notice to quit is determined thereby and is sufficient if it equal the length of the term or the interval between the times of payment of rent.[243] "At common law, when a tenant for a fixed term, as for a year, held over after the expiration of his term, paying rent, he was strictly a tenant at will, but as tenancies at will from their uncertain nature were not favored, there gradually grew up the requirement that to terminate a tenancy, notice must be given of an intention to terminate at the end of the current period. So that where the original term was for one year, the tenancy upon the holding over and receipt of rent became in effect one not at will strictly, nor for a fixed term, but from year to year. So where the stated term was for a less period than a year, as for one month, the tenancy became upon holding over and payment of rent a tenancy from month to month."[244]

Where no time is mentioned, and no annual rent reserved in a letting, the character of the letting as to time will be controlled by the intervals between the rent payment; monthly or weekly payments implying monthly or weekly tenancies. This determines the length necessary for the time of giving notice to quit.[245] The doctrine of year to year tenancy originated in respect to the occupation of farming land and the unit for the periodic term was naturally a year. So, to-day if a lessee for a term of years holds over after the expiration of his term, the implication as to a new holding is for a single year only and not for a period equal to the term of the previous lease.[246] The foundation upon which the selection of a year as the unit was based seems to be that an annual rent was reserved in farming leases. So the real unit is not any particular period of time, but the rent period, whatever that may be in any given case. In Indiana the doctrine is that when a tenant for a fixed period, less than one year, remains in possession of the property beyond that period, with the consent, express or implied, of the landlord, it creates a tenancy for another term equal in time to the one under which he had previously held. Thus, where a lessee for a term of eight months at a monthly rental held over and paid a month's rent, the term was renewed for another eight months.[247] Such a conclusion might, per-

[243] Hurd v. Whitsett, 4 Colo. 77; Noel v. McCrory, 7 Coldw. (Tenn.) 627; 1 Greenl. Cruise, 269, n. 2.

[244] Shirk v. Hoffman, 57 Minn. 230, 58 N. W. 990, per Gilfillan, C. J.

[245] Steffens v. Earl, 40 N. J. Law 128; Bright v. McOuat, 40 Ind. 521.

[246] Kleespies v. McKenzie, 12 Ind. App. 404; Providence &c. Bank v. Hall, 16 R. I. 154, 13 Atl. 122.

[247] Rothschild v. Williamson, 83 Ind. 387; Bollenbacker v. Fritts, 98 Ind. 50.

follow from the Indiana statute, but at common law it does eem to result either on grounds of policy or of legal principles. nthly rent was paid and the rent periods should have been the s to the periodic tenancy arising from a holding over so that a cy from month to month would result. In accordance with this usion it was held in another jurisdiction that a lessee holding after a written lease for six months at a monthly rent became a t from month to month. Remaining in possession for two ns after the expiration of the lease, with payment of rent each n at the rate provided for in the lease indicates nothing more a tenancy from month to month.[248]

ere a wharf and ware-room in a commercial town were the sub- of a demise and the term of the letting was indefinite, it was hat the jury need not necessarily infer that the letting was for r, as in the case of an agricultural lease, but the jury could hat it was understood by the parties that the letting should be shorter time.[249]

16. A tenancy from month to month may be created by express ment. Such would be the case where the original letting was short period and the parties agreed upon an extension from h to month after the end of the term. Thus a written lease for nonths at a monthly rent contained a clause that it should be ded as a month to month tenancy. Therefore, the lessee held an express agreement that he was to be a tenant from month to h. Having accepted the contract, he would not subsequently be to complain of its terms.[250] As has already been stated in this er, a tenancy for the period of one month is not a tenancy from h to month. They are different estates, with different incidents re designated in law by different technical terms. There is a antial, not a mere verbal difference. A tenancy for one month hnically a term for years, and not a tenancy from year to year om month to month. But if the tenant for one month holds over the expiration of the month, he would then become a tenant month to month.[251] Where a person rents premises at a certain per month and holds over for several months, paying the same without any new agreement, he becomes a tenant from month to

Backus v. Sternberg, 59 Minn. 1 N. W. 335.

Cooke v. Norris, 7 Ired. L. (N. 213.

[250] Pappe v. Frout, 3 Okla. 260, 41 Pac. 397.

[251] Stoppelkamp v. Mangeot, 42 Cal. 316; Hislop v. Moldenhauer, 23 Ore. 119, 31 Pac. 252.

month.[252] In case a tenant is put into possession at an agreed monthly rental without any provision as to the length of time he shall occupy it may either be considered as an express arrangement for a month to month tenancy or as a renting for a single month, which becomes a tenancy from month to month by holding over and continued payment of rent. The doctrine has been stated as follows: "When, however, we are dealing with the question of an implied renewal of a tenancy, all the terms of the former lease must be considered. The purpose is not to make a new lease essentially different, but to continue the former so far as its terms may be applicable. In its very nature the implied renewal of a lease assumes a continuation of its characteristic features. Hence, if a landlord elect to treat one holding over as a tenant, he thereby affirms the form of tenancy under which the tenant previously held. If that was a tenancy by the month, it will presumptively so continue."[253] In either case the general rule is that a tenant holding by a verbal letting for an indefinite term at a monthly rental becomes a tenant from month to month.[254] No time being specified the letting is in its origin a letting for a single month and is renewed by the tacit assent of the parties at the beginning of every succeeding month.[255] The mere fact that a tenant under such an arrangement continues to occupy for two years does not have the effect of making him a tenant from year to year. The rule that the law favors tenancies from year to year applies only as between such tenancies and tenancies at will.[256]

In Oregon, however, leasing a building at a monthly rent without specifying the term, does not create a tenancy by the month which may be terminated by ten days' notice, but a tenancy at will or from year to year, according to the circumstances necessitating thirty days' notice for its termination. The theory of this case is that a definite leasing for the period of one month must be established before a holding over would create a tenancy from month to month. The circumstances of the case negative any such assumption. Nowhere does

[252] Branton v. O'Briant, 93 N. Car. 99.

[253] Hollis v. Burns, 100 Pa. St. 206, 45 Am. R. 379, per Mercur, J.

[254] Colorado: Edmundson v. Preville, 12 Colo. App. 73, 54 Pac. 394. Illinois: Sebastian v. Hill, 51 Ill. App. 272. Michigan: Haines v. Beach, 90 Mich. 563, 51 N. W. 644. Minnesota: Rogers v. Brown, 57 Minn. 223, 58 N. W. 981. New York: Wilson v. Taylor, 8 Daly 253. *Compare* Spies v. Voss, 16 Daly 171. North Carolina: Branton v. O'Briant, 93 N. Car. 99. Texas: H. R. E. &c. Assn. v. Cochran, 60 Tex. 620. Utah: Utah &c. Co. v. Garbutt, 6 Utah 342, 23 Pac. 758.

[255] Edmundson v. Preville, 12 Colo. App. 73, 54 Pac. 394.

[256] Jones v. Willis, 8 Jones L. (N. Car.) 430.

vidence indicate that any time was specified or agreed upon, and e leasing was not for a specified term of one month, there was ror in refusing to hold that there was a tenancy from month to h.[257]

17. Effect of void lease to render time for termination definite. s already been stated as a general rule that payment of a hly rent and holding for an indefinite time creates a tenancy month to month. According to the cases in England and in jurisdictions of this country, an agreement, which is unenforce- because not reduced to writing as required by the statute of s, will nevertheless have the effect of setting a time for the ng to end and prevent the occupancy from becoming one for an nite time. The agreement regulates the terms upon which the cy subsists in all respects except as to the duration of the term.[258] a reasonable inference that the parties intended a tenancy on the of the original agreement, and the law implies a new contract en the parties corresponding therewith, so far as it is not in ct with the statute.[259] Occupation for several years under a void for years has been held to create a tenancy from year to year, ugh rent was paid monthly, because that might have been merely ne sake of convenience and was not inconsistent with a letting year to year.[260]

wever, there is authority for the opinion that at no time can a demise, void under the statute of frauds, be resorted to for the se of ascertaining the duration of the term.[261] If the void lease e looked at for the purpose of determining the duration of the the statute of frauds is evaded beyond doubt; so the question ner the payment of rent was made with reference to a yearly, hly, or other holding should be determined without reference to oid demise. To create a year to year tenancy, payment of rent mean payment with reference to a yearly holding. When city rty is involved, occupancy and monthly payments as for each h's rent are insufficient, standing alone, to indicate an intention

[257] Hislop v. Moldenhauer, 23 Ore. 1 Pac. 252.

[258] Doe v. Bell, 5 Term R. 471; 1 e Dig. 281–284.

[259] Laughran v. Smith, 75 N. Y. People v. Rickert, 8 Cow. (N. 26; Clayton v. Blakey, 8 Term

[260] Laughran v. Smith, 75 N. Y. 205; Fougera v. Cohn, 43 Hun (N. Y.) 454, affirmed in 118 N. Y. 309, 28 N. Y. St. 684.

[261] Warner v. Hale, 65 Ill. 395; Wheeler v. Frankenthal, 78 Ill. 124; Brownel v. Wech, 91 Ill. 523.

to create a yearly tenancy. These acts cannot be construed as indicativ of anything more than an intention to create a tenancy from month t month, and the effect thereof cannot be changed by the mere lengt of time the occupation has continued. If the void lease cannot be re ferred to during the first twelve months, it is inconsistent and illogica to say that by the mere lapse of time the inference of a new and vali contract arises.[262] In one case the premises were demised by parol fo one year at a stipulated rent, payable monthly. Under it the lessee entered into possession, and paid the rent as it accrued for a part o the year. They thereby became tenants from month to month and a such would have been entitled to a month's notice to quit, but the could not be held for a full year.[263] In a case occurring subsequentl a parol lease for a year was made and rent was reserved, payable i monthly instalments. The tenant occupied the whole term and hel over. The court decided he also was a tenant from month to month an not one from year to year. Where a parol lease is made, fixing th amount of rent and the time of its payment, and fixing the term at greater period than one year, it is clearly within the statute of frauds and the tenant entering under such voidable contract, and paying ren at the sum fixed by the contract, becomes a tenant from month t month. Being such a tenant and having made payment of rent, an holding over from month to month, he is liable monthly for the ren to be paid by the terms of the contract under which he entered.[264] Nevertheless the inconsistent and illogical result of making a distinc tion between the holding for the first and for subsequent years wa supported in New York. A tenant, who for the first year of hi occupation held from month to month, became bound for a year b holding over after the expiration of the first twelve months.[265]

Where a party enters into the possession of premises under an agree ment to accept a lease for twenty months, and subsequently refuses t accept the lease, he becomes by such refusal a tenant at will or b sufferance, and may be ejected immediately. But if the landlord sub sequently accepts rent from the tenant monthly, according to th original agreement, a tenancy from month to month is created, com mencing from the time of entry.[266]

[262] Johnson v. Albertson, 51 Minn. 333, 53 N. W. 642; Backus v. Sternberg, 59 Minn. 403, 61 N. W. 335.

[263] Warner v. Hale, 65 Ill. 395; Brownell v. Welch, 91 Ill. 523, followed in People v. Darling, 47 N. Y. 666.

[264] Marr v. Ray, 151 Ill. 340, 37 N E. 1029.

[265] Lawrence v. Hasbrouck, 2 Misc. (N. Y.) 39, 46 N. Y. S. 868.

[266] Anderson v. Prindle, 23 Wend (N. Y.) 616, affirming 19 Wend. (N Y.) 391.

18. A lessee for a year who holds over after his term expires es a tenant from year to year even though the rent is payable nthly instalments. Where a party, holding premises for a cer- erm, under a written lease, holds over the term, the law will com- m to pay rent according to the written lease. Though the pay- of rent was monthly it does not imply a renting from month to , against the testimony that the letting was for one year, on monthly payments. The lessees cannot, therefore, abandon emises without paying rent for the second year upon which they ntered.[267] In one case the facts showed a verbal agreement for ar, at ten dollars a month, and for a second year at eleven dol- This being so, the holding over and aceptance of rent continued tenancy from year to year and not from month to month. The hat rent was payable monthly did not make it any less a contem- yearly holding.[268]

s permissible that an annual rent be made payable in monthly ments for the sake of convenience. This is not the same as the ation of a monthly rent.[269]

a tenant from month to month to begin to pay rent at quarterly ls would not change the tenancy from one from month to month ne for quarterly periods.[270]

19. A tenancy from month to month is not a continuing right session; but as in the case of a tenancy from year to year, it is to end and recommence at the expiration of every month.[271] theless, tenants from month to month are supposed to continue rental for each new month upon the same terms as for the pre- month, so a reduction of the rent in a monthly letting would be nent even though no time were specified.[272] A month to month cy does not necessarily begin at the beginning of a month, but ave its point of beginning at any time during the month.[273]

e act of paying rent to the purchaser of the reversion does not a new tenancy, but is merely a recognition of the old one. If a

ladwell v. Holcomb, 60 Ohio 7, 54 N. E. 473; McKinney v. 28 Ill. 174.

chneider v. Lord, 62 Mich. 141, W. 773.

ickolls v. Barnes, 39 Neb. 103, W. 990, reversing s. c. 32 Neb. 9 N. W. 342.

ondon &c. Bank v. Curtis, 27 656, 68 Pac. 329.

[271] Borman v. Sandgren, 37 Ill. App. 160; Clarke v. Thatcher, 9 Mo. App. 436; citing Tomkins v. Lawrence, 8 C. & P. 729; Gandy v. Jubber, 5 B. & S. 78.

[272] Corson v. Berson, 86 Cal. 433, 25 Pac. 7.

[273] Russell v. McCartney, 21 Mo. App. 544.

tenancy was originally from month to month while the reversion w in the hands of the original lessor, it would still continue to be a te ancy from month to month while the reversion was in the hands of l grantee. Moreover, it would be the same holding, and a new term wou not begin at the time of the transfer of the lessor's interest.[274] Whe either a month to month term or the reversion is assigned and t assignee recognizes the tenancy as continuing, it will continue just it was between the original parties.[275] A mere transfer of title do not in any way change, modify or affect a lease from month to mont but the grantee simply takes the place of the grantor, and becomes t landlord of the tenant, and the lease continues as before.[276]

The distinction between tenancies from month to month and at w is unimportant in those jurisdictions where a month's notice is quired to terminate a tenancy at will. So courts sometimes fail discriminate between the two.[277]

V. *Tenancy at Sufferance.*

§ 220. General nature of holding.—A lessee for years has an tate in the demised land; a tenant from year to year has a qualifi estate; and a tenant strictly at will holds lawful possession until l tenancy has been brought to an end by some act of the landlord. But tenancy by sufferance is not a tenancy at all; it is merely not an adver possession; the so-called tenant is merely not a disseisor. It has be aptly described by saying that *"A tenancy by sufferance is not by t consent but by the laches of the owner,* and it follows that where t owner has been guilty of no laches there can be no tenancy at suffe ance."[278] It has never been required that there should be privity eith of contract or estate between the parties to a tenancy at sufferance. Whenever the continued possession has been clearly assented to, so to become a holding by assent, instead of by mere laches, the possessi would cease to be wrongful, which a tenancy by sufferance to a certa extent always is, and the tenancy at sufferance would be changed

[274] Hurd v. Whitsett, 4 Colo. 77; Shaw v. Schietinger, 51 N. J. Law 152, 16 Atl. 186; Marquart v. La Farge, 5 Duer (N. Y.) 559.

[275] Shaw v. Schietinger, 51 N. J. Law 152, 16 Atl. 186.

[276] Macdonough v. Starbird, 105 Cal. 15, 38 Pac. 510.

[277] Haines v. Beach, 90 Mich. 5 51 N. W. 644.

[278] Moore v. Morrow, 28 Cal. 5 554, per Shafter, J.; Spalding Hall, 6 D. C. 123; Rowan v. Lyt 11 Wend. (N. Y.) 616.

[279] Smith v. Littlefield, 51 N. 539; Bennett v. Robinson, 27 Mi 26; 1 Cruise Dig., tit. 9, ch. 2, §

will.[280] The distinguishing feature of a holding by sufferance absence of consent. There is merely a failure to take affirmative o oust the occupant. This of itself does not show consent to the g.

peaking of an occupation the character of which was not clear, n, J., speaking for the Supreme Court of Massachusetts, said: ere was any *agreement* he could not be a tenant at sufferance."[281] ind of tenancy arises from the termination of some estate less he fee, and held in subordination to the fee. Any one who con- in possession without agreement after the determination of the ular estate by which he gained it becomes a tenant at suffer-[282] "Tenants *per autre vie* after the death of the *cestui qui vie,* s for years whose terms have expired, tenants at will whose have been determined by alienation or by the death of the lessor, enants holding over after the expiration of the original lease, grantor who agrees to give possession by a particular day and over, are tenants at sufferance."[283]

1. **Arises on holding over.**—Where the term of holding of a for life or for years comes to an end and he nevertheless con- in occupation of the demised premises, the tenant thereby be- a tenant at sufferance.[284] Such a holding is not at will, because sent to it can be implied on the part of the landlord, and without nsent of the landlord there cannot arise a tenancy at will.[285] So e for a fixed term agreeing to quit upon a sale of the premises e a tenant at sufferance by holding over after the sale had been nmated.[286] If a tenancy at will, under a verbal lease, dependent ondition, is terminated by a breach thereof, the tenant holding ecomes a tenant at sufferance. The reason for this is that a con- t limitation is valid to end a tenancy at will without any notice .[287]

enant at sufferance, holding over after the expiration of a written

ennett v. Robinson, 27 Mich.

hnson v. Carter, 16 Mass. 443.

ok v. Norton, 48 Ill. 20.

rown v. Smith, 83 Ill. 291, per , J.

beel v. Hubbell, 52 Mich. 37, W. 531; Hauxhurst v. Lobree, l. 563; Poole v. Engelke, 61 Law 124, 38 Atl. 823; Hanson nson, 62 Md. 25, 29; Warren v. Lyons, 152 Mass. 310, 25 N. E. 721; Smith v. Littlefield, 51 N. Y. 539; Coomler v. Hefner, 86 Ind. 108; Mendel v. Hall, 13 Bush. (Ky.) 232.

[285] Perine v. Teague, 66 Cal. 446, 6 Pac. 84.

[286] Hollis v. Pool, 3 Metc. (Mass.) 350.

[287] Creech v. Crockett, 5 Cush. (Mass.) 133.

lease, does not become a tenant at will by virtue of stipulations that will "during the term and such further term as he holds possessio pay a certain quarterly rent. The lease in the case under considerati contained the stipulations on the subject of holding over which it necessary to consider. The covenants for the payment of rent, in ca the lessees should hold over, did not give them the right to hold ov Although it was a valid contract, it did not enlarge or alter the ter When the lessors notified the lessees that they should regard them tenants at will, the lessees replied that they regarded themselves tenants at sufferance. The lessees thus refused to consent to the cr tion of any tenancy more permanent than a tenancy at sufferance.[288]

The law is that a tenant for life cannot make a lease for a long period than his own term, unless the remainder-man joins; and th when a person is in possession under a tenant for life, and the latt dies, such sub-tenant then becomes a tenant by sufferance to the r mainder-man.[289] But if the lessee of the life tenant is not in possessi or does not hold over, a mere recognition by the remainder-man of lease previously made by the life tenant does not constitute such te ancy. The lessee, never having occupied the premises, owed no duty fealty to the remainder-man. There was no privity of contract betwe these parties, and the death of the tenant for life did not operate as assignment of the covenants in the lease. The personal representativ of the life tenant may be entitled to recover the rent due on the contra up to the time of his death; but the right of the remainder-man do not arise or spring from the lease made by the tenant for life. If exists at all, it comes from the continued occupation of the lessee. The tenant of a widow having dower interest becomes a tenant at su ferance to the heirs by his continued occupation after the death of t widow. Such a tenancy at sufferance would continue the possession the heirs and prevent the statute of limitations from running again their right to disaffirm a conveyance made during minority.[291] T holding of the occupant in such case would not be adverse to the he who acquired the title to the land after the death of the dowress. T tenant could not set up a claim of ownership by virtue of a tax ti which he had bought in.[292]

[288] Edwards v. Hale, 9 Allen (Mass.) 462.

[289] Peters v. Balke, 170 Ill. 304, 48 N. E. 1012, in the words of Justice Magruder. As same see Wright v. Graves, 80 Ala. 416; Horsey v. Horsey, 4 Harr. (Del.) 517; Kenney v. Sweeney, 14 R. I. 581; Manni v. Brown, 47 Md. 506, 510.

[290] Wright v. Graves, 80 Ala. 416

[291] Harvey v. Briggs, 68 Miss. 8 So. 274.

[292] Lyebrook v. Hall, 73 Miss. 5 19 So. 348.

here an easement was taken by power of eminent domain in prem-
nder lease, the tenant holding over after the end of his term be-
a tenant at sufferance to his former landlord. Inasmuch as the
as not taken, the plaintiff remained the owner of the fee, and the
dant, remaining in occupation, was liable as a tenant at suffer-
The tenant was not evicted here, but continued to enjoy the
ises. It was of no consequence that everybody else on the line of
aking was disturbed in their occupation so long as this tenant
not.[293]

22. **To constitute a tenancy by sufferance there need not have any prior contract of letting**; all that is necessary is that the ten-
should have entered into possession of the premises lawfully and
continue to hold after the termination of his right; provided,
ver, that he does not come in by act of law; for if he comes in by
f law and then holds over, he is regarded as an intruder, abator
espasser.[294] A grantor who remains in possession without any con-
to that effect after the delivery of the deed becomes a tenant at
rance, and as such is not liable for rent. Furthermore, such a
act for continued occupancy would not be implied from a simple
nuance in possession after the sale. The burden of proving it
l be on the person setting it up.[295] Non-payment of the purchase
y would not affect the result after the property had been con-
l to a third person who took in reliance on the title deeds. After
ying the legal title, the grantor was a mere tenant at sufferance.[296]
mploye occupying premises owned by his master becomes, on
ng over after the termination of his employment, a tenant at
rance. This is the effect of his continuing in possession even
gh the relation of landlord and tenant had not previously existed
en the parties.[297] In another case an employer agreed to give his
oye as part of his wages a room to live in, no time being specified
ng which the relationship was to continue. The employe quitted
ervice but continued to occupy the premises, and the employer
ed him. This the court held he had a right to do. When of his
accord the employe left the service, his right to remain longer on

Devine v. Lord, 175 Mass. 384, E. 570.

Johnson v. Donaldson, 17 R. I. 20 Atl. 242; Payton v. Sher-e, 15 R. I. 213, 2 Atl. 300.

Stevens v. Hulin, 53 Mich. 93, 18 N. W. 569; Bennett v. Robinson, 27 Mich. 26.

[296] Work v. Brayton, 5 Ind. 396.

[297] School District No. 11 v. Batsche, 106 Mich. 330, 64 N. W. 196; People v. Annis, 45 Barb. (N. Y.) 304.

the premises was at an end; thenceforth he was there by the me sufferance of the owner.[298]

§ 223. A mortgagor holding after a sale of the mortgaged pro erty for breach of condition is a tenant at sufferance. During su time as the mortgage debt has to run, a mortgagor continuing in po session has been likened to a tenant at will to his mortgagee, but wit out denying the accuracy of this comparison, all the elements of a te ancy at sufferance arise after a breach of the condition in the mor gage.[299] The effect of holding over is not modified by the circumstan that the parties bear the relation of mortgagor and mortgagee to o another. Thus, where the mortgagor remained in possession for fo months by agreement and held over after the end of the four month he became tenant by sufferance to the mortgagee.[300] What is true r garding a mortgagor applies with equal force to those who stand in h shoes. Therefore, a tenant with a lease junior to a mortgage becomes mere tenant at sufferance upon a breach of the condition in the mor gage. This was held in a case where the mortgagor had conveyed awa his equity of redemption and taken back a lease of the premises fro his grantee.[301] It has also been held that a mortgagor in possessio after sale, in pursuance of a power in the mortgage, is a tenant b sufferance.[302] It seems to follow that a mortgagor's grantee of th equity of redemption in possession is likewise a tenant by sufferanc if as such grantee he enters before the mortgagee's sale. At any rat the grantee would be a tenant at sufferance to the original mortgag after he had purchased at the mortgagee's sale and received a conve ance of the premises.[303]

§ 224. Another case in which a tenancy at sufferance arises wit out any preceding contract of tenancy is that of a purchaser put i possession before a transfer of title, and the rule is that a purchas in possession who makes default in the payment of an instalment o the purchase money becomes a tenant by sufferance.[304] This appli to a contract under which the purchaser is given the right to posse

[298] Eichengreen v. Appel, 44 Ill. App. 19.

[299] Mayo v. Fletcher, 14 Pick. (Mass.) 525; Kinsley v. Ames, 2 Metc. (Mass.) 29.

[300] Mayo v. Fletcher, 14 Pick. (Mass.) 525.

[301] Tuttle v. Lane, 17 Me. 437.

[302] Kinsley v. Ames, 2 Met (Mass.) 29.

[303] Johnson v. Donaldson, 17 R. 107, 20 Atl. 242.

[304] Doe v. Lawder, 1 Stark. 246 Sanders v. Richardson, 14 Pick (Mass.) 522.

A breach of the agreement forfeits his right to hold possession
r it. But where the contract is silent in regard to possession, and
urchaser is put into possession without conditions, the retention
ssession is not contrary to the conditions or covenants of the con-
because there were none on the subject. Whatever rights existed
ie strength of it depended on implications. That the purchaser
tenant at will and entitled to three months' notice to quit under
tatute was the conclusion reached by the Michigan court on this
of facts.[305] But the landlord cannot by his own default bring
this change. Thus, a contract of sale was made, the purchaser
n possession, and it was agreed that he should be allowed to re-
in possession till the day set for the delivery of the deed. The
failed to deliver the deed, and sued the purchaser in trespass,
t was held that the seller could not by his own default convert a
l holding into a trespass. He could not better his position or en-
his rights in the premises by his own violation of good faith.[306]
nother instance an agent employed to care for property put an
ding vendee into possession and contracted to sell the premises to
subject to the approval of the owner. The owner never gave his
)val, and it was held that as long as the party remained in posses-
ie was a tenant at sufferance.[307]

25. Exception to rule.—The rule that one who comes into pos-
)n of land lawfully, and holds after the expiration of his right,
nes a tenant at sufferance, does not apply to one whose original
of occupancy became vested in him by operation of law. Thus, a
and holding land which belongs to his wife by virtue of his marital
s becomes an adverse possessor after the death of his wife, and
a tenant at sufferance. The statute of limitations would run
st the claims of the true owner.[308] Lord Coke, in his commentary
ittleton, says: "There is a diversity between particular estates
ed by the tenant and particular estates created by act of law; as,
guardian, after the full age of heire, continueth in possession, he
tenant at sufferance, but an abator, against whom an assize of
d'ancestor doth lye, *et sic de similibus.*"[309] "Where a man comes

Rawson v. Babcock, 40 Mich.
Dunham v. Townsend, 110
440.
Smith v. Singleton, 71 Ga. 68.
Doe v. Gregory, 2 A. & E. 14;
son v. Dryer, 98 Mich. 564, 57 N. W. 814; Hanson v. Johnson, 62 Md. 25; Brown v. Smith, 83 Ill. 291; Livingston v. Tanner, 14 N. Y. 64. See also, Jackson v. Harsen, 7 Cow. (N. Y.) 323.

[309] 1 Co. Lit. 57b.

to a particular estate by the *act of the party,* then, if he holds over, h is *tenant at sufferance.* But where he comes to the particular estat by *act in law,* as, if a guardian, after the full age of the heir, continue in possession, he is not a tenant at sufferance, but an *abator.*"[310] Sub sequent text writers on the law of property have commented on thi point, and recognized a material distinction between the cases of person coming to an estate by act of the party and afterwards holdin over, and one coming to an estate by act of the law and then holdin over. Statements to this effect are found in Kent, Washburn, an Angell.[311]

In Rhode Island the law is otherwise on this point. Thus, in on case a husband and wife occupied the husband's premises until th husband deserted his wife and made a conveyance of the premises Before the conveyance the wife continued in occupation by virtue o the marital relation. On the conveyance her right to occupy as a wif ceased, and she became a tenant at sufferance to the grantee. "He original entry under her husband having been lawful, her possessio did not become unlawful, or, in other words, she did not become trespasser until some act on the part of the owner to terminate he right to occupy."[312]

However, the common-law rule on this point would lead to th opposite conclusion in such a case. A divorced wife who persists i occupying a room in her husband's house against his will is a mer intruder, and not a tenant at sufferance. During the pendency of th divorce proceedings the wife had been allowed to occupy apartment

[310] 1 Cruise Dig., tit. ix, ch. 2, § 2.

[311] Kent's Comm. Vol. IV, p. 117; Washburn on Real Prop., Vol. I, p. 393; Angell on Limitations, § 443. In Livingston v. Tanner, 14 N. Y. 64, 69, the court said: "In respect to the two other cases mentioned in the section—that of a guardian or trustee holding for an infant and a husband seized in right of his wife only,—neither of these persons holding over after the determination of their respective estates became tenants at sufferance at common law. They were mere intruders, abators and trespassers. At common law there was a material distinction between the cases of a person coming to an estate by act of the party and afterward holdin over and by act of the law an their holding over. In the firs case, which included an estate de terminable upon any life or lives he was regarded as a tenant at suf ferage. In the other, to which be long guardians or trustees holdin for infants, and husbands seized i right of their wives only, they wer trespassers, and the relation o landlord and tenant never, in an sense, existed."

[312] Taylor v. O'Brien, 19 R. I. 429 34 Atl. 739, per Matteson, C. J., cit ing Kenney v. Sweeney, 14 R. I 581; Payton v. Sherburne, 15 R. I 213, 2 Atl. 300; Johnson v. Donald son, 17 R. I. 107, 20 Atl. 242.

r husband's house. "As a wife she had undoubtedly a right to use e apartments in the house, in virtue alone of the marriage rela- When that ceased by the decree of the court, her rights to any ll portions of the house ceased. . . . after the divorce her terminated. She was not a tenant on sufferance, but an intruder and after the day the divorce was granted."[813] But where a hus- allowed his divorced wife to keep possession of a farm for several she became his tenant at will. She "was not a tenant at suffer- She was no less, at any rate, than a tenant at will. Whether or ny difficulty existed in her tenure during the marriage, there have been none after the divorce."[814]

26. **Rights of tenant at sufferance.**—As has already been pointed a tenant at sufferance is not in reality a tenant at all. He is y in a position where the statute of limitations will not run st the right of the owner to recover possession of the premises. lows that the duties of such an occupant are limited, and his and privileges are correspondingly few. "The tenant at suffer- has merely a naked possession; stands in no privity to the land- is not liable for rents, unless expressly made so by statute, nor entitled to notice to quit. The landlord may put an end to the cy when he thinks proper, and may, under certain circumstances, the one in possession as an intruder or trespasser."[815] By refus- leave when ordered to do so, a tenant at sufferance becomes a sser. The lessor, after the term is ended, may enter at pleasure rder the lessees out, and if they hold over, there is no question t is a trespass.[816] All the books agree that he retains the posses- s a wrong-doer, just as a disseisor acquires and retains his pos- n by wrong.[817] But before being allowed reasonable time to leave, ccupying by the sufferance of the true owner is not guilty of a ss.[818] "If the landlord suffered the tenant to remain in posses- fter the expiration of the term, the common law intervened by ring that the tenant should not be subjected to an action of ss (though he might be to an action of ejectment), un- n entry or demand were first made, and by declaring that, as the

rown v. Smith, 83 Ill. 291, per e, J.
Vilson v. Merrill, 38 Mich. 707.
IcLeran v. Benton, 73 Cal. 329,
c. 879, per Paterson, J., citing hurst v. Lobree, 38 Cal. 563; v. Thiemann, 15 Mo. App. 307; Smith v. Littlefield, 51 N. Y. 539.
[816] Danforth v. Sargent, 14 Mass. 491.
[817] 2 Bl. Com. 150.
[818] Pratt v. Farrar, 10 Allen (Mass.) 519.

tenant was in possession under lawful title, the continuance in p session should not be deemed unlawful until the landlord, by some like an entry, should put the tenant in the wrong. This shadowy est was termed tenancy at sufferance, . . . Practically, it diffe from the holding of a trespasser only in this, that the landlord, by acquiescence, could at any time base upon it the relation of landl and tenant." . . .[319] While it is true that a tenant at sufferar can hardly be called a tenant at all, and that his holding is with right of any kind, yet if a landlord permits him to remain, and es cially if he receives rent of him, he then becomes a tenant at will.

The nature of this kind of holding was examined in an inquiry ascertain the liability of a tenant at sufferance for the loss of buildi by fire. Now, the only point of difference between the case of the d seisor and the tenant at sufferance is that the owner cannot maint an action of trespass against his tenant by sufferance until he has tered upon the premises. Upon this view, the liability of the ten to answer for the loss by fire is regulated not by the rule applicable tenants under contract or holding by right, but by that which gove the case of the disseisor and unqualified wrong-doer. A mere dissei is responsible for any damage which results from any of his wrong acts. He has no right to build any fire upon the premises, and if m fortune results from it he must bear the loss. Since, however, the r that a tenant at sufferance is not liable in trespass is well establish the form of action in which the tenant would be liable would be *tr pass on the case.*[321]

A taking by eminent domain of land which is occupied by a ten at sufferance does not deprive the occupier of anything for which can claim damages. A prior tenancy had been terminated by pro notice, but the lessee did not vacate the premises on the day specifi His remaining in possession after that day gave him no right as tenant. At best such occupancy was by the mere sufferance of t lessor, and conferred no kind of estate in the land.[322]

§ 227. The common law gave no right of action in any c against a tenant at sufferance to recover for use and occupation. At common law, tenants at sufferance were not liable to pay re

[319] Semmes v. United States, 14 Ct. Cl. (U. S.) 493, 501, per Nott, J.

[320] Dunning v. Finson, 46 Me. 546; Ramsdell v. Maxwell, 32 Mich. 285.

[321] Russell v. Fabyan, 34 N. H. 218.

[322] Shaaber v. Reading City, 1 Pa. St. 402, 24 Atl. 692.

[323] Livingston v. Tanner, 14 N. 64; Smith v. Littlefield, 51 N. 539.

so called, because it was the folly of the owners to allow them tinue in possession after the determination of the preceding [324] In a case before the Court of Exchequer a purchaser tried ver in use and occupation from his grantor, who had remained upation of part of the premises. The court denied the right of y and nonsuited the plaintiff, on the ground that there was no ent in regard to the holding. Baron Rolfe remarked in his n: "If a vendor remains in possession by agreement, the terms agreement will speak for themselves; if not, he is a wrong-doer, ay be turned out by ejectment, and is liable in trespass for profits."[325] So use and occupation will not lie when the holding in express subordination to the owner's title.[326] Where a sub- renting from a lessee holds over after the termination of the l lease, the landlord cannot assent to such holding over, for by ng he would be accepting a new tenant, and thereby releasing iginal lessee from liability by reason of such holding over. The rd can recover rent from the original lessee for the time the sub- remains in occupation.[327] A somewhat similar situation arises a lease runs to several and some of them hold over after the end term. Until the landlord agrees to accept those remaining in sion as his tenants, he may hold all liable to pay for the use of emises while the occupation continues.[328]

Massachusetts, tenants at sufferance have by statute been made to pay rent during such time as they occupy the premises.[329] s statute a tenant at will remaining after notice of a sale of the ion is made liable to the purchaser for rent.[330] A tenant at will

Kent Comm. (6th ed.) 116; se Dig., tit. 9, ch. 2, § 5; De- . Montague, 4 Cush. (Mass.) labama: Smith v. Houston, . 111. California: McLeran ton, 73 Cal. 329, 14 Pac. 879, St. 814. Illinois: Dixon v. 16 Ill. 145. Maryland: De v. Buchanan, 10 Gill & J. 149, n. Dec. 156. Massachusetts: ns v. Scudder, 115 Mass. 367; v. Flood, 1 Allen 217. Michi- Stevens v. Hulin, 53 Mich. 93, W. 569. New Jersey: Con- . Barr, 47 N. J. Law 113, 54 . 121.

ew v. Jones, 13 M. & W. 12.

ripps v. Blank, 9 D. & R. 480.

[327] Ibbs v. Richardson, 9 A. & E. 849.

[328] Christy v. Tancred, 7 M. & W. 127.

[329] Rev. Laws 1902, ch. 129, §§ 3, 6, 8.

[330] Bunton v. Richardson, 10 Allen (Mass.) 260. In Merrill v. Bullock, 105 Mass. 486, Gray, J., said: "In this Commonwealth, it was always held that where the tenant at sufferance had never occupied under the plaintiff or under any party in privity with him, but claimed to hold under an adverse title, the action for use and occupation could not be maintained, because to support such an action

of a mortgagor of land who continues in possession after entry by t mortgagee, with knowledge of the entry, becomes liable to him for u and occupation.[331] A lessee may recover rent from his tenant at suff ance although the written lease terminates during the pendency of t action.[332]

But a tenant at sufferance, made such by a conveyance of which had no notice or knowledge, is not liable to an action for rent und the provisions of this statute. "It has long been held to be a ru founded on the plainest principles of equity and fair dealing, th where a right of action depends on a fact peculiarly within the knov edge of the plaintiff, and which the other party may not be presum to know, and does not in fact know, the plaintiff must give the d fendant notice of such fact."[333]

§ 228. **Right of entry on tenant at sufferance.**—The owner of la who forcibly enters thereon and ejects without unnecessary force tenant at sufferance, who has had reasonable notice to quit, is not liab to an action for an assault, and, *a fortiori,* he would not be liable in action of trespass. "A tenant holding over after the expiration of h tenancy is a mere tenant at sufferance, having no right of possessi against his landlord. If the landlord forcibly enters and expels hi the landlord may be indicted for the forcible entry. But he is not liab to an action of tort for damages, either for his entry upon the prem ises or for an assault in expelling the tenant, provided he uses no mo force than is necessary. The tenant cannot maintain an action in t nature of trespass *quare clausum fregit,* because the title and the la ful right to the possession are in the landlord, and the tenant, against him, has no right of occupation whatever. He cannot mai tain an action in the nature of trespass to his person for a subseque expulsion with no more force than necessary to accomplish the purpo

there must be evidence of a contract or undertaking by the defendant, express or implied, and because where the defendant had never admitted himself to be a tenant and so estopped himself to deny his landlord's title, conflicting titles to real estate could not be tried in an action of assumpsit. . . . But it was assumed by Mr. Justice Wilde, in Keay v. Goodwin, 16 Mass. 1, 4, and by Chief Justice Shaw, in Gould v. Thompson, 4 Metc. 224, 228, that either tenant at will or a tenant at su ferance occupying by permission the landlord, was liable to him an action of assumpsit for use a occupation."

[331] Lucier v. Marsales, 133 Mas 454.

[332] Casey v. King, 98 Mass. 503.

[333] Dixon v. Smith, 181 Mass. 21 63 N. E. 419, quoting from Furlo v. Leary, 8 Cush. (Mass.) 409, 41

the landlord, having obtained possession by an act which, subject to be punished by the public as a breach of the peace, one of which the tenant has any right to complain, has, as the tenant, the right of possession in the premises; and the d, not being liable to the tenant in an action of tort for the al act of entry upon the land, cannot be liable to an action for idental act of expulsion, which the landlord, merely because of ant's own unlawful resistance, has been obliged to resort to in o make his entry effectual. To hold otherwise would enable a occupying land utterly without right to keep out the lawful until the end of a suit by the latter to recover the possession to he is legally entitled."[334] If the owner of land held by a tenant rance enter and expel the occupant, but makes use of no more han is reasonably necessary to accomplish this, he will not be o an action of trespass *quare clausum,* nor for assault and bat- r for injury to the occupant's goods, although it becomes neces- use such force and violence as to subject him to indictment for h of the peace, or under the statute for making a forcible s

ough it was decided in an early case in Massachusetts that the *liberum tenementum* was not a justification of a charge of per- ssault and battery,[336] this decision, so far as it allowed the f to recover damages for the incidental injury to him or to his l property, has been overruled.[337] However, a landowner has t to enter by force upon a tenant at will. The tenant might l removed by legal process, and in Maine it has been held that ant could bring trespass *quare clausum* for such entry.[338]

re entry, a landlord cannot maintain an action of trespass a tenant by sufferance, as he might against a stranger. Because, ant being in by lawful title, the law will presume him to con- pon a title equally lawful till the owner declare his continuance ortious.[339] But the landlord has the right of entering upon a at sufferance at any time without being liable in an action of

w v. Elwell, 121 Mass. 309, y, C. J.; Jackson v. Farmer, l. (N. Y.) 201; Overdeer v. 1 Watts & S. (Pa.) 90; Kel- Janson, 17 Pa. St. 467; v. Sampson, 59 Me. 568; g v. Warden, 51 N. H. 217. nning v. Brown, 47 Md. 506, Washburn on Real Prop. (3d ol. I, p. 538.

[336] Sampson v. Henry, 13 Pick. (Mass.) 36.

[337] Eames v. Prentice, 8 Cush. (Mass.) 337.

[338] Brock v. Berry, 31 Me. 293.

[339] Uridias v. Morrell, 25 Cal. 31; Bright v. McOuat, 40 Ind. 521; Keay v. Goodwin, 16 Mass. 1; Kising v. Stannard, 17 Mass. 282.

trespass *quare clausum*. The objection to such an action is that plaintiff cannot allege that it was his close upon which the entry made. The so-called tenant holds possession wrongfully. The ow has a full right of entry.[340] Slight acts are sufficient to constitute entry upon a tenant at sufferance. After the expiration of a lease f definite time, the agent of the lessor went on the land and cut d some trees by the direction of the lessor. The lessee remained on land. This was held to be a sufficient resumption by the lessor to able him to maintain trespass.[341]

In two jurisdictions, however, it has been held that a tenant sufferance, upon whom a landlord has entered by force, may main an action of *trespass quare clausum fregit*.[342] In an exhaustive art on the subject, these decisions are explained as resting on a misap hension of the English authorities.[343] However, many of the stat in this country give the tenant redress in case his landlord mak forcible entry upon him.

§ 229. The term tenant at sufferance is not always used in strict sense which it bore in the old law. In certain cases, the st tory requirements for notice to terminate tenancies at will would w hardship. To avoid this the occupant has been called a tenant at ferance. On the other hand, the question whether a tenancy was at will or by sufferance merely, becomes immaterial when both required to be terminated by the same notice.[344] In regard to matter, Lyon, chief justice of the Wisconsin court,[345] said: "T doctrine that a tenancy by sufferance necessarily arises when a comes into possession of lands lawfully, but holds over wrongf after the termination of his interest therein, has been qualified in state and elsewhere in an important particular." In the case to wh the learned judge referred, it had been held that consent to the h ing by the landlord was necessary to create a tenancy at sufferance The opinion continues: "It is quite true that the ruling in that narrows the distinction which has sometimes been supposed to e between tenancies at will and by sufferance. But since the adopt

[340] Moore v. Mason, 1 Allen (Mass.) 406; Curtis v. Galvin, 1 Allen (Mass.) 215; Esty v. Baker, 50 Me. 325; Wilde v. Cantillon, 1 Johns. Cas. (N. Y.) 123.

[341] Dorrell v. Johnson, 17 Pick. (Mass.) 263.

[342] Dustin v. Cowdry, 23 Vt. 631; Page v. DePuy, 40 Ill. 506; Re v. Purdy, 41 Ill. 279.

[343] 4 Am. L. Rev. 429.

[344] Bennett v. Robinson, 27 M 26.

[345] Eldred v. Sherman, 81 Wis. 186, 51 N. W. 441.

[346] Meno v. Hoeffel, 46 Wis. 1 N. W. 31.

statutes on the subject of terminating such tenancies, which
em on precisely the same footing, it is not unjust or unreason-
us to narrow the supposed distinction between them; and were
ely abolished, the result would be, at most, the abolition of a
echnicality of the old law, for the retention of which no good
can be given." Thus, because of a statute declaring that all
tenancies should be estates from year to year, it was held that
ermission to use land, without any provision for rent, could at
mount to a tenancy at sufferance, if indeed it could amount to
In a case where one occupying land rent free for an indefinite
y consent of the owner was called a tenant by sufferance, the
t issue was whether the land could be charged with a mechanic's
r building materials. To decide that it could not be so charged,
only necessary to hold that the tenant had no transferable in-
and the holding might have been a tenancy at will as well as
sufferance.[348] The same criticism could be made in a case where
lder of a leasehold estate put a person into possession under a
e to give him the land, and the court said the occupant was a
at sufferance. The decision of the case did not depend on the
of the tenancy.[349]

ommon law the purchaser of a life estate becomes a tenant at
nce after death of life tenant, but by the New York statute he
s a trespasser and is not entitled to notice to quit.[350]

0. **Use of term in statutes.**—As has already been seen the pe-
nature of this form of tenure is that it confers no rights and
without consent; the occupier simply is not a trespasser; he
in subordination to the title of the true owner. As soon as an
t is made to give the tenant at sufferance rights to notice, diffi-
arise as to the construction of the term. Thus, under a statute
ing that whenever there was a tenancy at will or by sufferance,
l in any manner, it could be terminated only on one month's
the tenant could not by the mere fact of holding over and re-
to surrender possession create a tenancy either at will or suf-
e in himself without the consent of his landlord. The term ten-
t sufferance as used in the statute was not given the meaning it
common law.[351] Taylor, J., speaking for the Wisconsin court,

rgar v. Fee, 140 Ind. 572, 39
3.
octor v. Tows, 115 Ill. 138, 3
69.
ufman v. Cook, 114 Ill. 11,
E. 378.

[350] Livingston v. Tanner, 14 N. Y. 64.

[351] Smith v. Littlefield, 51 N. Y. 539; Rowan v. Lytle, 11 Wend. (N. Y.) 616; Meno v. Hoeffel, 46 Wis. 282, 1 N. W. 31.

said: "If the tenant, by simply holding over after the expiration
his term, becomes a tenant at sufferance, requiring the thirty d
notice to quit, and the notice be given and the landlord delayed in
commencement of his proceedings for a day after the thirty days
pired, a tenancy at sufferance would, according to the claim of
learned counsel, again exist in favor of the tenant, which must ag
be terminated by another thirty days' notice, and so *ad infinitum.*
injustice, if not absurdity, of this claim on behalf of the tenant .
is fully demonstrated. . . ."[352]

In Michigan, on the contrary, the term tenancy at sufferance, w
used in a statute in regard to notice to quit, was interpreted in its
common-law sense. "The statute says nothing of privity between
parties, and certainly none can be required by implication in the
of a tenancy at sufferance; since there never was any privity, either
contract or estate, in this kind of tenancy, and to require it would
to take this species of tenancy out of the statutes."[353]

In Massachusetts an early statute required a three months' no
to terminate a tenancy by sufferance, but a subsequent revision, wh
provided "that *estates at will* may be determined by three mon
notice, designedly omitted tenancies at sufferance, because, as the c
missioners say in their note to this section, so long as the party
tinues to be a mere tenant at sufferance his estate is, and ought to
determinable at any moment at the pleasure of the landlord."[354]

The Rhode Island court reached a similar conclusion in regard
statute requiring a notice to terminate a tenancy at sufferance,
held that the expression was used in its technical sense. Durfee, C.
comments on the New York cases as follows: "We are aware t
there are cases in New York that refuse to give to the words 'tenan
sufferance,' used in a New York statute similar to ours, their st
technical meaning, and hold that a person who, having come in

[352] Meno v. Hoeffel, 46 Wis. 282, 1 N. W. 31.

[353] Bennett v. Robinson, 27 Mich. 26. The Michigan court comments on the New York cases as follows: "The New York statutes are very different from our own in respect to the tenancies by sufferance to which these special proceedings are made applicable. The proceeding is there confined to those classes of cases where tenancies by sufferance or otherwise, in which the *conventional* relation of landlord and ant exists, and applies, so far tenancies by sufferance are cerned, only to that particular cl of them which arises from hold over after the expiration of a le or term, and (by special provisi to lands sold on execution," cit Sims v. Humphrey, 4 Denio. (N. 185.

[354] Kinsley v. Ames, 2 M (Mass.) 29, 31, per Shaw, J.

holds over after the expiration of his estate is not a tenant at nce so as to be entitled to notice to quit under said New York until he has held over so long or under such circumstances as assent thereto on the owner's part. The trouble with these cases ignore the difference between a tenancy by sufferance and a at will, since a person who so occupies with the owner's con- technically a tenant at will."[355]

VI. *Statutory Provisions.*

. **California.**—"In all cases of tenancy upon agricultural where the tenant has held over and retained possession for more xty days after the expiration of his term, without any demand ession or notice to quit by the landlord, he shall be deemed to ing by the permission of the landlord, and shall be entitled to nder the terms of the lease, for another full year; . . . and lding over for the period aforesaid shall be taken and construed sent, on the part of the tenant, to hold for another year."[356]

2. **Connecticut.**—"No holding over by any lessee, after the ion of the term of his lease, shall be evidence of any agreement urther lease; and parol leases of lands or tenements reserving a y rent, and in which the time of their termination is not agreed hall be construed to be leases for one month only."[357] Before tute, a tenant under a lease for one year holding over was re- le for another term on the same conditions.[358] Under this mere holding over is no evidence of a new lease, and the court ly charged the jury that they must be satisfied from other evi- showing a meeting of the minds of the parties, before they could new lease for another year.[359] This act does not, however, do ith tenancies from month to month.[360] To constitute such a under this section, three things are requisite: a parol lease, a y rent, and no agreed time for the termination of the lease.[361] ect of this statute is not to do away with year to year tenancies

nson v. Donaldson, 17 R. I. 3, 20 Atl. 242, citing Moore row, 28 Cal. 551, 554; and . Carpenter, 15 Mich. 25.

le Civil Procedure, § 1161.

neral St. 1902, § 4043.

con v. Brown, 9 Conn. 335,

[359] Miller v. Lampson, 66 Conn. 432, 34 Atl. 79.

[360] Corbett v. Cochrane, 67 Conn. 570, 35 Atl. 509; Miller v. Lampson, 66 Conn. 432, 34 Atl. 79.

[361] Corbett v. Cochrane, 67 Conn. 570, 35 Atl. 509.

entirely. Where a lessee took possession under a parol lease for t
years, it created a tenancy at will which by implication was held t
a tenancy from year to year, and the terms of the special cont
would govern the rights of the parties.[362] Under the second claus
the statute, a lease by parol reserving a monthly rent does not ne
sarily become a lease from month to month. Such is not the stat
To be a lease for a month only, three things must concur: the l
must be by parol, a monthly rent reserved, and the time of termina
must not be agreed upon. A lease running for a fixed time could
well be considered one which had no agreed time of termina
within the fair intent and meaning of the statute. A parol lease
a certain number of years creates a tenancy at will, which by in
cation is held to be a tenancy from year to year.[363]

§ 233. **District of Columbia.**—"A tenancy at will must be cre
by express contract and occupation; possession and holding of
messuage or real estate without such express contract or lease, o
such contract or lease which has expired, shall be tenancies by su
ance." "Tenancies at will may be terminated by thirty days' wri
notice to quit. . . ."[365] The original act upon which these sect
are based was passed in 1864, and received judicial interpretation
after its passage. The effect of the act seems to have been to abo
the doctrine of year to year tenancy which had previously been
law. Mere wrongful holding over did not create a tenancy at su
ance or entitle the tenant so holding over to any notice to quit
holding over by implied consent of the landlord made the tena
tenant at sufferance.[366]

§ 234. **In Delaware** it is provided by statute that "where no t
is expressly limited, a demise shall be construed to be for a year,
cept of houses and lots usually let for a less time."[367] Under
statute a letting without any lease or agreement in writing of pr
ises for fifty dollars a year for the purpose of erecting a distillery u
them by the lessee was held to constitute a renting for a year.[368]
tenant is liable for a year's rent by force of the statute, even tho
he remains in possession only part of the year. In the action for

[362] Corbett v. Cochrane, 67 Conn. 570, citing Larkin v. Avery, 23 Conn. 304.

[364] Corbett v. Cochrane, 67 Conn. 570, 35 Atl. 509.

[365] Rev. Stat., §§ 680, 681,

[366] Spalding v. Hall, 6 D. C. 1

[367] Laws of Delaware 1893, ch. § 2.

[368] Humphries v. Smith, 4 He (Del.) 9.

ccupation, the plaintiff may recover for the whole year, if there ontract or agreement of tenancy either for a year or for no cerime, although the tenant may not have occupied for all the year. Delaware act was only in confirmation of the Stat. 11, Geo. 2, ch. Even before it was re-enacted, that statute was, by usage and con- a part of the common law of the state. Under it, if a contract of cy be proved, the defendant is liable in use and occupation though ay never have entered into possession.[369]

35. Georgia.—"Where no time is specified for the termination enancy, the law construes it to be for the calendar year, but if it pressly a tenancy at will, then either party may terminate it at '[370] A landlord may treat a tenant from year to year, who con- s to occupy a part of the premises after the end of the term, as a t for the ensuing year. And this, too, although the tenant has proper notice to end the year to year holding, and has attempted render the keys to the landlord.[371]

36. In Indiana it is provided by statute that an estate at will nly be created by express agreement. The same act provides that olding of real estate for an indefinite term and without a valid en lease shall be construed to be a periodic tenancy.[372] A state- in a pleading that a person took possession by consent of a land- r for an indefinite time is an allegation of a general tenancy, and al tenancies are deemed to be tenancies from year to year. A lease for an indefinite period is, with reference to its extent, a for a year certain and no more.[373] The effect of this is to increase imits of year to year tenancies and restrict those of month to h periods. An indefinite letting at a monthly rent creates a "gen- enancy," which by force of the statute becomes a tenancy from to year.[374] So, where a void lease provided for payment of rent vance, it was held that occupation by the lessee rendered the ten- a valid year to year holding, and that rent could be collected by efore the end of the first year's holding. It is not necessary that should be a reservation and payment of an annual rent in order

[369] Lofland v. Emory, 2 Harr.) 297.

[370] Code 1895, Vol. II, § 3132.

[371] Cavanaugh v. Clinch, 88 Ga. 5 S. E. 673.

[372] Burns' Ann. Ind. St. 1901, 9.

[373] Swan v. Clark, 80 Ind. 57, citing 2 R. S. 1876, § 2; Burbank v. Dyer, 54 Ind. 392; Ross v. Schneider, 30 Ind. 423; Schmitz v. Lauferty, 29 Ind. 400.

[374] Rothschild v. Williamson, 83 Ind. 387.

to raise the presumption of an implied agreement between the pa ties.[375] Under the statute in this state, a tenancy in which the pre ises are occupied by the assent of the landlord without any written definite verbal agreement, the tenant paying the taxes and such oth rent as the landlord requires, is a tenancy from year to year.[376] B it seems that if the tenant holds over after a definite term for a ye that implies a renewal of the agreement, and the holding would co to an end on the expiration of the second year without notice. Ho ever, an express agreement between the parties that the tenant shou stay as long as they agreed, and give up possession whenever the lan lord wanted it, excludes the application of such a doctrine, and mak the holding either a tenancy from year to year or a tenancy at w In either case a notice to quit was necessary; and until the proj notice had been given, there was and could be no tenancy by suff ance.[377]

§ 237. **In Iowa** it is provided that "any person in the possess of real estate with the assent of the owner is presumed to be a tena at will until the contrary is shown."[378] By force of this statute lessee for a term of two years with monthly rent payments holdi over becomes a tenant at will rather than a tenant from year to year. The presumption obtaining at common law that a party holding o after the expiration of his lease becomes a tenant from year to yea overcome by this statutory provision making him a tenant at will. One in possession with the assent of the owner, in the absence of fu ther proof, is presumed to be a tenant at will.[381] The common-l rule that when a tenant for years holds over after the termination his lease, with the assent of his landlord, and pays rent according the terms of his lease, a tenancy from year to year is established, changed by this section of the code. At most it may be said that th is a presumption, which obtains at common law, that by reason these acts and this conduct of the parties such a tenancy exists. B this is overcome by the statutory presumption, and to overcome t statutory presumption an agreement or contract is necessary. commenting on the statutory provisions, the Supreme Court of t state explained that the rules about year to year tenancies "were dev

[375] Nash v. Berkmeir, 83 Ind. 536.
[376] Ross v. Schneider, 30 Ind. 423.
[377] Coomler v. Hefner, 86 Ind. 108.
[378] Iowa Code, §§ 2014, 2991.
[379] O'Brien v. Troxel, 76 Iowa 760, 40 N. W. 704.
[380] O'Brien v. Troxel, 76 Iowa 7 40 N. W. 704; German State Ba v. Herron, 111 Iowa 25, 82 N. 430.
[381] Fischer v. Johnson, 106 Io 181, 76 N. W. 658.

when agriculture was the main pursuit, and before other interests assumed their present importance. While the statute still protects in possession of land for the purposes of cultivation, it also ls protection to the owners and tenants of other property."[382] protection referred to is the statutory provision that "in case of ts occupying and cultivating farms, the notice must fix the ter- tion of the tenancy on the first of March."[383]

person in possession not recognizing the owner as landlord cannot garded as a tenant at will.[384]

38. In Kentucky it is provided that a tenant for a fixed term year or more, to expire on a certain day, shall abandon the prem- on that day, unless by express contract he secures the right to in longer. If without such contract the tenant holds over, he does cquire any rights for ninety days, and may be expelled without e. After the lapse of ninety days without the institution of pro- ngs, the tenant acquires a right to remain a year, and is under an ation to do so. At the end of such a year of holding, the condi- as to holding over are the same. In case the original term was ess than a year, the periods are shortened from ninety to thirty and from a year to sixty days.[385] It was maintained that this sec- of the statute gave the landlord, when the tenant held over, the d of ninety days in which to determine whether he would regard enancy as continuing for another year or term, and, the deter- tion of this question being alone with him, he could eject the nt without notice at any time within the ninety days, or compel to retain the possession. But the court held that such was not a er construction of the statute. The section is for the protection of landlord and tenant. The tenant may abandon the premises n the ninety days next succeeding the expiration of the term, and t liable for a longer period than he holds. He is a tenant by suf- nce for ninety days, and may be evicted without notice if action ken within that time. If permitted to remain longer than the y days, his tenancy is regulated by the original contract.[386] ner the mere belief on the part of the tenant that he is to continue the implied understanding alone is sufficient to defeat the land- s rights. If, however, the landlord, without objection, permits the

Herman State Bank v. Herron, owa 25, 82 N. W. 430.

Code, § 2991.

Martin v. Knapp, 57 Iowa 336, W. 721.

[385] Ky. St. 1899, § 2295; Ky. St. 1903, §§ 2295, 2296.

[386] Mendel v. Hall, 13 Bush (Ky.) 232.

tenant to make arrangements to retain possession for another y and to make expenditures under the belief that he is to remain, t belief being induced by the conduct of the landlord, the right of landlord to adopt the remedy provided by the statute will be den him.[387] An actual agreement for a further yearly term may be ferred from a shorter period of holding over. This was done wh rent was payable monthly and the agreement was that when the le started out on one year he became a renter for that year.[388]

§ 239. **In Maine** it is provided that "there can be no estate crea in lands greater than a tenancy at will, and no estate in them can granted, assigned or surrendered unless by some writing signed by grantor or maker, or his attorney."[389] The effect of this section m be regarded as reducing what would otherwise be a tenancy from y to year to a tenancy at will. In this respect the local law follows law of Massachusetts, and for a lessee to hold over two years after expiration of his term would constitute him a tenant at will only A verbal lease of real estate at an annual rent creates under t statute only an estate at will. It results, as incident to an estate will, that it may be determined at the will of either party; neithe required to give notice.[391] A lessee under a written lease who ho over might, however, be clothed with greater rights by special stipu tions in the lease. So, where one held under a former lease that g him the right to perpetual possession until certain conditions relati to the purchase of the property should be complied with, the terms the new lease would not be construed as an abandonment or waiver his antecedent rights. The very terms of the original lease implie continued tenancy until the tenant shall be repaid his authorized o lay whereby an idle site was converted into valuable property.[392]

§ 240. **In Massachusetts** there has never been any recognition periodic tenancies. In the early case settling this rule,[393] it was s that the year to year holding originated before the statute of frau Its continuance after the passage of that act was made possible by t exception in favor of short term parol leases in the English statute

[387] Irvine v. Scott, 85 Ky. 260, 3 S. W. 163.

[388] Unger v. Bamberger, 85 Ky. 11, 2 S. W. 498.

[389] Rev. St., ch. 75, § 13.

[390] Bennock v. Whipple, 12 Me. 346; Wheeler v. Cowan, 25 Me. 283.

[391] Withers v. Larrabee, 48 570; Davis v. Thompson, 13 Me. 2

[392] Franklin Land &c. Co. v. Ca 84 Me. 528, 24 Atl. 960.

[393] Ellis v. Paige, 1 Pick. (Mas 43.

's. The omission of this exception in the Massachusetts act ed clearly the intention of the legislature to place all parol leases e same footing. At first a lease without limitation of time, and the limitation of an annual rent, was considered as a lease for a certain. Then followed tenancies from year to year which could e determined without six months' notice to quit. Wilde, J., con- d to trace the history of the doctrine as follows: "Thus stood the t the time the English statute of frauds was penned, and the tion was introduced, no doubt, for the purpose of supporting parol leases and tenancies from year to year depending on im- contracts. But whether this be so or not, it is very clear that the ish doctrine respecting tenancies from year to year can only be orted by the exception in the statute, and that by our statute can be no tenancy from year to year unless by a lease in writing." where the different wording of the statute does not have a direct ng on the result, no tenancy from year to year would be recog- in Massachusetts. Thus, a written lease of a house at a certain *per annum,* payable monthly, was to begin upon the completion house. Its term was undefined except by a stipulation that lessor repossess himself of part of it after two years if he wished. was held to create a tenancy at will merely. Although there was id lease for an indefinite period, the presumption that the parties ded a holding from year to year was not implied. The duration lease for years must be certain; this includes both its commence- and termination. It may be conceded that a lease for years may "when a house is suitable to be occupied," according to the n, *Id certum est quod certum reddi potest.* But the fatal objec- remains in this case that no period of termination is fixed. A old interest for an uncertain and indefinite term is an estate at nly. After the lessee had entered under this instrument, he could nate his tenancy in any of the modes provided by statute.[894]

41. In Michigan the doctrine seems to be that a tenant occupy- nder a parol lease for a number of years is during the term a t from year to year, because a written instrument is necessary to e a valid term for years. But after the expiration of the term the is *functus officio,* and cannot be treated as a void lease. If the was payable monthly, the contract of leasing could not be treated, the expiration of five years, in any other manner than as a ten- or lease from month to month.[895] The apparent reason for this

[894] Murray v. Cherrington, 99 Mich. 229.

[895] Barlum v. Berger, 125 Mich. 504, 84 N. W. 1070.

is because the act regarding notice to quit provides that the time
such notice shall be sufficient if it be equal to the interval between t
times for payment of rent.[396]

§ **242. In Missouri** the line between month to month and year
year tenancies has been defined by statute.[397] The Court of Appe
thought this statute did not apply where buildings are not let
nomine, and it did not appear that they were the essential object of t
letting, even though the premises were within the limits of a tow
They argued that "it is a notorious fact that most farms have buildin
upon them, and a fact no less notorious that many farms are situat
within the limits of this city, and probably within the limits of ma
towns and villages in this state. To interpret the law to make t
tenure of such farms, where a yearly tenant holds over, one from mon
to month would be neither within the spirit nor the letter of t
law."[398] The leased property in this case was a park or ornament
estate not used for agricultural purposes. On appeal the decision of t
court below was reversed by the Supreme Court. The grounds f
this conclusion were stated to be that "the statute makes no exceptio
and we are authorized to make none; we shall obey its commands. W
do not propose by fine-spun distinctions to sanction the creation
leases which that statute in such plain terms forbids. Should we
so we would be but following that unfortunate precedent set by t
English courts whereby they frittered away the wholesome provisio
of the statute of frauds and allowed parol agreements and part pe
formance for that which the law said should be put down in black a
white." The court expressly reserves its opinion as to a case whe
land within the limits of a town or city was used for farming pu
poses.[399] Before the decision in the park case had been reversed
appeal, the lower court commented favorably upon its interpretati
of the statute and decided a case in reliance on it. Where the buil
ings on the demised premises were erected by the lessee and owned
him, the lease was of the ground alone, and the statute under discussi

[396] Comp. Laws 1897, § 9257.

[397] Mo. Rev. St. 1899, § 410 (R. S. 1889, § 6371). A portion of this section reads: "All contracts or agreements for the leasing, renting or occupation of stores, shops, etc., in cities, towns, and villages not made in writing and signed by the parties shall be tenancies from mon to month and may be terminat by one month's notice."

[398] Withnell v. Petzold, 17 M App. 669.

[399] Withnell v. Petzold, 104 M 409, 16 S. W. 205, reversing 17 Ap 669.

l not apply.[400] Such a conclusion might very well have been ed, however, even under the interpretation of the statute as de- l by the Supreme Court. An oral letting of a farm at the will e lessor creates a tenancy from year to year and is terminable by ssor upon sufficient notice,[401] but it cannot be determined with- otice. However, a mere cropper who is without any interest in ssession of premises, and who has merely tilled the ground and sted the crops after an entry for the sole purpose of so doing, is ntitled to notice.[402] By virtue of the landlord and tenant statute ol agreement to rent for the certain period of two weeks and r, until the happening of a certain event, was held to create a cy from month to month which could only be ended by a month's e to quit. The premises were buildings in a city.[403] For the reason a void lease to begin *in futuro* has been held to create a h to month tenancy requiring a notice to quit.[404]

here a tenant was holding as a tenant from year to year during ear when the statute became a law, the act was nevertheless held ply and change the holding for the ensuing year into one from h to month, the premises being within an incorporated town.[405]

43. **Nevada.**—"In all leases of lands or tenements or any in- therein for a month or any term less than a year, if the tenant over his term by consent of his landlord the tenancy shall be con- d to be a tenancy from month to month, or a tenancy for such less than a year, as the case may be."[406]

44. **In New Hampshire** the form of the statutory provision is "every tenancy or occupancy shall be deemed to be at will, and ent payable upon demand, unless a different contract is shown."[407] effect of this act is to change the presumption in force at common hat every tenancy at will was a tenancy from year to year. In Hampshire but little property being in fact held by tenants, ex- buildings in cities and towns, which are not usually let for long ds without written leases, a different rule of presumption is intro- d by statute, and every tenancy is presumed to be a lease at will

Delaney v. Flanagan, 41 Mo. 651.

Tiefenbrun v. Tiefenbrun, 65 App. 253.

Davies v. Baldwin, 66 Mo. App.

[402] Smith v. Smith Bros., 62 Mo. App. 596.

[403] Winters v. Cherry, 78 Mo. 344.

[404] Hammon v. Douglas, 50 Mo. 442.

[405] Comp. Laws 1900, §§ 3827, 3838.

[406] Pub. St. 1901, ch. 246, § 1.

with the rent payable on demand.[408] It is not understood, howev that this provision affects in any way the rules of evidence at comm law as to the nature of the tenancy, except by changing the burden proof and making it incumbent on the tenant to show a tenancy fr time to time. It will still be inferred, as at common law, that tenancy is from year to year, from the fact that the original lett from which the tenant has held over was from year to year. And will be inferred that a tenancy is from quarter to quarter or fr month to month from the fact that the rent has been paid quarte or monthly. The same is true of any other circumstance from wh the term of the tenancy may be inferred.[409]

§ 245. **New York.**—An agreement for the occupation of real pr erty in the city of New York for an indefinite period shall be deem to continue until the first day of May next after the possession co mences. Rent is payable at the usual quarter day for the payment rent in that city unless otherwise expressed in the agreement.[410]

§ 246. **Oklahoma Territory.**—When rent is reserved payable intervals of three months or less, the tenant shall be deemed to h from one period to another, equal to the intervals between the days payment, unless there is an express contract to the contrary. Wh a tenant holds over with the assent of his landlord after a letting one or more years he is to be deemed a tenant from year to year. other cases a person in possession of real property with the assent the owner is presumed to be a tenant at will till the contrary shown.[411]

§ 247. **In Rhode Island** the usual common law doctrine in reg to tenancies from year to year is in force. The rule is not affected the statutory provision to the effect that "the time agreed upon i definite letting shall be the time of the termination thereof for all p poses; and if there be no time of termination agreed upon it shall deemed a letting from year to year."[412] This statute, as the co construed it, applied only where the letting was definite—that is to s definite at least except in regard to duration. The statute was h not to cover a case where there was no definite letting, but only a p missive occupation without terms.[413]

[408] Hazeltine v. Colburn, 31 N. H. 466.

[409] Currier v. Perley, 24 N. H. 219.

[410] Gen. Laws 1901, ch. 46, Art. 6, § 202.

[411] Rev. St. 1903, §§ 3320–3322.

[412] Gen. St., cap. 221, § 5.

[413] Johnson v. Johnson, 13 R. 467, in the words of Durfee, C. J

248. South Carolina.—The early acts in this state did not alter common law in relation to tenancies from year to year, and the ssity of notice to quit before the tenancy can be determined, either he landlord or the tenant.[414] In addition to the statute of frauds his state it is provided in the landlord and tenant act that "No l lease shall give a tenant a right of possession for a longer term twelve months from the time of entering on the premises; and all leases shall be understood to be for one year, unless it be stipud to be for a shorter term."[415] One effect of this section is to pre- the application of any doctrine of part performance to render d a parol lease for more than one year.[416] After the termination he first year of the holding, the tenant remaining in possession is nant at will merely. The tenant has no right to claim a term in premises for the second year, but can be evicted on proceedings n after ten days' notice.[417] But it seems that this tenancy at will ing from the continued possession after the expiration of the first might become a tenancy from year to year which could only be inated by three months' notice to quit.[418] It is just as reasonable dopt this conclusion in such a case as to hold that a term for a year ted by a valid instrument in writing becomes a tenancy from year ear from the continued occupation of the tenant.[419]

249. In Washington there are the following provisions in regard eriodic tenancy: "In all cases where real property is leased for a ified term or period by express or implied contract, whether writor by parol, the tenancy shall be terminated without notice at the ration of such specified term or period." In all cases of tenancy n agricultural lands, where the tenant has held over and retained session for more than sixty days after the expiration of his term out any demand or notice to quit, . . . he shall be deemed to be ling by permission, . . . and shall be entitled to hold under the ns of the lease for another full year, and shall not be guilty of an awful detainer during said year, and such holding over for the od aforesaid shall be taken and construed as a consent on the part tenant to hold for another year."[420] Under the sections quoted, n tenants held for more than sixty days without demand or notice

[414] Godard v. South Carolina R. 2 Rich. L. (S. Car.) 346.
[415] Civ. Code 1902, § 2416.
[416] State v. Mays, 24 S. Car. 190.
[417] Hillhouse v. Jennings, 60 S. 392, 38 S. E. 596.
[418] Godard v. South Carolina R. Co., 2 Rich. L. (S. Car.) 346.
[419] State v. Fort, 24 S. Car. 510.
[420] Bal. Code, §§ 5527, 5528.

to quit they were then entitled to hold for another year. This sa condition arose at the expiration of the next year. An oral or writ demand for the premises within sixty days after the expiration of a year, or any notice prior to the end of the year that the lease would terminated was sufficient to authorize the bringing of an action forcible detainer.[421] A letting for an indefinite time, with mont or other periodic rent reserved, creates a tenancy from month to mo or from rent day to rent day, and may be terminated by thirty da notice preceding the end of any of said periods.[422]

The fact that without any agreement for a change in the origi tenancy the tenant began paying rent for quarterly periods, which accepted at his own request and for his own accommodation, would operate to change a tenancy from month to month into one for qu terly periods.[423]

"Whenever any person obtains possession of premises without consent of the owner or other person having the right to give said p session, he shall be deemed a tenant by sufferance merely, and shall liable to pay reasonable rent for the actual time he occupied premises, and shall forthwith, on demand, surrender his said possessi to the owner or person who had the right of possession before s entry, and all his right to possession of said premises shall termin immediately upon said demand."[424]

§ 250. **Wyoming.**—It is provided that there shall not exist a tenancy by implication or operation of law except a tenancy by suff ance. Upon the expiration of a term, there is no implied renewal the same either by the tenant holding over or by the landlord accepti rent for such period of holding over. Such holding over shall cons tute only a tenancy at sufferance, with the rights, duties, obligatio and incidents of such tenancy. No tenancy other than that by suff ance shall exist after the termination of the original lease unl created by express contract in writing.[425]

[421] Mounts v. Goranson, 29 Wash. 261, 69 Pac. 740.

[422] Bal. Code, § 4969; Schreiner v. Stanton, 26 Wash. 563, 67 Pac. 219.

[423] London &c. Bank v. Curtis, Wash. 656, 68 Pac. 329.

[424] Bal. Code 1897, § 4571.

[425] Rev. St. 1899, §§ 2272, 2273.

CHAPTER IV.

NOTICE TO QUIT.

cessity for Notice, §§ 251–259.
fficiency of Notice, §§ 260–271.
3. Service of Notice, §§ 272–276.
4. Statutory Provisions, §§ 277–317.

I. *Necessity for Notice.*

51. Notice to quit is necessary to terminate a year to year hold-

The obligations imposed by a year to year tenancy not only

gland: Johnstone v. Huddle- 4 B. & C. 922; Chapman v. er, 6 M. & W. 100. **California:** an v. Cary, 17 Cal. 80. **Con-** ut: Larkin v. Avery, 23 Conn. **Illinois:** Herrell v. Sizeland, . 457. **Indiana:** Jackson v. es, 1 Blackf. (Ind.) 421. **Ken-** Miller v. Shackleford, 4 (Ky.) 264; Morehead v. Wat- 5 B. Mon. (Ky.) 228. **Mary-** Hall v. Myers, 43 Md. 446. ari: Ridgely v. Stillwell, 25 570. **New Jersey:** Den v. , 14 N. J. L. 523; Den v. Blair, J. L. 181; Den v. Snowhill, 23 L. 447. **New Hampshire:** Cur- . Perley, 24 N. H. 219. **New** Jackson v. Salmon, 4 Wend. .) 327; Bradley v. Covel, 4 (N. Y.) 349; People v. Paul- 22 Hun (N. Y.) 91. **North na:** Irwin v. Cox, 5 Ired. L. ar.) 521; Stedman v. McIntosh, l. L. (N. Car.) 291. **Oregon:** tt v. Clark, 5 Oreg. 464; Wil- v. Ackerman, 8 Oreg. 405. **ylvania:** Brown v. Vanhorn, 1 (Pa.) 334, *n.;* Logan v. Her- S. & R. (Pa.) 459; Thomas v. t, 9 S. & R. (Pa.) 87; McDow- Simpson, 3 Watts (Pa.) 129. **Carolina:** Godard v. South Carolina R. Co., 2 Rich. L. (S. Car.) 346; Floyd v. Floyd, 4 Rich. L. (S. Car.) 23. **Rhode Island:** Thurber v. Dwyer, 10 R. I. 355. **Vermont::** Hanchet v. Whitney, 1 Vt. 311; Hall v. Wadsworth, 28 Vt. 410; Boudette v. Pierce, 50 Vt. 212.

Notice to quit generally. The doctrine of notice to quit is very old. It is founded on such evident principles of right, that the courts at the earliest times recognized its justice, and required notice to terminate certain tenancies. The object was to protect the tenant more fully from the arbitrary will of the lessor and also to save the lessor from loss by a too sudden determination of the tenancy by the tenant, the requisite notice being mutual. As leases became more free, the courts, following the liberal policy which had first dictated notice, extended the rule so as to include tenancies not falling within the original rule. The rights of both parties have been the better secured by this wise course of decision, and tenancies which were at one time entirely dependent upon the will of either party have been changed from precarious tenures to fixed and stable holdings. In the American states the tendency of

precluded the tenant from leaving during the year without be liable for the full year's rent, but also prevented him from vacat at the end of the year unless he gave proper notice of his intention do so and thus relieved himself from the responsibility of pay rent for the ensuing year. The obligation was to give notice bef the expiration of that or of any succeeding year.[2] Thus, wher year to year tenant vacated at the end of the year, but allowed sub-tenant to continue in occupation for one entire year and a p tion of another, the principal tenant was held liable for the full years' rent.[3] "The ancient rule of the common law required that notice, when necessary and not otherwise limited by agreement of parties, should be for half a year or six calendar months expir at the end of the current year of the tenancy; and that a notice any other period, sooner or later, will not be sufficient."[4]

§ 252. In the United States the length of notice depends alm entirely on statute. Some of the states have followed the Engl rule as to the length of notice but in most the length of the not has been shortened to three months. A statute providing for th months' notice to terminate estates at will was held to apply to t ancies from year to year. In the latter case it was held that three months must terminate at the end of the year.[5] In Ohio a tinction has been made between those tenancies from year to y from which the rule requiring notice to quit had its origin, and th arising from a holding over by the tenant after the expiration o lease for a specified term. In each year of occupancy under former there is, it is said, a growing interest in the ensuing y springing out of the original contract. While in the latter cas

legislation has been to enlarge the common law doctrine, but with the exceptions of the additions made and a few changes in the form of the notice, its length, etc., it remains as it was before. The doctrine of notice to quit is one that is peculiar to the relation of landlord and tenant, and belongs entirely to it. It sprung up to alleviate the hardships that arose from that relationship, and has been strictly confined to its original use.—Am. Dec. 125. Note by A. C. Freeman.

[2] Right v. Darby, 1 Term R. 159, 161, quoted in Roberson v. Simo 109 Ga. 360, 34 S. E. 604.

[3] Roberson v. Simons, 109 Ga. 3 34 S. E. 604.

[4] Den v. Drake, 14 N. J. L. 523, Hornblower, C. J. To same ef see Hall v. Myers, 43 Md. 4 Critchfield v. Remaley, 21 Neb. 1 31 N. W. 687; Den v. Blair, 15 N L. 181; Hanchet v. Whitney, 1 311; Sartwell v. Sowles, 72 Vt. 2 48 Atl. 11; Brown v. Kayser, 60 W 1, 18 N. W. 523.

[5] Hunter v. Frost, 47 Minn. 1, N. W. 327.

ntract arises each year of the holding by implication from the t of the parties. As the assent of both parties is necessary to ation of this new contract at the beginning of each year, it is s that if the tenant chooses not to hold over, and vacates the es at the end of any year, the tenancy ceases without liability t for the ensuing year, though no notice of his intention to re- e given, as certainly as it does upon the expiration of a lease ly made for a specific term. The holding over after the end year without the landlord's consent, is equivalent to holding ter the expiration of a lease for a specific term.[6]

3. At common law a tenant from month to month must give days' notice of his intention to vacate,[7] and unless he does l be liable for a month's rent after he does actually vacate.[8] nancy from week to week, a full week's notice is certainly suffi- and in a tenancy from month to month, a full month's notice course sufficient.[9] It has even been queried whether a notice e-half week or one-half month would not be sufficient.[10] In to this difference it was said in a recent case:[11] "By strict eness, the rule of a half-year's notice in tenancies from year to ould only require a half-month's or a half-week's notice in f monthly or weekly tenancies. The briefness of the latter and gth of the former kind of tenancies, was the probable reason e rule was not uniform."

requirement for notice may be affected by the stipulations of reement under which the month to month tenancy arose. Thus ice to quit was necessary where the receipts for rent given the every month provided that "this term of hiring and letting one month only and will expire as aforesaid."[12] Though it lled a tenancy from month to month, it was in effect a series arate leases for terms of one month each. A provision that the

dwell v. Holcomb, 60 Ohio St. N. E. 473, citing Alexander v. , 4 Cranch (U. S.) 298.
wart v. Murrell, 65 Ark. 471, W. 130; Donohue v. Chicago , 37 Ill. App. 552; Steffens v. 0 N. J. L. 128, 133; People v. g, 47 N. Y. 666; Shipman v. ll, 64 Tex. 174; Utah Loan &c. Garbutt, 6 Utah 342, 23 Pac.

[8] Donohue v. Chicago &c. Co., 37 Ill. App. 552.
[9] Doe v. Hazell, 1 Esp. 94; Doe v. Raffan, 6 Esp. 4.
[10] Jones v. Willis, 8 Jones (N. Car.) L. 430.
[11] Stewart v. Murrell, 65 Ark. 471, 47 S. W. 130, per Hughes, J. To same effect see Prescott v. Elm, 7 Cush. (Mass.) 346.
[12] Gibbons v. Dayton, 4 Hun (N. Y.) 451.

landlord might have the premises for his own use when he w
them, would also do away with the necessity for notice.[13]

**§ 254. A written notice to terminate a tenancy strictly at w
by sufferance was not required at common law,** and is not now r
sary except when the statute so requires it.[14] At common law, a
ant at sufferance was not entitled to any notice to quit.[15] He h
estate in the premises. He was merely not a trespasser, and the
lord could, without ceremony, at any time enter and put him
The possession of tenants at sufferance is wrongful and they w
not be entitled to notice to quit prior to the institution of an a
of ejectment.[17] Mere holding over after the end of a specified
does not entitle a tenant to notice. There must be circumstances
which the court can imply a new agreement for a further holdi

A tenant at sufferance would, however, be entitled to reaso
time to remove himself, his family and goods, and to remain or
for that purpose, without being deemed a trespasser. Where
premises were the lower floor of a tenement house, forty-eight
were enough for this purpose.[19] After the party by right entitl
possession against a tenant at sufferance had obtained it peace
two days was sufficient time for the tenant to remove effects
sisting of a stock of groceries.[20] But where the notice requi
tenant to quit on a specified day, it was held that an action to re
possession brought on that day was premature.[21]

The interest of a tenant who was strictly a tenant at will[22] cou
common law be terminated at any time by either party without
previous notice to quit.[23] It was only necessary to give the te

[13] People v. Schackno, 48 Barb. (N. Y.) 551.

[14] Guvernator v. Kenin, 66 N. J. L. 114, 48 Atl. 1023.

[15] Hauxhurst v. Lobree, 38 Cal. 563; Emerick v. Tavener, 9 Grat. (Va.) 220; Peters v. Balke, 170 Ill. 304, 48 N. E. 1012; Wamsganz v. Wolff, 86 Mo. App. 205; Kinsley v. Ames, 2 Metc. (Mass.) 29; Hollis v. Pool, 3 Metc. (Mass.) 350; Doe v. Thomas, 6 Exch. 854, 857; Pinhorn v. Souster, 8 Exch. 763, 772.

[16] Wheeler v. Wood, 25 Me. 287.

[17] McClung v. Echols, 5 W. Va. 204.

[18] Calderwood v. Brooks, 28 Cal. 151.

[19] Pratt v. Farrar, 10 Allen (M 519; Hooten v. Holt, 139 Mass. N. E. 221; Wardell v. Etter Mass. 19, 8 N. E. 420.

[20] Arnold v. Nash, 126 Mass. 3

[21] Decker v. McManus, 101 63.

[22] See *supra*, § 194.

[23] **California:** Blum v. Rober 24 Cal. 127. **Colorado:** Crane v drews, 6 Colo. 353. **Maine:** v. Thompson, 13 Me. 209; Moo Boyd, 24 Me. 242; Withers v. L bee, 48 Me. 570; Esty v. Bake Me. 325. **Massachusetts:** Ell Paige, 1 Pick. (Mass.) 43. **Miss** Grant v. White, 42 Mo. 285.

onable time to remove his effects. "Tenant at will," says Little-is where lands or tenements are let by one man to another, to and to hold to him at the will of the lessor, by force of which the lessee is in possession. In this case the lessee is called ten-t will, because he hath no certain or sure estate, for the lessor ut him out at what time it pleaseth him."[24]

55. When there is a valid lease for a time certain, no notice to s necessary to terminate it, for the parties know when the term [25] This universal rule of the common law has been recognized claratory statutes in many codes and statutes. With the single tion of Delaware the doctrine prevails throughout all the states e union, modified slightly in a few cases, however, by the stat-regarding actions for the recovery of possession of land. If is a valid lease for a fixed time, the tenant is bound to sur-r possession at the end of the term without regard to covenants t effect in the instrument of demise.[26] So, in case a lease fixes me for the expiration of the term, and provides that the tenant restore possession of the demised premises, the duty of the ten-yield up the possession will not be dependent upon a demand ssession or upon any proceeding to be taken or thing done by

Jackson v. Livingston, 3 (N. Y.) 455. **North Carolina:** hries v. Humphries, 3 Ired. L. ar.) 362. **Pennsylvania:** Over-. Lewis, 1 W. & S. (Pa.) 90. nt: Rich v. Bolton, 46 Vt. 84. nd: Keech v. Hall, 1 Dougl. oe v. McKaeg, 10 B. & C. 721; C. L. 304.

tt., § 68.

izona: Rev. St. of Ariz. 1901, . **California:** Kuhn v. Smith, al. 615, 58 Pac. 204; Canning v. h, 77 Cal. 196, 19 Pac. 376; ssick v. Ashby, 98 Cal. 422, 33 29. **Colorado:** Brandenburg v. an, 7 Colo. 323, 3 Pac. 577; Ann. St. of Colo., § 1976. **Illi-** Walker v. Ellis, 12 Ill. 470; v. Pestana, 37 Ill. 525; Willer-Shoemaker, 60 Ill. App. 126. na: Mason v. Kempf, 11 Ind. 311; Alcorn v. Morgan, 77 Ind. 184; Pierson v. Doe, 2 Ind. 123; Chicago &c. R. Co. v. Perkins, 12 Ind. App. 131; Myerson v. Neff, 5 Ind. 523; Layman v. Throp, 11 Ind. 352; McClure v. McClure, 74 Ind. 108. **Kentucky:** Barlow v. Bell, 4 Bibb (Ky.) 106. **Maine:** Lithgow v. Moody, 35 Me. 214; Clapp v. Paine, 18 Me. 264; Preble v. Hay, 32 Me. 456. **Missouri:** Stephens v. Brown, 56 Mo. 23; Young v. Smith, 28 Mo. 65. **New York:** Smith v. Littlefield, 51 N. Y. 539. **Pennsylvania:** Evans v. Hastings, 9 Pa. St. 273. **Texas:** Hendrick v. Cannon, 5 Tex. 248. **Washington:** Stanford Land Co. v. Steidle, 28 Wash. 72, 68 Pac. 178. **English:** Cobb v. Stokes, 8 East 358; Messenger v. Armstrong, 1 Term R. 53.

[26] Schreiber v. Chicago &c. R. Co., 115 Ill. 340, 3 N. E. 427; Stockwell v. Marks, 17 Me. 455.

the landlord.[27] According to common law, when the tenancy ter
nated at a day certain, the landlord could always commence his act
of ejectment to recover possession of the land, after the expiration
the lease, without any notice to quit. This he could do, although
tenant became a tenant by sufferance by holding after the term with
his permission.[28] The termination of an extension to a lease is ide
cal with a lease for a definite term having no extension. No no
to quit is necessary. All that would be required in regard to a
further extension would be the expression of an opinion not to acc
it.[29]

**§ 256. Where a tenant holds premises for the full term provi
for by a void agreement,** the agreement is nevertheless effective to
a time for the termination of the term and renders a notice to
at the end of the term unnecessary.[30] "The doctrine of the Eng
cases seems to be that a party entering under a lease, void by
statute of frauds, for a term as expressed in it of more than one y
and paying rent, is treated as a tenant from year to year from the t
of his entry, subject only to the right to terminate the tenancy w
out notice at the end of the specified term. And to that extent
for that purpose only, the terms of agreement, in such case, regu
the time to quit. This right is held to be reciprocal."[31] The ag
ment for termination will bind the parties if the property is h
up to the period designated in the lease and no notice to quit
be necessary, though if such lease be for a number of years, it
be terminated at the end of any yearly period on proper notice.[32]

A parol lease for a single year would, in most jurisdictions, be
valid to create a definite term for years as an instrument in writ
would be. Even where it was not valid, it would expire by its
limitation and bring the holding to an end without any notice
quit.[33] Prior occupation for several years on a year to year tena

[27] Poppers v. Meagher, 148 Ill. 192, 35 N. E. 805.

[28] Smith v. Littlefield, 51 N. Y. 539.

[29] Whetstone v. Davis, 34 Ind. 510.

[30] Ryan v. Mills, 129 Mich. 170, 88 N. W. 392; Williams v. Derlar, 31 Mo. 13; Teft v. Hinchman, 76 Mich. 672, 43 N. W. 680; Butts v. Fox, 96 Mo. App. 437, 70 S. W. 515; Coudert v. Cohn, 118 N. Y. 309, 23 N. E. 298; Hollis v. Pool, 3 Metc. (Mass.) 350; Berrey v. Lindley, 3 M. & G. 498, 42 E. C. L. 263; Davenish v. Moffatt A. & E. (N. S.) 257, 69 E. C. L. 2 Doe v. Stratton, 4 Bing. 446; T v. Savage, 4 E. & B. 36, 82 E. C. L.

[31] Coudert v. Cohn, 118 N. Y. 23 N. E. 298, per Bradley, J., ci Doe v. Stratton, 4 Bing. 446.

[32] Butts v. Fox, 96 Mo. App. 437 S. W. 515.

[33] Teft v. Hinchman, 76 Mich. 43 N. W. 680; Butts v. Fox, 96 App. 437, 70 S. W. 515.

d not affect the result. In such a case a definite parol agree- for a year's holding would end the tenancy at the expiration of ear without a notice to quit.[34]

257. **No notice to quit is necessary when the parties do not d in the relation of landlord and tenant,** and so no notice is neces- after a tenant has repudiated the relation.[35] Where a tenant sets andlord at defiance and does an act disclaiming to hold under him nant, this dispenses with the necessity of notice to quit. An in- e of this is found in the act of attorning to a stranger.[36] The n for this rule has been aptly stated to be that "one is not al- d to blow hot and cold in the same breath, i. e., if he disallows elation, he cannot afterward claim the privileges of a tenant."[37] plea of title in himself in an ejectment suit, a tenant waives right to insist upon ordinary notice to terminate the tenancy.[38] action of unlawful detainer, it is not necessary, after the defend- has disclaimed the relation of tenant, for the landlord to prove demand for possession before suit is brought; a disclaimer is valent to a demand and refusal.[39] No notice to quit is necessary ntitle the landlord to recover possession from a tenant who has eyed in fee even before the termination of the lease.[40] A mere see as to the occupancy of land is not entitled to notice to quit nay be ordered to vacate at any time and becomes a trespasser on failure to obey such an order.[41] A mere intruder, occupying out claim of lawful authority, cannot insist upon any rights

Brandenburg v. Reitman, 7 Colo. 3 Pac. 577.

Simpson v. Applegate, 75 Cal. 17 Pac. 237; Bolton v. Landers, al. 104; Eberwine v. Cook, 74 377; Sims v. Cooper, 106 Ind. N. E. 726; Tobin v. Young, 124 507, 24 N. E. 121; Roosevelt v. gate, 110 Ill. 595; Bodwell ite Co. v. Lane, 83 Me. 168, 21 829; Herrell v. Sizeland, 81 Ill. Fogle v. Chaney, 12 B. Mon.) 138; Den v. Blair, 15 N. J. L. Tuttle v. Reynolds, 1 Vt. 80; nberlin v. Donahue, 45 Vt. 50; rick v. Tavener, 9 Grat. (Va.)

Kunzie v. Wixom, 39 Mich. 384; Steinhauser v. Kuhn, 50 Mich. 367, 15 N. W. 367; Vincent v. Corbin, 85 N. Car. 108; Head v. Head, 7 Jones L. (N. Car.) 620; Ladd v. Riggle, 6 Heisk. (Tenn.) 623; Doe v. Williams, 2 Cowp. 621; Doe v. Hull, 2 D. & R. 38; Doe v. Stanion, 1 M. & W. 695; Tew v. Jones, 13 M. & W. 12.

[37] Head v. Head, 7 Jones L. (N. Car.) 620, per Pearson, J.

[38] Doss v. Craig, 1 Colo. 177; Catlin v. Washburn, 3 Vt. 25.

[39] Rabe v. Fyler, 10 Sm. & M. (Miss.) 440.

[40] Trustees &c. v. Meetze, 4 Rich. L. (S. Car.) 50.

[41] Johns v. McDaniel, 60 Miss. 486.

against the rightful owner growing out of his occupation, and th
fore is not entitled to notice to quit.[42]

§ 258. Where a certain kind of notice is by statute required terminate a tenancy, a proper notice is essential to end the holdi The tenant will continue liable for rent even after he has ab doned the premises for a longer time than the period for which holds, unless he gives the required notice.[43] It is usually requi that notice be in writing and this requirement must be complied w to render the notice effective. An oral notice will not end the t ancy.[44] The tenant's abandonment which is known by the landl will not end the tenancy unless the landlord accepts a surrende For the landlord to accept possession of course terminates the h ing and ends the liability of the tenant for future accruing r Such was the ground for decision in a case where the lessor accep payment of a judgment for rent covering a short period after tenant abandoned the premises. By so doing the landlord wai his right to hold the tenant for future rent.[46] A notice from a t ant to his landlord that he has transferred the premises is not g as a tenant's notice to quit and does not end the tenancy because a sufficient compliance with the statute.[47]

§ 259. The rights and duties in respect to the giving of notice quit between landlord and tenant are mutual and reciprocal. common case is that of the landlord who is required to give notic get rid of the tenant, but in all periodical tenancies the landlor entitled to a notice of equal length before the tenant can leave premises and terminate his liability for rent.[48] That some do may have existed on this point is shown by the language of the c in an early Vermont case. The tenant from year to year had after only two weeks' notice and denied his liability for future r Judge Bennett said: "The tenant could not quit at pleasure, thus debar the landlord of all accruing rent. In a tenancy fr year to year, a right to notice should, at least to some extent, be

[42] Lewis v. Ringo, 3 A. K. Marsh. (Ky.) 247; Petty v. Malier, 15 B. Mon. (Ky.) 591, 606.

[43] Rollins v. Moody, 72 Me. 135; Smith v. Smith, 62 Mo. App. 596.

[44] Chapman v. Tiffany, 70 N. H. 249, 47 Atl. 603.

[45] Taylor v. Tuson, 172 Mass. 145, 151 N. E. 462; Waples v. City New Orleans, 28 La. Ann. 688.

[46] Betz v. Maxwell, 48 Kan. 142 Pac. 147.

[47] Whicher v. Cottrell, 165 M 351, 43 N. E. 114.

[48] Currier v. Perley, 24 N. H. Morehead v. Watkyns, 5 B. M (Ky.) 228.

d as reciprocal."[49] In statutes regarding notice to quit there quently an express provision to the effect that the right to receive e to quit and the duty to give it is mutual between the parties. construction is usually given to statutes even where there are no ss provisions to this effect. In the case of the Kansas statute, ver, the language was so clear and unambiguous that the court notice from the tenant to the landlord was not necessary.[50] s based upon the Kansas act would probably receive a similar ruction.

II. *Sufficiency of Notice.*

60. That the notice must point to the time for the tenants uit is a general requirement based on obvious grounds of con- nce and justice.[51] In holding that a demand for present pos- n would not operate as a notice to quit at a future day it was after an enumeration of the essential parts of a notice: "It is, ver, unnecessary to say more here than that a simple demand esent possession, which is all that the testimony shows, is not tice to quit after the expiration of thirty days. Without an edent notice the landlord here was not entitled to possession, t must be plain that a demand for a possession to which he is ntitled amounts to nothing, certainly not to a notice to quit at a e time."[52] Thus testimony was adduced in another case that veral occasions the landlord told the tenant to clear out, to leave remises and that he would not have him there. Some of these rsations were more than half a year before the end of the term. the objection to their sufficiency was that they set no time at h the tenant must quit and further that they imported an im- ate quitting and alluded to no future period whatever.[53] And s been held that notice by a tenant that he surrenders possession e day on which the notice is given would not terminate the ten- on the expiration of one month from that date, even though month's notice only is required to terminate such a tenancy.[54] xplanation of this requirement the Massachusetts court said:

lall v. Wadsworth, 28 Vt. 410.

Nelson v. Ware, 57 Kan. 670, 47 540, reversing 4 Kan. App. 258, ac. 923.

Hanchet v. Whitney, 1 Vt. 311; y v. Hickman, Litt. Sel. Cas.) 266.

[52] McLean v. Spratt, 19 Fla. 97, 101, per Westcott, J.

[53] Hanchet v. Whitney, 1 Vt. 311.

[54] Eastman v. Vetter, 57 Minn. 164, 58 N. W. 989; Currier v. Barker, 2 Gray (Mass.) 224, 227; Grace v. Michand, 50 Minn. 139, 52 N. W. 390.

"The notice to quit is technical, and is well understood; it fi
time at which the tenant is bound to quit, and the landlord h
right to enter, and a time at which the rent terminates. The r
of both parties are fixed by it, and are dependent on it. Shoul
landlord decline to enter, and the tenant quit according to the n
the tenant could be no longer holden for rent, although he had
no notice to the landlord. The lease is 'determined' by such n
properly given, by either party. It is manifest, therefore, that
such consequences depend upon the notice to be given, the n
should fix, with reasonable exactness, the time at which these c
quences may begin to take effect."[55]

**§ 261. The time for quitting must be on the day of the year
the tenancy commenced.**[56] During the year of the holding, the
lord has no more right to require the tenant to vacate the pre
by notifying him to do so than a landlord would have to ma
similar demand during the term of a written lease. The lando
can only require the occupant to yield up possession at the en
a year and after giving him six months' warning that the holdi
to be brought to a conclusion. A notice to quit at any period s
or later than the conclusion of one of the periods of the ten
will not avail.[57] In a year to year tenancy the notice must sho
time when it is given and the time when the tenancy began, and
out this it cannot be good.[58] A notice to quit which breaks int
quarter, month or week, is not a good notice. The statutory n
for the determination of an estate at will, when the rent reserv
payable at periods of less than three months, must not only be as
as the interval between the days of payment but must termina
the expiration of such an interval.[59]

It is an almost universal custom to name the day correspon
to the date of the letting and entry of the tenant as the time
quitting and no objection seems to have been raised to the suffici
of notice on that ground.[60] In reckoning the conclusion of a per

[55] Currier v. Barker, 2 Gray (Mass.) 224, 227, per Shaw, C. J.

[56] Critchfield v. Remaley, 21 Neb. 178, 31 N. W. 687; Lesley v. Randolph, 4 Rawle (Pa.) 123; Brown v. Kayser, 60 Wis. 1, 18 N. W. 523; Barlow v. Wainwright, 22 Vt. 88; Silsby v. Allen, 43 Vt. 172; Blanchard v. Bowers, 67 Vt. 403, 31 Atl. 848.

[57] Waters v. Williamson, 59
L. 337, 36 Atl. 665.

[58] Phelps v. Long, 9 Ired. L.
Car.) 226.

[59] Prescott v. Elm, 7 Cush. (M
346.

[60] Roe v. Ward, 1 H. Bl. 97; D
Weller, 7 Term R. 474; Mills v.
14 M. & W. 72; Doe v. Matthew

holding, the day specified in the notice to quit must be the day esponding to the day of the commencement of the term.[61] If eriodical tenancy expires at midnight on the last day of a certain th, should the notice to quit specify the last day of that month he first day of the next month? The Supreme Court of Rhode nd comments as follows on this question: "If we seek to deduce le from the reason of the thing, we find that there are reasons both sides. On the one hand, if we say the tenant is bound to previous to the return of the day on which he enters, we virtu- deprive him of a part of his term; for he would, almost neces- ly, come in and go out in the daytime, and so would lose the ier part of the one and the later part of the other day. On the r hand if we say he is not bound to quit until the return of the on which he enters, we give him time for which he pays no rent. ule which should divide the day between the outgoing and the in- ing tenant, by making the term begin and end at noon, would rd the best solution of the difficulty. But such a rule, in the nce of any usage or statute establishing it, we cannot adopt. m such light as we have, we must determine what the rule actually and following the authorities which we have cited and resolving doubt which we may have in favor of the lessee, we have con- led somewhat against our first impressions, to uphold the previ- practice." The previous practice had been that the tenant could be required to leave before the day following the midnight when term came to an end.[62]

he opposing view is forcibly stated in a New Jersey case. The rt says: "I think it would be carrying the rule that a notice to must be made with reference to the end of the term to an il- cal and unreasonable length to hold that a notice given for the day mencing at that midnight is not a good notice. The law is rant of fractions of a day. The notice covers all and any period the twenty-four hours from midnight to midnight. The very ment the tenancy expires the tenant is confronted with a notice uit. On what process of reasoning can it be said that a new term commenced before notice is given."[63] A statutory notice to quit,

B. 675, 73 E. C. L. 673; Detroit ings Bank v. Bellamy, 49 Mich. 13 N. W. 606.

Finkelstein v. Herson, 55 N. J. 17, 26 Atl. 688; Kemp v. Derrett, amp. 510.

Waters v. Young, 11 R. I. 1, per Durfee, J., citing Taylor's Landlord and Tenant, § 477; Kemp v. Derrett, 3 Camp. 510, and Ackland v. Lutley, 9 A. & E. 879.

Steffens v. Earl, 40 N. J. L. 128, 136, per Reed, J. To the same effect see Petsch v. Biggs, 31 Minn. 392, 18

properly served in regard to other requirements as to time, was h not to be bad because it gave the tenant all of the first day of succeeding month in which to vacate.[64]

"On or before" in a notice to quit is common language of the meaning that if you remain one day after, you remain at your pe you are a trespasser and wrongdoer. By serving such a notice landlord does not give the tenant the privilege of leaving at o without further obligation to pay rent.[65]

§ 262. **Defective notice.**—Notices to quit being informal do ments are liable to contain errors either in the names of the par or in the description of the premises or in the wording of the no itself. Slight errors do not invalidate the notice and the govern principle has been said to be that a notice to quit will be held g if it is so certain that the tenant cannot reasonably misunderst it.[66] No particular form of notice to quit is necessary. It sh be reasonably certain, such as to appear to be a notice given by landlord and received by the tenant and in such terms as may understood by the tenant. A misstatement of the street where ho is situated is not fatal if the premises are located with reasona certainty.[67] The office of any description is to furnish the me of identification of the object described and this general truth applicable to that part of a notice to quit which describes the manded premises.[68] So, in so far as the requirement regarding scription is concerned, a notice from a landlord to a tenant has b declared sufficient if it apprise the latter what premises are manded.[69] A discrepancy in the description of the premises as gi in the notice and in the complaint was held not a material er rendering the notice ineffective, when the testimony was undispu that the thus differently described premises were the same premise Slight inaccuracies in wording will not invalidate notices, for courts do not treat them in a technical way. Thus a notice to q the house is a sufficient notice to quit the land upon which the ho stands.[71] Where notice is served upon a tenant "to leave" the pr

N. W. 101; Fox v. Nathans, 32 Conn. 348, and Leahy v. Lubman, 67 Mo. App. 191.

[64] Harris v. Halverson, 23 Wash. 779, 63 Pac. 549.

[65] Koehler v. Scheider, 16 Daly (N. Y.) 235.

[66] Cook v. Creswell, 44 Md. 581; McLean v. Spratt, 19 Fla. 97.

[67] Congdon v. Brown, 7 R. I. 1

[68] Epstein v. Greer, 78 Ind. 348.

[69] Whipple v. Shewalter, 91 I 114.

[70] Farnam v. Hohman, 90 Ill. 3

[71] Kuhn v. Kuhn, 70 Iowa 682, N. W. 541.

occupied by him, instead of "to quit," the words "to leave" are nymous with "to quit," and the irregularity would not invali- the notice.[72] But a statement by a lessee from month to month he "guessed" he would have to give up the house, is not a suf- t notice of an intention to terminate the lease.[73]

263. **A notice to quit should be addressed to the lessee or tenant ssession of the demanded premises,** the reason for this require- being that the notice shall come to his attention. So a notice h was actually received and read by an assignee of a term was to terminate the holding, although it was sent after the assign- and addressed to the original lessee.[74] A mistake in the name e tenant upon whom the notice is served does not invalidate it. ne case under consideration there was no uncertainty as to the from whom the notice emanated or the tenement to which it ed, and there could have been no doubt that it was meant for family occupying that tenement. The mistake in the Christian e of the tenant was therefore of no importance.[75] A written e of intention to quit, addressed by a tenant at will to the agent e landlord in the agent's own name, was held sufficient if given d received by him as such agent. If the person receiving the e was the agent in reference to the leasing of the building, and notice was in fact given to him by such agent, and was so re- d and so understood by him, the form of its direction would not er it invalid.[76]

264. **A formal insufficiency of a notice to quit is waived by the nt's repudiation** of the monthly tenancy and his refusal to quit he ground that he has a tenancy for years in the premises.[77] A nt, who has received an irregular notice to quit, waives the ir- larity by claiming a right to continue in possession of the prem- on another ground.[78] If a tenant chooses to comply with a e asking him to vacate a portion of the leased premises, he could, o doing, terminate his liability for rent to that extent. But the nt could not be compelled to vacate part and continue the ten- as to the balance of the premises; a notice to vacate a part

Douglass v. Anderson, 32 Kan. 4 Pac. 257.

Hunter v. Karcher, 8 S. Dak. 67 N. W. 621.

Farnam v. Hohman, 90 Ill. 312.

Clark v. Kelliher, 107 Mass. 406.

[76] Bay State Bank v. Kiley, 14 Gray (Mass.) 492.

[77] Drey v. Doyle, 28 Mo. App. 249.

[78] Drey v. Doyle, 99 Mo. 459, 12 S. W. 287.

would not justify him in vacating the whole, so that such a p notice would be ineffectual as a notice to quit and would only to protect the tenant in case he chose to comply with its terms.[79]

§ 265. **Authority of agent.**—In a case where a notice to quit been signed by an agent it was argued that such notice was in because the agent was not authorized in writing. The analogy u was to the execution of instruments within the statute of fr But the court held the notice valid, relying on a statutory prov to the effect that an oral authorization was sufficient for any pur except that an authority to enter into a contract required by la be in writing can only be given by an instrument in writing.[80] statute is only declaratory of the common law and the prin case probably represents the general law on the point. A noti quit is not instrumental in making a contract and therefore is n be governed by the rules which regulate the making of cont Any requirements as to form rest on statutes and such statute not to be extended by construction. A notice to quit, which has given by an unauthorized agent, cannot be subsequently ratifie the principal so as to be valid *ab initio*. Otherwise the princ by refusing to recognize his agent's act, could hold the other p to his contract; a notice to be valid must bind the party givi during the entire time that the notice must continue.[81] Whe notice in writing to quit is executed by an agent in behalf of principal, the ordinary mode of indicating the agency in use in c written instruments should be employed. The general rule that signature is sufficient if the relationship is unmistakably indic holds true in regard to notices to quit. So a notice signed A by C. D., "an authorized agent," was held sufficient although a b form would be "his authorized agent."[82]

§ 266. **Who may give notice after assignment.**—In case a l hold is assigned, notice to quit may be given by the original le to the assignee and in case of an underletting, the notice must be g either from the landlord to the original lessee or from the orig

[79] Alworth v. Gordon, 81 Minn. 445, 84 N. W. 454.

[80] Felton v. Millard, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750, Civ. Code, § 2309.

[81] Story on Agency, §§ 245-246; Doe v. Walters, 10 B. & C. 626; Doe v. Goldwin, 2 A. & E. (N. S.) 14 E. C. L. 610; Right v. Cuthell, 5 490, 500; Goodtitle v. Woodwa B. & Ald. 689; Pickard v. Perle N. H. 188.

[82] Reed v. Hawley, 45 Ill. 40.

to the under-tenant. So that a direct notice from the landlord under-tenant would be bad.[83] But a lessee cannot convey a r interest in the leased premises than he himself has and the ng of underleases could not extend the term of the holding er the contract between the original parties.[84] So a notice to erved on the original lessee in order to enable the landlord minate the tenancy is binding on under-tenants who acquire sion from the tenant after the service.[85]

ere a lease is given while the premises are in possession of an- under a tenancy, without attornment, the owner, rather than w lessee, is the proper party to give notice to quit and to sue ctment.[86]

7. A notice to quit should be absolute rather than in the al- ive. Where a lease could be determined by the lessor on ten notice, a demand for possession accompanied by a declaration f possession was not given a certain rate per day would be d as long as the tenant continues to occupy the premises, was ot valid as a notice to quit.[87] A notice to quit can hardly nsidered valid which gives the tenant an option of remaining ssession upon payment of a specified increased rent.[88] The ne, as thus laid down, has been modified to some extent. Thus s held that a notice to quit unless the tenant complies with ain condition was not insufficient if it gave no option which be exercised after the time fixed by the notice. So a notice ate unless the tenant is willing to enter into an immediate nent to pay an increased rent is valid.[89] This is in effect what e in every case where a landlord wishes to allow his tenant from to period to continue in possession at an increased rent. The rd may make proposals for a new tenancy upon different terms the tenant remain in possession he is presumed to consent to roposed terms. Under such circumstances mere silence on his vill amount to an assent.[90] Where a tenant refuses to comply

aters v. Roberts, 89 N. Car.

e *post*, § 554.

hilling v. Holmes, 23 Cal. 227.

aher v. Hanley Brewing Co., 23 43, 50 Atl. 392.

res v. Draper, 11 Mo. 548.

Arcy v. Martyn, 63 Mich. 602, W. 194.

[85] Candler v. Mitchell, 119 Mich. 464, 78 N. W. 551.

[86] Roberts v. Hayward, 3 C. & P. 432; Higgins v. Halligan, 46 Ill. 173; Despard v. Walbridge, 15 N. Y. 374; Reithman v. Brandenburg, 7 Colo. 480, 4 Pac. 788; Hunt v. Bailey, 39 Mo. 257.

with a notice to quit and continues in possession against the w
his landlord, he may still be charged with liability for the an
of the rent reserved in the lease at the option of the landlord.[91]
in a case where the notice to quit came from the tenant and the
posal for an increased rent from the landlord, continued posse
made the tenant liable as on a new contract.[92]

If the tenant manifests his dissent from the terms propose
increased rent, then no privity of contract will be created for th
creased rent, and if he holds over it will be considered to be o
terms of the lease by which he originally gained possession.
such case, the remedy of the landlord would be ousting the t
from the possession under the statute.[93] The rent cannot b
creased without an express or implied consent on the part of the
ant.[94] However, dissatisfaction with the proposed new terms
not necessarily show that the tenant refuses to accept them.
previous refusal of the tenant to sign a lease reserving higher
did not prevent the court from inferring his assent to the new t
from his silence after receiving notice of them.[95] The natu
the transaction as being the making of a new contract was illust
in a case where the landlord gave the alternative notice on a Su
In holding the tenant was not liable for the increased rent, the
said: "I do not forget that the contract was not completed on
day. It would have arisen only by the fact that retention of
session was an acceptance of the landlord's proposal or den
But in proving the contract it was essential to prove a business
ter occurring upon Sunday. Without proof of the notice, th
tention of possession had no significance whatever. It is unlike
cases in which a preliminary conference held on Sunday has
merged into a contract made upon a secular day. Here the
important circumstance out of which the contract grew was
upon a Sunday, by the person who is now seeking to enforce it.

Mere notice by a tenant holding over that he will hold und
different tenure is not sufficient to create a new lease.[97]

§ 268. Notice by parol to terminate a tenancy from year to was of course sufficient at common law.[98] A written documen

[91] Clapp v. Noble, 84 Ill. 62.

[92] Pittfield v. Ewing, 6 Phila. (Pa.) 455.

[93] Hunt v. Bailey, 39 Mo. 257; Galloway v. Kerby, 9 Ill. App. 501.

[94] Atkinson v. Cole, 16 Colo. 83, 26 Pac. 815.

[95] Griffin v. Knisely, 75 Ill. 41

[96] Cannon v. Ryan, 49 N. J. L 8 Atl. 293, per Reed, J.

[97] Sears v. Smith, 3 Colo. 287.

[98] Graham v. Anderson, 3 (Del.) 364; Haley v. Hickman, Sel. Cas. (Ky.) 266; Hanche

seal carried no greater weight than spoken words and written
nce was only made necessary by the statute of frauds, which did
xtend this requirement beyond certain cases of contractual rela-
A notice to quit served in no sense to create a contractual re-
. Thus the removal of a year to year tenant more than six
hs prior to the end of a year, which removal is brought to the
ion of the landlord, is a sufficient notice of the tenant's inten-
o quit, and ended the holding at the expiration of the year.[99]
wever, the statutes on this subject almost invariably provide
notice shall be given in writing. The object of this requirement
ofold: it provides the tenant with a convenient reference as to
uty in vacating the premises and serves to prevent the introduc-
of false testimony as to notices which were never given. This
rement means that the writing shall be given to the party who
tified and not merely read to him. The rule is supported by
eight of authority throughout the states, that, where the law
es notice in writing, the reading of a writing to the person to
tified is no compliance with the requirement.[100]

89. **Notices to and from joint owners.**—On the question whether
ice to terminate a lease made by joint tenants or tenants in com-
must come from all the joint owners or not, there is a conflict
thority. It has been held that notice by one of two joint lessors
alf of both was sufficient to terminate the entire tenancy. "The
hip upon the tenant, if he were not entitled to treat the notice
one as putting an end to the tenancy as to the whole is obvious;
owever willing he might be to be sole tenant of an estate, it is
kely he would be willing to hold undivided shares of it; and if
such a notice the tenant is entitled to treat it as putting an end
e tenancy as a whole, the other joint tenant must have the same
It cannot be optional on one side only."[101]
e Supreme Court of New Hampshire, reviewing the case just
d and recognizing its authority, nevertheless reached the oppo-
onclusion.[102] The ground of decision seems to be that as each
t in common could only demise his own interest so he could

ney, 2 Aik. (Vt.) 240; McLean
ratt, 19 Fla. 97.
dams v. Cohoes, 127 N. Y. 175,
E. 25.
Langan v. Schlief, 55 Mo. App.
Jenkins v. Jenkins, 63 Ind. 415;
v. Gray, 3 Sumn. (U. S.) 339;
Williams v. Brummel, 4 Ark. 129;
Fitts v. Whitney, 32 Vt. 589.

[101] Doe v. Summersett, 1 B. & Ad. 135, per Lord Tenterden.

[102] Pickard v. Perley, 45 N. H. 188, citing Doe v. Chaplin, 3 Taunt. 120, and Right v. Cuthell, 5 East 491.

only end the tenancy as to his own interest. In regard to the ar ment of hardship the court say: "On the other hand, cases mi often arise where it would be for the interest of the tenant to c tinue to hold the remaining share, and where he would elect to so if in his power. To hold, then, that a notice to quit by one several lessors must terminate the entire lease, might be a gr hardship to the tenant as it might compel him to give up what would be for his interest to hold, and what he had not been cal to surrender by the owner."

Without regard to the view adopted as between these conflict decisions, when the question is whether a notice must be given all of several joint owners or lessees neither of the arguments in fa of such a requirement will apply. So it was held that a notice quit, given to one of two joint tenants, was sufficient.[103] As long one of the parties jointly interested knew of the termination of tenancy there could be no hardship. Furthermore the question authority to give the notice does not enter into the question at s However, it has been held, without any argument or citation authority, that where there are two landlords, the tenants' not to quit must be given to each of them separately.[104]

§ 270. The requirements for notice to quit may be waived agreement between the parties. This holds true in all cases wh notice to quit is necessary and without distinction as to whether tenancy is strictly at will,[105] or from year to year.[106] There see to be no reason why a general waiver would not be valid and bindi upon the familiar doctrine of estoppel and a specific waiver of not at the end of a definite period could be supported on the same grou An agreement that a tenant at will may leave the premises at pleas and at a moment's notice is valid and relieves the tenant from g ing the notice mentioned in the statute.[107]

However, in one case it was said that such an agreement chan the tenancy at will into one for a fixed term. The reciprocal s render of rights constituted a consideration on each side of the agr

[103] Glenn v. Thompson, 75 Pa. St. 389.

[104] Bless v. Jenkins, 129 Mo. 647, 31 S. W. 938; Long v. Bolen Coal Co., 56 Mo. App. 605.

[105] Betz v. Maxwell, 48 Kan. 142, 29 Pac. 147; Engels v. Mitchell, 30 Minn. 122, 14 N. W. 510; Moody v. Seaman, 46 Mich. 74, 8 N. W. 7 Farson v. Goodale, 8 Allen (Mas 202.

[106] Lane v. Ruhl, 94 Mich. 474, N. W. 175; Graham v. Anderson Harr. (Del.) 364.

[107] Davis v. Murphy, 126 Mass. 1

and notice became unnecessary, because there was an agreed for the termination of the tenancy and notice was always dis-d with in such cases.[108]

respect to what constitutes a waiver, a distinction has been drawn een a specific agreement to waive notice and the mere circum-es that the duration of the term is left indefinite. In a case is kind, where the court held there was no waiver, it was said: true that the tenant was privileged to vacate at any time, the thus being made indefinite instead of fixed; but, as before l, this was not an agreement to waive the statutory notice. It mined the character of the lease and the nature of the tenancy, ng more. To do away with the notice when the tenancy is at an agreement that notice need not be given is necessary."[109]

accepting possession after tenant has abandoned the premises, dlord waives the requirement for a notice to quit and can recover only to the time he resumed possession.[110] But the acceptance ssession is a matter of intention and slight acts by the landlord ot prevent him from holding the tenant liable for rent. Thus dlord did not waive his right to notice, and accept the premises, oing into the rented house with a person who had been sent by enant to remove articles left there by him, or by entering after-, as cold weather approached, to see that the water was properly d off.[111]

rties might create an estate at will, which should terminate by wn limitation upon the contingency[112] of a failure by the tenant y the rent quarterly in advance.[113] But no such intention can ferred from a mere agreement by the tenant to pay rent quarterly dvance. So failure to pay rent would not enable the landlord aintain the summary process provided by statute, without giv-valid notice under the statute.[114] *A fortiori,* the tenant can-reat the tenancy as terminated by reason of his failure to comply his agreement to pay rent in advance. A mere agreement to rent in advance is not a condition precedent to the vesting of

Engels v. Mitchell, 30 Minn. 122, W. 510.

Paget v. Electrical &c. Co., 82 . 244, 246, 84 N. W. 800, per Col-J.

Vegely v. Robinson, 20 Mo. App.

[111] Finch v. Moore, 50 Minn. 116, 52 N. W. 384.

[113] See *supra,* § 114.

[113] Elliott v. Stone, 1 Gray (Mass.) 571.

[114] Elliott v. Stone, 12 Cush. (Mass.) 174.

the estate. So such an agreement does not give a tenant at
right to leave without giving the statutory notice to quit.[115]

§ 271. Enforcement of notice.—A valid notice to quit, well s
may be waived by the subsequent conduct of the parties, so th
right to end the tenancy, once acquired, is lost. This is the eff
accepting rent. Acceptance of rent accruing after the expirat
a notice to quit is a waiver of the notice.[116] The tenancy is
nized as still subsisting. Another act having the same effect
service of a second notice to quit. Giving a second notice aft
expiration of the first is, in effect, an admission that a tenanc
subsists, and is a waiver of the first notice. Upon receivir
second notice, the tenant unquestionably had the right to su
that the landlord had waived the first notice and that the te
would continue until the time fixed in the last notice and act a
ingly.[117] Similarly, a second notice from the grantee of a
waives a former one which was given by the lessor himself.[118]
ever, the doctrine of waiver would not be carried to such an
that it will be presumed from a mere reminder to the tenant t
at a time agreed upon. This was the effect of a second notice
set the same time for the termination of the tenancy that had
previously agreed upon. There was no recognition of the te
as still subsisting after the time when it was to terminate by th
notice.[119] Service of a notice to quit upon a tenant at will
which no action is taken by either party for several years do
affect the relation of the parties.[120] But a parol permission
main a few days after the expiration of the period fixed by a
to quit is not necessarily a waiver of that notice.[121]

III. *Service of Notice.*

§ 272. Personal service of a notice to quit upon a tenant
necessary.[122] Such a notice is not legal process.[123] The reas

[115] Sprague v. Quinn, 108 Mass. 553; Hilsendegen v. Scheich, 55 Mich. 468, 21 N. W. 894.

[116] Collins v. Canty, 6 Cush. (Mass.) 415.

[117] Dockrill v. Schenk, 37 Ill. App. 44; Morgan v. Powers, 31 N. Y. S. 954; Brierly v. Palmer, 16 East 53; D'Arcy v. Martyn, 63 Mich. 602, 30 N. W. 194.

[118] O'Neill v. Cahill, 2 B (Pa.) 357.

[119] Moody v. Seaman, 46 Mich N. W. 711.

[120] Newell v. Sanford, 13 Iow

[121] Babcock v. Albee, 13 (Mass.) 273.

[122] Doe v. Gray, 2 Houst. 135; Jones v. Marsh, 4 Term R

[123] Weeks v. Sly, 61 N. H. 89.

ring notice at all is to warn the other party of the termination e tenancy and thus prevent inconvenience and loss. If the ten- has actual knowledge, the object of the notice is accomplished. has been declared that a notice of this nature may be served he tenant, whether on or off the premises, or if he cannot be d, upon some one of proper age residing on the premises.[124] a general rule any mode of serving a notice to quit is sufficient e it can be traced to the hands of the party for whom it was in- ed in due time. Whenever the service upon the party in per- s practicable, it should be the mode adopted, but in the absence e tenant the notice may and should be served in the mode best lated to reach him."[126]

is a sufficient service of the notice to leave it at his house he premises with his wife in the absence of the tenant from .[127] Service was well made when the notice was given to a of tenant on the premises after tenant had been seen but had himself up in a room.[129] Service upon the tenant's husband upon premises is also sufficient.[130] The service of a notice to ter- te a tenancy at will upon an agent having charge and manage- of his principal's business with reference to the tenancy is as tive as service upon the principal himself.[131] But it was held o be a good service of a notice to quit to leave it at the lessee's e off the demised premises with some one not an agent of the les- r a member of his family.[132]

273. In England a notice to quit left with the servant or wife e tenant of the premises is not well served unless the contents of nessage is explained to the person receiving it.[134] It was ruled n early case that "The mere leaving of a notice to quit at the

Epstein v. Greer, 78 Ind. 348; e v. Johnson, 168 Mass. 17, 46 . 431; Doe v. Dunbar, Mood. &); Roe v. Street, 2 A. & E. 329; v. Ongley, 10 C. B. 25, 70 E. C. .

Alworth v. Gordon, 81 Minn. 453, 84 N. W. 454, per Start, C. an Studdiford v. Kohn, 46 Mo. 436.

Blish v. Harlow, 15 Gray ss.) 316; Doe v. Gray, 2 Houst. .) 135; Beiler v. Devoll, 40 Mo. App. 251; Hazeltine v. Colburn, 31 N. H. 466; Clark v. Keliher, 107 Mass. 406.

[129] McSloy v. Ryan, 27 Mich. 110.

[130] Cook v. Creswell, 44 Md. 581.

[131] Prendergast v. Searle, 81 Minn. 291, 84 N. W. 107.

[132] Hodgkins v. Price, 137 Mass. 13.

[134] Doe v. Dunbar, Mood. & M. 10; Roe v. Street, 2 A. & E. 329; Doe v. Ongley, 10 C. B. 25, 34, 70 E. C. L. 25; Smith v. Clark, 9 Dowl. 202.

tenant's house, without further proof of its being delivered to a vant and explained, or that it came to the tenant's hands, is not ficient to support an ejectment."[136] But the service was adeq where it was proved that the notice was delivered to the tenant's vant at the dwelling house of the tenant, off the premises, and its tents were explained at the time.[137] However, it has been sugge that no such distinction exists in this country.[138] Still the land must adopt the best reasonable means within his power to bring sonal knowledge of the notice home to the tenant. So it was held leaving a notice to vacate a farm with the servant in a city boar house where the tenant boarded was not a sufficient service. The ant or his wife could have been found by inquiry.[139] This que was presented to the Supreme Court of Massachusetts in a case w a leased shop was left in charge of a partner of the tenant and notice to quit was served on such partner. Justice Gray, speakin the court, said: "And upon principle, it would seem that a n delivered to an authorized agent upon the premises would be as likely to reach the tenant, or to be attended to if he did recei in person, as a notice given to one of his family or household a dwelling house in his absence. . . . Under these circumsta the mode of service adopted, if not the only one practicable for landlord, was clearly the most beneficial to the tenant and mus held sufficient."[140]

§ 274. **Service of a notice by mail** so as to cast upon the te the risk of receiving it is not authorized; yet if such mode of se is adopted and it is actually received by the tenant within the requ time it is sufficient.[141] In supporting its decision that such a mod service was good the Minnesota court said: "While the plaintif this case was not authorized to serve the notice by mail, so as to upon the defendant the risk of receiving it, yet if the notice was livered to and received by him within the required time it is im terial whether it was delivered to him by the postman or any o agency; for the essential thing is that he received the notice in

[136] Doe v. Lucas, 5 Esp. 153.

[137] Jones v. Marsh, 4 Term R. 464.

[138] De Giverville v. Stolle, 9 Mo. App. 185.

[139] De Giverville v. Stolle, 9 Mo. App. 185.

[140] Walker v. Sharpe, 103 Mass. 156.

[141] Candler v. Mitchell, 119 M 464, 78 N. W. 551; Alworth v. don, 81 Minn, 445, 84 N. W. 454.

e. When the plaintiff selected the mail as the agency for delivering notice to the defendant he took the risk of its coming into his hands due time. We hold the service of the notice good in this case upon sole ground that it was actually delivered to the defendant within required time."[142] In another case where this question was raised, court ventured the comment that service by mail would doubtless e been good had the letter addressed to the tenant through the mail n stamped; but as there was no evidence that this was done there s no *prima facie* evidence of service of notice on the tenant.[143]

Where it is allowed by statute that a three months' notice in writing terminate a tenancy can be served by mailing, it is essential that it received three months before the end of the term, as well as mailed t length of time before. It makes no difference that the landlord a non-resident of the state.[144]

A tenant at will sent to his landlord's office a notice to determine tenancy. The office door was closed and had on it a placard re-esting letters to be put in a box near by. The notice was put in the and the landlord found it there the next day. The court were of nion that dropping the notice in the box was not a proper service the landlord, and that it would take effect only from the time it s actually received.[145]

§ 275. **Service by posting.**—Ordinarily a notice to quit should be ivered into the hands of somebody and not merely left at the use.[146] But statutes in regard to notice frequently provide for the vice upon tenants who have abandoned the premises by posting. e usual requirement is that the notice be posted in a conspicuous ce on the premises and a copy mailed to the tenant. Where service y be made by posting the notice to a door on the premises when they ve been abandoned, it is not objectionable to have the premises de-ibed as "now occupied by you," for that is merely following out the tutory form of notice.[147]

§ 276. **Proof of service.**—Since a notice to quit does not in any y partake of the nature of a process issuing out of a court of law,

[142] Alworth v. Gordon, 81 Minn. , 453, 84 N. W. 454, per Start, C. J.
[143] Bless v. Jenkins, 129 Mo. 647, 31 W. 938, citing Briggs v. Hervey,) Mass. 186.
[144] Roberts v. Grubb, 5 Houst. el.) 461.
[145] May v. Rice, 108 Mass. 150
[146] Hazeltine v. Colburn, 31 N. H. 466.
[147] Consolidated Coal Co. v. Schaefer, 135 Ill. 210, 25 N. E 788.

code provisions applying only to notices given in judicial proceedi have no bearing on the question of service. The service of such noti must therefore be proved, as any other fact essential to the cause action, and parol testimony is admissible for the purpose.[148] T matter has been aptly summed up in a recent case of *Weeks* v. *Sly* where the court say: "The notice is not a legal process issuing out court, directed to an officer and to be served by him. Proof of serv may be made by any one who has knowledge of the fact.[150] The dence of the person making the service, given in court in a suit tween the parties, with an opportunity to the tenant for cross-exami tion, is competent evidence to prove the fact of service. Whether *ex parte* affidavit on a copy of the notice would be competent evide we have no occasion to inquire."

IV. *Statutory Provisions.*

In a very large proportion of the states the requirements as to not necessary to end a tenancy are to a greater or less extent regulated statute. The statutes on this subject are uniform in purpose but va ing in phraseology. A brief summary of the law of notice in different states, as created by statute and judicial decision, is h given, as the topic is too important to be omitted, and can be de with adequately in no other way.

§ 277. **Alaska.**—Where tenant refuses to pay rent or holds o after the termination of his lease or agreement, he is guilty of unlaw holding after written notice to quit has been served on him. T period of the notice is ten days, except in the case of farming land, which case it must be served for a period of ninety days.[151]

§ 278. **Arizona.**—Tenancies from year to year shall terminate the end of every year, unless a written permission shall be given said tenant to remain for a longer period; and permission so given sh specify the date till which the tenant may remain. Any lease fr month to month shall be terminated by the landlord giving at le ten days' previous notice of the termination of such lease. A tena holding possession against the will of his landlord shall not be c

[148] Chung Yow v. Hop Chong, 11 Ore. 220, 4 Pac. 326.

[149] Weeks v. Sly, 61 N. H. 89.

[150] Citing 2 Greenl. Ev., § 322.

[151] Carter's Annotated Alask Codes, Part IV, 1025, 1026, 1027.

ed a tenant at will or by sufferance. No notice is necessary to inate a lease for a definite time.[152]

279. **Arkansas.**—There are no statutes regulating the length of e required to terminate periodical tenancies, and the courts are efore governed by the common-law rule. This fixes the length of notice at six months in tenancies from year to year. But when ecurring periods are for less than a year, the length of notice must or the full time of the periodical term. Thus to end a tenancy month to month thirty days' notice is necessary, and notice given en days before the expiration of the term is not sufficient.[153] s it was obvious that a ten days' notice was not a reasonable one rminate a tenancy from year to year.[154]

280. **California.**—"A tenancy or other estate at will, however ted, may be terminated by the landlord's giving notice in writing he tenant . . . to remove from the premises within a period ot less than one month, to be specified in the notice."[155] This e should be served by delivering a copy to the tenant personally; he be absent, by leaving a copy to some person of suitable age and retion and mailing a copy to the tenant; or if the tenant's where- its cannot be found, by leaving a notice with the person residing the premises and posting a copy on a conspicuous place on the nises, and also sending a copy through the mail to the tenant.[156] ntry can only be made by the landlord after three days' notice, n subsequently to the termination of the tenancy. The action of wful detainer "cannot be maintained to recover possession from nts at will without first terminating the tenancy by giving at least ty days' notice in writing, and after the termination of the tenancy e days' notice in writing to surrender the possession; and these gs must be made to appear by express averments in the com- nt."[157] The death of the landlord terminates a tenancy at will, thereafter his heirs may maintain ejectment without previously ing a notice to quit or demanding possession of the tenant.[158] An erse claim of title also precludes the tenant from setting up his

[152] Rev. St. 1901, § 2694.
Stewart v. Murrell, 65 Ark. 471, W. 130.
[153] Bromley v. Aday, 70 Ark. 351, W. 32.
[154] Civil Code, §§ 789, 791.
[155] Code of Civil Procedure, § 1162.
[156] Martin v. Splivalo, 56 Cal. 128; King v. Connolly, 51 Cal. 181; Smith v. Hill, 63 Cal. 51.
[157] Joy v. McKay, 70 Cal. 445, 11 Pac. 763.

right to have the prescribed statutory notice to quit.[159] More where a tenant at will assigns his term he terminates the will, an assignee becomes a tenant at sufferance, who is not entitled to re a notice to quit.[160] Wherever a landlord is entitled to bring an a of forcible detainer against a tenant at sufferance, having given requisite notice to quit, he may, instead of proceeding in that a bring ejectment.[161]

§ 281. **Colorado.**—In all cases of tenancy from year to year same may be terminated by notice in writing to quit, duly served months prior to the end of the year; a six months' tenancy m terminated by service of a similar notice of one month; a mo tenancy may be terminated by a similar notice of ten days; a ten at will may be terminated by a similar notice of three days; such n shall describe the premises, the particular time when the tenancy terminate, and be signed by the party giving the notice. Whe term is certain, no notice to quit is necessary. Notice shall be s by delivering a copy to the tenant or some person on the prem Posting is allowable when the premises are vacant.[162] Where a te goes into possession without any agreement as to the time for hol and the rent reserved is payable monthly, the tenancy is from m to month. It could be determined by a notice ten days prior t end of the month.[163] But a monthly tenant cannot claim the of ten days' statutory notice to quit where he has refused to attorn has offered to leave and does so.[164]

§ 282. **Connecticut.**—A lessor desiring to recover possessio leased premises shall give notice to the lessee to quit possession at ten days before the termination of the lease or before the time spe in the notice for the lessee to quit. A duplicate copy of the n should be delivered to the lessee or left at his place of residence l indifferent person. If the lessee fails to comply with the notice a plaint in summary process may be brought before a justice of the p The ten days' notice to quit may be waived in any written lea Parol leases for one year or less are valid.[166] Where a parol lea

[159] Simpson v. Applegate, 75 Cal. 342, 17 Pac. 237.

[160] McLeran v. Benton, 73 Cal. 329, 14 Pac. 879.

[161] McCarthy v. Yale, 39 Cal. 585.

[162] Mills Ann. St. of Colo., §§ 1976, 1977.

[163] Edmundson v. Preville, 12 App. 73, 54 Pac. 394.

[164] Salomon v. O'Donnell, 5 App. 35, 36 Pac. 893.

[165] Gen. Laws 1902, 1078, 1079

[166] Gen. Laws 1902, 1089.

s rent to be paid at stated periods, and such rent remains unpaid days after it is due, such lease shall, at the option of the lessor and otice thereof to the lessee, expire and terminate.[167] Month to h and year to year tenancies still exist in this state, but the com- law doctrine of notice was never adopted to its full extent. Judge vorth explains this in an early case,[168] saying: "Our statute gives andlord in every case of holding over, a right and the remedy to n possession in thirty days. This statute has ever been held in ecticut to do away with the rule of six months' notice."

83. **Delaware.**—Unless three months' notice by either landlord nant is given prior to the end of a fixed term, the term shall be ded for another year, and all the stipulations of the demise shall nue in force.[169] There is no qualification or distinction between a ent and a non-resident landlord in the provision of this statute.[170]

84. **District of Columbia.**—When real estate is leased for a cer- term no notice to quit shall be necessary. A tenancy from month onth or from quarter to quarter may be terminated by a thirty notice in writing from either landlord or tenant, said notice to e on the day of the month from which such tenancy commenced n. A tenancy at will may be terminated by thirty days' notice in ng by either landlord or tenant. A tenancy at sufferance may be inated at any time by notice in writing from either landlord or nt, to take effect on the thirtieth day after the day of the service e notice. If such notice expires before any periodical installment nt falls due, the landlord shall be entitled to a proportionate part ch installment. Notice should be served on tenant personally if an be found, otherwise it is sufficient service to deliver the notice me person of proper age upon the premises, and in the absence of tenant or person it is sufficient to post the notice in a conspicuous e upon the leased premises.[171]

85. **Georgia.**—"Two months' notice is necessary from the land- to terminate a tenancy at will. One month's notice is necessary the tenant."[172] Where a tenant was to hold for an uncertain od, to be determined upon the happening of a contingency, he was

Gen. Laws 1902, 4044.
Larkin v. Avery, 23 Conn. 304, citing 1 Sev. Dig., 95 Dul. ed.
Laws of Delaware 1893, ch. 120,
[170] Roberts v. Grubb, 5 Houst. (Del.) 461.
[171] Code 1902, §§ 1218–1223.
[172] Code 1895, Vol. II, § 3133.

entitled to reasonable warning after the event happened before
required to vacate.[173] A person entering under a contract for a
was held to become, on refusing to execute the lease, a tenant a
who could be evicted on two months' notice.[174]

§ 286. **Idaho.**—"A tenancy or other estate at will, however cre
may be terminated by the landlord's giving notice in writing t
tenant to remove from the premises within a period of not less
one month, to be specified in the notice." "After such notice has
served, and the period specified by such notice has expired, but no
fore, the landlord may re-enter or proceed according to law to re
possession."[175] In all leases from month to month the landlord
upon giving notice in writing at least fifteen days before the expir
of the month, change the terms of the lease, to take effect at the ex
tion of the month.[176] Service of notice may be on the tenant in p
or by leaving it at his residence, between the hours of eight in
morning and six in the evening, with some person of suitable age
discretion. If the tenant's residence be not known, notice ma
enclosed in an envelope and put into the postoffice, directed to him

§ 287. **Illinois.**—"When the tenancy is for a certain period
the term expires by the terms of the lease, the tenant is then bou
surrender possession, and no notice to quit or demand for possessi
necessary." "In all cases of tenancy from year to year sixty
notice in writing shall be sufficient to terminate the tenancy at the
of the year. The notice may be given at any time within four mo
preceding the last sixty days of the year." "In all cases of tenanc
the month or for any other term less than one year where the te
holds over without special agreement, the landlord shall have the
to terminate the tenancy by thirty days' notice, in writing, an
maintain an action for forcible detainer or ejectment." Service
be made by delivering a copy of the notice to the tenant, or by lea
such copy on the premises with some one above the age of twelve y
or by posting a copy on unoccupied premises. The oath of the pe
serving a notice is *prima facie* evidence of the facts stated therein.

§ 288. **Indiana.**—"Estates at will may be determined by
month's notice, in writing, delivered to the tenant."[179] Under

[173] Sloat v. Rountree, 87 Ga. 470, 13 S. E. 637.

[174] Weed v. Lindsay, 88 Ga. 686, 15 S. E. 836.

[175] Civil Code 1901, §§ 2373, 2374.

[176] Civil Code 1901, § 2384.

[177] Code Civ. Procedure, § 3711

[178] Rev. St. 1903, ch. 80, §§ 5, 6 11, 12.

[179] Burns Ann. St. 1901, § 7088.

e notice is necessary to terminate a tenancy at will.[180] All ies from year to year may be determined by at least three s' notice given to the tenant prior to the expiration of the year, l all periodic tenancies of less than three months duration a equal to the interval between such periods shall be sufficient.[181] there is a general tenancy, and the rent is payable at stated three months' notice before the end of the year is necessary to ate the tenancy.[182] But a tenancy from year to year may be ated by a ten days' notice for failure to pay rent.[183] "Where ndlord agrees with the tenant to rent the premises to him for a ed period of time; or where the time for the determination of the y is specified in the contract; or where a tenant at will commits or in the case of a tenant at sufferance; or where by the express of the contract rent is to be paid in advance, and the tenant has d and refuses or neglects to pay the rent; and in any case where lation of landlord and tenant does not exist, no notice to quit e necessary."[184] Tenants at sufferance are not entitled to notice t.[185] Notice should be served on the tenant in person, or if he be found it should be served by delivering a copy to some per- proper age and discretion, residing on the premises, having first known to such person the contents thereof; and if no such person found then notice may be posted on the premises.[186] Service of may be made and proved by a constable.[187]

9. Iowa.—Thirty days' notice in writing must be given by party before he can terminate a tenancy at will, but when rent rved payable at intervals of less than thirty days, the length of need not be greater than such interval. In case of tenants occu- farms, the notice must fix the termination of the tenancy to take on the first day of March, except in cases of mere croppers, whose shall be held to expire when the crop is harvested. But where eement is made fixing the time of the termination of the tenancy, er in writing or not, it shall cease at the time agreed upon with- tice.[188] The provision regarding a notice to fix the termination tenancy of agricultural lands has no application when there is an

omler v. Hefner, 86 Ind. 108.
rns' Ann. St. 1901, § 7090.
liott v. Stone City Bank, 4 pp. 155.
ary v. Meier, 78 Ind. 393.
rns' Ann. St. 1901, § 7094.
[183] Cargar v. Fee, 140 Ind. 507, 39 N. E. 93.
[184] Burns' Ann. St. 1901, § 7095.
[185] Epstein v. Greer, 78 Ind. 348; Cressler v. Williams, 80 Ind. 366.
[186] Ann. Code 1897, § 2991.

express agreement.[189] A field tenant or cropper has no right c
turage either before or after the crop is harvested.[190] The thirty
notice in writing to terminate a tenancy at will is not required
the tenant does not occupy the premises with the assent of the la
after the termination of the written lease.[191] Where a tenancy
cease at an agreed time, the tenant is not entitled to a thirty
notice to quit.[192] An employe occupying premises belonging
employer after the termination of the service is entitled to no g
rights than a tenant holding over after the expiration of his term

§ 290. **Kansas.**—"Where the time for the termination of a te
is specified in the contract, or where a tenant at will commits
or in the case of a tenant at sufferance, and in any case where th
tion of landlord and tenant does not exist, no notice to quit sh
necessary." "All tenancies from year to year may be determined
least three months' notice, in writing, given to the tenant prior
expiration of the year."[194] This last section in effect dispense
the notice to the landlord, although the lack of notice must oper
an injustice to him in many cases.[195] "In case of tenants occu

[189] Johnson v. Shank, 67 Iowa 115, 24 N. W. 749; Waller v. Vermitt, 97 Iowa 518, 66 N. W. 763. In the former case Reed, J., said: "This provision, however, does not establish a rule for the government of parties in making their contract. It simply fixes a time at which, in the absence of express agreement to the contrary, the lease shall terminate. The lease in question terminated on that day, not because of any stipulation that it should terminate at that time, but because the parties had failed to agree that it should terminate on another date."

[190] Kyte v. Keller, 76 Iowa 34, 39 N. W. 928; Tantlinger v. Sullivan, 80 Iowa 218, 45 N. W. 765.

[191] McClelland v. Wiggins, 109 Iowa 673, 81 N. W. 156; Kellogg v. Groves, 53 Iowa 395, 5 N. W. 517.

[192] Shuver v. Klinkenberg, 67 Iowa 544, 25 N. W. 770.

[193] Grosvenor v. Henry, 27 Iowa 269. Where tenant entered for the remainder of an unexpired te
der the mistaken belief they
get a term for the ensuing y
was held that they did not en
stealth, but were entitled to
to quit like any other tenant
ing over after the expiration o
term. Gifford v. King, 54 Iow
6 N. W. 735.

[194] Gen. St. 1897, ch. 121, §§

[195] Nelson v. Ware, 57 Kan.
Pac. 540, reversing 4 Kan. Ap
45 Pac. 923. In this case the
say: "The language of the
is clear and unequivocal in d
what is necessary to determ
tenancy from year to year, a
only requirement is a written
for at least three months to t
ant. In effect it dispenses w
tice to the landlord, althou
lack of notice must operate as
justice to him in many cases.
an explicit statute, however,
covers the subject and lea
room for construction."

ıltivating farms, the notice must fix the termination of the
y to take place on the first day of March." "Thirty days' notice
ing is necessary to be given by either party before he can termi-
tenancy at will, or from one period to another of three months
; but where in any case rent is reserved payable at intervals of
an thirty days, the length of notice need not be greater than
ıterval between the days of payment."[196]
conduct of the parties may be such as to waive actual written
in case the tenant vacates the premises. Such was the effect of
ng payment of a judgment recovered for one month's rent after
l of the tenant's occupancy.[197]
ice may be served on the tenant, or if he cannot be found, by
ing a copy to some person over twelve years of age residing on
emises, having first made known the contents to such person.[198]

1. **Kentucky.**—"A tenancy at will or by sufferance may be
ated by the landlord giving one month's notice, in writing, to
ıant requiring him to remove. When a tenant enters or holds
es by virtue of a contract in which it is stipulated that he is to
for his landlord, and he fails to begin such labor, or if, having
without good cause fails to comply with his contract, his right
premises shall at once cease, and he shall abandon them without
d or notice."[199] A tenant under contract by which he is to culti-
op, landlord getting part of proceeds, is a "cropper" within the
ng of this section, and upon his failure to perform the contract
ndlord may maintain forcible detainer proceedings against
.

statutes modifying year to year and month to month tenancies
done away with the common law requirements for six months'
in the former and one month's notice in the latter kind of hold-
01

02. **Louisiana.**—"The parties must abide by the agreement as
at the time of the lease. If no time for its duration has been
l on, the party desiring to put an end to it must give notice in
g to the other at least fifteen days before the expiration of the
which has begun to run."[202] A lease from month to month con-

en. St. 1897, ch. 121, §§ 8, 9.
etz v. Maxwell, 48 Kan. 142, 29
47.
en. St. 1897, ch. 121, § 12.
t. 1903, §§ 2326, 2327.

[200] Wood v. Garrison, 23 Ky. L. R. 295.
[201] See § 238, and St. 1903, §§ 2295, 2296.
[202] Merrick's Rev. Civ. Code 1900, Art. 2686.

tinues till notice is given. Lessee s mere abandonment does not nate the lease.[203]

§ 293. **Maine.**—"Tenancies at will may be determined by party by thirty days' notice in writing for that purpose, given other party, and not otherwise save by mutual consent, exceptin where the tenant, if liable to pay rent, shall not be in arrears expiration of the notice, in which case the thirty days' notice af shall be made to expire upon a rent day. Either party may w writing the thirty days' notice or any part thereof. When the t is terminated the tenant is liable to the process of forcible ent detainer without further notice. . ." The wording of this stat been said to be awkward if not obscure.[205] The construction pu it by the court was that the "expiration of the thirty days' no terminate the lease at will must be coincident in point of time pay day of rent. Such notice given by either side will be valid there is an exception to this requirement so far as a termination landlord is concerned. His notice to the tenant may be thirt without respect to any pay day, if when the notice expires the shall be in any arrears of paying his rent. That is, it matt whether any rent becomes payable on such particular day or not, rent previously due then remains unpaid." No notice to quit is sary when the holding is for a fixed term, though such fixed term from the exercise of a power conferred by a previous lease to m extension.[206] The common law doctrine that a tenancy at w terminated by a transfer of the landlord's estate in force bef passage of this act[207] remains the law since its passage.[208] The had reference to the determination of tenancies by the will a of the parties, and not by operation of law. The alienee does come the lessor at will of the former lessee at will, nor does the tenant at will become tenant to the alienee. In conformity wi construction of the statute it should be held that a tenancy at w terminated by a transfer of the tenant's interest. Such was result reached in an earlier case where it was said that this superseded the mode of determining such tenancies at common

[203] Waples v. City of New Orleans, 28 La. Ann. 688.

[204] Rev. St. 1903, ch. 96, § 2; Rev. St. 1883, ch. 94, § 2.

[205] Wilson v. Prescott, 62 Me. 115, per Peters, J.

[206] Willoughby v. Atkinson &c. Co., 93 Me. 185, 44 Atl. 612.

[207] Esty v. Baker, 50 Me. 325

[208] Seavey v. Cloudman, 90 I 38 Atl. 540. *Contra*, Young v. 36 Me. 133.

[209] Cunningham v. Horton, 420.

Where a tenant, without written notice or the consent of the land-, abandons the possession of premises verbally leased to him his ility for rent continues for whatever period may elapse before the ncy becomes terminated by written notice, or until possession of premises may be accepted by the landlord.[210]

294. **Maryland.**—Where real estate is leased for a definite term t will and the lessor desires to repossess himself of the same he shall notice one month before the expiration of the term or determina- of the will; and if the tenant refuses to vacate he may make com- nt to a justice of the peace, etc. This section applies to periodic ncies, except that in cases of tenancy from year to year a notice in ing shall be given six months before the current year of the ten- ; and in weekly or monthly tenancies a notice in writing of one k or one month, as the case may be, shall be given. Where a tenant given notice by parol of sufficient duration to terminate his periodic ling, the landlord may prove such parol notice and insist that the ncy end and the tenant vacate. The provisions as to notice do not ly in Baltimore city.[211]

295. **Massachusetts.**—"Estates at will may be determined by er party by three months' notice in writing to the other party; and he rent reserved is payable at periods of less than three months, time of such notice shall be sufficient if it is equal to the interval veen the days of payment; and in all cases of neglect or refusal to the rent due from a tenant at will fourteen days' notice to quit, en in writing by the landlord to the tenant, shall be sufficient to ermine the tenancy."[212] As tenants at sufferance are expressly tted from this statute, the common law rule would prevail, and n tenants would not be entitled to any notice to quit.[213] The re-

[210] Rollins v. Moody, 72 Me. 135.

[211] Pub. Gen. Laws 1888, Art. 53, , 6, 7.

[212] Rev. Laws 1902, ch. 129, § 12.

[213] Kinsley v. Ames, 2 Metc. ass.) 29, 31. Chief Justice Shaw s: "By St. 1825, c. 89, § 4, com- nly called the landlord and ten- act, tenants at sufferance and ants at will were put on the same ting in regard to notice; and it s provided that such tenancies ght be terminated by either party by three months' notice, with some modification where the rent was payable more frequently than quarterly. But the Rev. Sts., c. 60, § 26, which provide that estates at will may be determined by three months' notice, designedly omit tenancies at sufferance because, as the commissioners say in their note to this section, so long as the party continues to be a mere tenant at sufferance, his estate is and ought to be determinable at any moment, at the

quirement for fourteen days' notice has not received a technic
struction, and if the notice is served more than fourteen days
the action is brought that is sufficient. Thus where a notice re
a tenant to quit within fourteen days from date and was served
day it was dated, the court would not entertain an objection
was not a proper and valid notice.[214]

§ 296. **Michigan.**—"All estates at will or by sufferance n
determined by either party by three months' notice given to the
party; and when the rent reserved in a lease is payable at peri
less than three months, the time of such notice shall be sufficien
be equal to the interval between the times of payment."[215] It
necessary to specify in the notice whether the holding is at will
sufferance.[216] A person in possession of land becomes a ten
sufferance if the owner suffers him to remain in possession a su
length of time to imply an intentional acquiescence in the occu
Although express consent to the holding is not necessary, implie
sent is necessary.[217] A tenant who wrongfully holds over aft
termination of his lease does not acquire, by a brief delay, e
entitling him to a three months' notice to quit.[218] In cases of t
from year to year a notice to quit, given at any time, shall be su
to terminate the holding at the expiration of one year from th
of the service of such notice.[219] A notice shall not be void by
of its mentioning a day for the termination of the tenancy not
sponding to the conclusion or commencement of any rent perio
in any such case the notice shall be held to terminate the tena
the end of a period equal in time to that in which the rent is mad
able.[220] An objection to the length of a notice given to termi

pleasure of the landlord. The defendant therefore was not entitled to notice to quit. He was precisely within the provision of the statute, which gives the process when the possession of lands or tenements is lawfully held by force."

[214] Johnson v. Stewart, 11 Gray (Mass.) 181.

[215] Comp. Laws 1897, § 9257.

[216] Bennett v. Robinson, 27 Mich. 26.

[217] School District v. Batsche, 106 Mich. 334, 64 N. W. 196.

[218] Benfey v. Congdon, 40 Mich. 283, 286.

[219] Comp. Laws 1897, § 9257; v. Warrell, 105 Mich. 310, 63 204.

[220] Comp. Laws 1897, § 9257. to the amendment of 1885 held that in order to termi tenancy at will by a notice than three months, the notic be for the full time of the r terval, and must terminate of the days fixed for the paym rent. Woodrow v. Michael, 13 187, 190; Huyser v. Chase, 13 98.

to year tenancy can not be raised for the first time on an appeal e Supreme Court, when at the time it is made the statutory year elapsed since the giving of the notice.[221] In cases of neglect or al to pay rent on a lease at will or otherwise, seven days' notice to given in writing by the landlord to the tenant, shall be sufficient termine the lease.[222] A tenant who has refused to pay rent until rs are made, and is accordingly notified to quit, has a right to d the lease as ended, and if the landlord then agrees to make the rs, provided the tenant will stay, the lease is a new one.[223]

297. **Minnesota.**—"Estates at will may be determined by either by three months' notice in writing for that purpose, given to the party; and when the rent reserved is payable at periods of less three months, the time of such notice shall be sufficient if it is to the interval between the times of payment; and in all cases glect or refusal to pay the rent due on a lease at will fourteen days' e to quit, given in writing by the landlord to the tenant, is ient to determine the lease.[224] Although this statute does not ex-ly mention tenancies from year to year, it was held to apply to , as such holdings were one species of tenancy at will according e common law idea.[225] But this section had reference only to the *h* of the notice, and does not otherwise change the existing rules w as to when the notice should terminate. For example, where nplication the tenancy is from quarter to quarter or from month onth, the rent being payable quarterly or monthly, the notice must terminate with the quarter or month; and where the tenancy is year to year the notice must terminate with a year, although the th of it may now be shorter than six months, as formerly required mmon law."[226]

tenancy at will where the rent is payable monthly may be deter-d by a month's notice to quit by either landlord or tenant, but the

Ganson v. Baldwin, 93 Mich. 53 N. W. 171.

Comp. Laws 1897, § 9257.

Conkling v. Tuttle, 52 Mich. 18 N. W. 391.

Stat. 1894, § 5873.

Hunter v. Frost, 47 Minn. 1, 49 . 327, overruling Smith v. Bell, inn. 524, 47 N. W. 263. In the cipal case it was said: "Notstanding what was decided in *Smith v. Bell*, *supra*, we have come to the conclusion, upon fuller examination, that the provisions of 75, §40, in relation to notices to quit, were intended to apply to all estates which do not terminate themselves without notice, and that for the purpose of such notices a tenancy from year to year is a tenancy at will."

[226] Hunter v. Frost, 47 Minn. 1, 49 N. W. 327.

notice must regularly terminate with some month counting fr beginning of the tenancy.[227]

The statute relating to service of notice in civil actions d apply to the service of a notice to quit.[228]

§ 298. **Mississippi.**—"Notice to quit shall be necessary only the term is not to expire at a fixed time. In all cases in which a is required to be given by the landlord or tenant to determine a t two months' notice, in writing, shall be given where the hol from year to year, and one month's notice shall be given wh holding is by the half year or quarter year; and where the lettin the month or by the week one week's notice, in writing, sl given."[229] This statute provides only for notice to terminate te from period to period. It makes no express provision requiring tenancy strictly at will shall be terminated by notice, for the fi tence is only negative in its effect. Such was the result reache this question arose in a case where the occupancy had been by but without the payment of rent.[230] And though the decisi rested on the ground that there was no estate but a mere licen argument would apply with equal force in the case of a strict t at will. So it is the opinion of the writer that the statute in th leaves the common law doctrine in regard to notice to terminate at will and by sufferance untouched. It follows that such holdi be terminated without notice, the only requirement being that sonable time be given the tenant to remove his effects.

§ 299. **Missouri.**—"Either party may terminate a tenanc year to year by giving notice, in writing, of his intention to ter the same, not less than sixty days next before the end of the ye tenancy at will or by sufferance or for less than one year may be nated by the person entitled to possession by giving one month's in writing, to the person in possession requiring him to remov notice to quit shall be necessary from or to a tenant whose ter end at a certain time, or when by special agreement notice is dis with."[231] A month's notice is necessary to terminate the t whether it be at will or by sufferance;[232] but by virtue of this

[227] Grace v. Michand, 50 Minn. 139, 52 N. W. 390; Finch v. Moore, 50 Minn. 116, 52 N. W. 384; Eastman v. Vetter, 57 Minn. 164, 58 N. W. 989.

[228] Alworth v. Gordon, 81 Minn. 445, 84 N. W. 454.

[229] Ann. Code 1892, § 2544.

[230] Johns v. McDaniel, 60 Mi

[231] Rev. St. 1899, §§ 4109–411

[232] Tarlotting v. Bokern, 541, 8 S. W. 547.

y tenancy for less than one year may be terminated by one month's ice.[283] A tenant is not bound by casual remarks made by his land- l about an increase of rent; and a mere verbal notice to a tenant m year to year is not enough to make him liable for increased rent ere he holds over.[284]

300. Montana.—"A tenancy or other estate at will, however ated, may be terminated by the landlord's giving notice in writing he tenant to remove from the premises within a period of not less n one month, to be specified in the notice. After such notice has n served and the period specified by such notice has expired, but before, the landlord may reënter or proceed according to law to over possession."[285] Service of the notice may be made personally the tenant, or it may be made by leaving the notice at his residence, ween the hours of eight in the morning and six in the afternoon, h some person of suitable age and discretion. If the residence be known, service may be made by putting the notice, enclosed in an elope, into the postoffice, directed to the tenant.[286]

301. Nevada.—In all leases from month to month, the land- l may, upon giving notice in writing at least fifteen days before the iration of the month, change the terms of the lease, to take effect the expiration of said month. Such notice shall of itself be ef- tual to establish the terms specified, if the tenant continues to hold premises. *Provided,* That a tenancy from month to month may terminated by the landlord giving notice of such termination ten s prior to the expiration of the month.[287]

302. New Hampshire.—"Any lessor or owner of lands or tene- nts may at any time determine any lease at will or tenancy at suffer-

[283] Berner v. Gebhardt, 87 Mo. App. App. 529. A tenant from month to month is entitled only to a month's notice to quit, even though he may have a right of action in equity to compel the execution of a lease for a given period. Such defense can not be set up in a justice's court. Gruenewald v. Schaales, 17 Mo. App. 324. Where one of the parties to a nthly renting attempts to termi- e the tenancy, the written notice st be served on the other party ore the beginning of the succeed- or last rental month. Gunn v. clair, 52 Mo. 327; Corby v. Brill Co., 76 Mo. App. 506. Where nth to month tenancy began on first of the month, a notice to t served, Feb. 10th, requiring ten- to quit March 31, was held suf- ent. Snyder v. Parker, 75 Mo.

[284] Witte v. Witte, 6 Mo. App. 488.

[285] Civil Code 1895, §§ 1240, 1241.

[286] Code of Civil Procedure 1895, § 1831. See § 280, post.

[287] Comp. Laws 1900, §§ 3827, 3838.

ance by giving to the tenant or occupant a notice in writing to qu same at a day named therein. If the tenant or occupant refu pay the rent due and in arrear upon demand, seven days' notice be sufficient. If the rent is payable more frequently than on three months, whether such rent is due or not due, thirty days' n shall be sufficient, and three months' notice shall be sufficient i cases. If a lessee violates the conditions of a written lease, seven notice shall be sufficient. If a lessee holds over after the expirati a definite written lease, seven days shall be sufficient. A lessee terminate his lease by notice in writing in the same manner a lessor."[238] The notice requisite under the statute to determine a ancy at will may require the tenant to quit on any day therein na it need not require the tenant to quit on the last day of the year, n or week of the tenancy.[239] Seven days' notice to quit is not suff to terminate a tenancy at will unless there has been a demand c precise amount of rent, due and in arrears, and a neglect or refu pay it.[240]

§ 303. **New Jersey.**—The statute provides "that in all cases w any tenant is or may be entitled by law to notice to quit the pre by him holden, in order to determine his tenancy, three months' n to quit as aforesaid shall be deemed and taken to be sufficient."[241] tenant is bound to quit the premises without notice when his leas pires.[242] But in all cases of tenancy from year to year or of unce duration the tenant must have notice.[243] A tenant at sufferan not entitled to notice at common law, and under the landlord tenant act a previous demand of possession only is required as a c tion upon which a summons may issue.[244] It is further provided supplemental section that in any letting where no term is agreed and the rent is payable monthly, so long as the tenant pays the re agreed it shall be unlawful for the landlord to dispossess the te before the first of April succeeding the commencement of the le

[238] Publ. St. 1901, ch. 246, §§ 2–6.

[239] Stickney v. Burke, 64 N. H. 377, 10 Atl. 852; Currier v. Perley, 24 N. H. 219; Hazeltine v. Colburn, 31 N. H. 466, 471.

[240] Nowell v. Wentworth, 58 N. H. 319. After giving a statutory seven days' notice to quit, landlord may waive the rights he thereby acquires to terminate the tenancy, as by an unconditional acceptance of a surety for rent. Whitney v. Swett, H. 10.

[241] Gen. St. 1895, p. 1921, § 2

[242] Decker v. Adams, 12 N. J.

[243] Den v. Drake, 14 N. J. L. Van Campden v. Depue, 11 N. 409; Den v. Snowhill, 23 N. 447.

[244] Moore v. Smith, 56 N. J. L 29 Atl. 159.

hout giving the tenant three months' notice in writing to quit.[245] s latter section does not apply where the letting is for a definite n, for "one month and a monthly term thereafter." Thus in one e the monthly term commenced on the tenth day of November, and as held that a notice to quit on the first day of April following was fficient.[246] The date set for quitting should have corresponded to time of the commencement of the tenancy.

304. New York.—"A tenancy at will or by sufferance, however ted, may be terminated by a written notice of not less than thirty s, given in behalf of the landlord to the tenant. The notice must given to the tenant or to a person of suitable age and discretion, ding upon the premises, or if neither the tenant nor such person be found, the notice may be posted on the premises. At the exation of thirty days after the service of such notice the landlord enter or maintain ejectment."[247] An exception to the general rule regard to the requirement for notice to terminate a year to year ancy is found in the law of New York. The statute authorizing mary process for the eviction of tenants provided for notice to ten- s at will or by sufferance, but no requirement of notice was pro- ed in the case of tenants for one or more years. So that a tenant n year to year, though in ejectment he was entitled to six months' ice, yet in summary proceedings was not entitled to any notice.[248] regard to this point Mr. Justice Balcom, a justice of the Supreme rt, reasons as follows:[249] "Now, as no notice to quit is required the Revised Statutes to be given to a tenant for one or more years uthorize proceedings for his removal, none need be given him; and tenant from year to year is a tenant for one or more years, he may proceeded against in a summary manner for holding over after the iration of his term without six or one month's previous notice." It ained for the Court of Appeals to extend this doctrine one step ther and hold that a tenant from year to year could vacate the mises at the expiration of any year of his holding without giving

[245] Gen. St. 1895, p. 1924, § 37.

[246] Finkelstein v. Herson, 55 N. J. 152, 26 Atl. 688. The court left construction of this supplental act to a future occasion. The tute in question had been charerized as a "curious act" by Mr. tice Reed in Shaw v. Schietinger, N. J. L. 152, 16 Atl. 186.

[247] Gen. Laws 1901, ch. 46, art. 6, § 198.

[248] Nichols v. Williams, 8 Cow. (N. Y.) 13.

[249] In Parke v. Castle, 19 How. Pr. (N. Y.) 29, the court fails to remember that by the old common law a tenancy from year to year was a modified tenancy at will.

any previous notice to quit, and escape any further obligation to rent. The court say: ". . . The landlord is not bound to give the ant notice to leave even for the purpose of instituting summary ceedings to recover possession of the premises. If such is the case i spect to the landlord, why should it not be so as to the tenant? T rights and duties are correlative and reciprocal." And again at an part of the opinion it is said: "At the end of the year thus hire implication the rights and the remedies which existed at the end o former term are again revived. Those rights are, as we have that the landlord may remove the tenant without notice, and the te may quit the possession without giving the landlord any notice o intention to do so."[250]

§ 305. **North Carolina.**—A tenancy from year to year ma terminated by a notice to quit, given three months or more befor end of the current year of the tenancy; a tenancy from month to m by a like notice of fourteen days; a tenancy from week to week, o days.[251] Under this statute a mere demand for possession of a to year tenant is insufficient, but it is sufficient to give a writte verbal notice to quit three months before the expiration of the cu year.[252]

§ 306. **North Dakota.**—A tenancy or other estate at will, hov created, may be terminated by the landlord's giving notice to the te in the manner prescribed to remove from the premises within a p specified in the notice of not less than one month. The notice be in writing, and must be served by delivering the same to the te or to some person of discretion residing on the premises. If ne can be found, the notice may be posted on the premises. After period specified by such notice has expired, but not before, the l lord may reënter or proceed according to law to recover possessio

§ 307. **Ohio.**—There are no statutes in this state in regard t requirements for notice to terminate tenancies. In ejectment a st requires ten days' notice before the commencement of the term at w the appearance of the defendant in the ejectment suit is to be ente and in forcible detainer three days' notice before the commence of the suit; but this is a different thing from notice to quit.[254]

[250] Adams v. City of Cohoes, 127 N. Y. 175, 28 N. E. 25.

[251] Code 1883, Vol. I, § 1750.

[252] Vincent v. Corbin, 85 N. Car. 108.

[253] Civil Code 1895, §§ 3346–33

[254] Gladwell v. Holcomb, 7 Ohi Dec. 369, quoting from Walker's Law, § 133; Bates Ann. St. § 6602.

o court feels itself bound by the technical rules of common law only ar as they are applicable to the changed conditions in a new coun-[255] So it was held in regard to a store-room rented for mercantile poses that the English rule requiring six months' notice to termi- a tenancy from year to year did not apply. The court adopted the that notice must be given a reasonable time before the expiration he year. In cases of doubt the question of reasonableness should be to the jury. But four months was a reasonable time as a matter w, and the trial court was justified in so instructing the jury.[256]

308. **Oregon.**—"All estates at will or by sufferance may be de-ined by either party by three months' notice, in writing, given to other party; and when the rent reserved in a lease at will is pay- at periods of less than three months, the time of such notice shall ufficient if it be equal to the interval between the times of pay-t." In cases of neglect to pay rent on a lease at will, fourteen ' notice to quit, given in writing by the landlord to the tenant, l be sufficient to determine the lease.[257] Twelve years after this ute was enacted the forcible entry and detainer act was thrust into statute without regard to its harmony or fitness with the other pro-ons.[258] This act provided that "the following shall be deemed s of unlawful holding by force within the meaning of this chapter: When the tenant or person in possession of any premises shall fail efuse to pay any rent due on the lease or agreement under which olds, or deliver up possession of said premises for ten days after and made in writing for such possession. 2. When, after a notice uit as provided in this chapter, any person shall continue in the ession of any premises at the expiration of the time limited in the e or agreement under which such person holds, or contrary to any dition or covenant thereof, or without any written lease or agree-t therefor."[259] In regard to these two acts it was held that the visions of the latter section could only be enforced as against a nt who is wrongfully in possession of the demised premises, and a edy under this act can not be taken against a tenant from year to until the tenancy is determined by the notice provided for in the

Bloom v. Richards, 2 Ohio St. Kerwhacker v. Cleveland &c. R. 3 Ohio St. 172; Drake v. Rogers, hio St. 21, 36.

Gladwell v. Holcomb, 7 Ohio Civ. 369. One of three judges dis-ted.

[257] Bell. & C. Ann. Codes & St. 1902, § 5390.

[258] Rosenblat v. Perkins, 18 Ore. 156, 22 Pac. 598.

[259] Bell. & C. Ann. Codes & St. 1902, § 5755.

earlier statute or by agreement of the parties. A tenant, theref possession of demised premises without any written lease or ment can not be dispossessed under this act until he is in the wr Where the letting is for less time than one year the period f notice is fixed by the manner of paying the rent. Thus if the paid monthly, a month's notice is required.[261] A notice to quit be served by being left with the tenant or person in possession premises. Proof of service may be by parol.[262]

§ 309. **Oklahoma Territory.**—"Thirty days' notice in wri necessary to be given by either party before he can terminate a t at will or from one period to another of three months or less; but in any case rent is reserved, payable at intervals of less than days, the length of notice need not be greater than such inter tween the days of payment. All tenancies from year to year r determined by at least three months' notice, in writing, given tenant prior to the expiration of the year. In the case of tena cupying and cultivating farms, the notice must fix the termina the tenancy to take place on the first day of January." Notice may be given in case of non-payment of rent, the duration of the being ten days where rent is payable at intervals of three mor longer and five days in other cases. "When the time for the te tion of a tenancy is specified in the contract or where a tenant commits waste, or in the case of a tenant by sufferance, and in a where the relation of landlord and tenant does not exist, no no quit shall be necessary." Notice may be served on the tenant, he can not be found, by delivering the same to some person over years of age, residing on the premises, having first made known t person the contents thereof.[263] In a tenancy from year to y notice is necessary from the tenant to the landlord.[264]

§ 310. **Pennsylvania.**—It is provided in the landlord and act that a landlord may require his tenant or lessee to remov the premises, and if such tenant or lessee shall refuse to comply with in three months after such request to him is made, the la

[260] Rosenblat v. Perkins, 18 Ore. 156, 22 Pac. 598.

[261] Rosenblat v. Perkins, 18 Ore. 156, 22 Pac. 598.

[262] Chung You v. Hop Chong, 11 Ore. 220, 4 Pac. 326.

[263] Rev. St. 1903, §§ 3323-3329. The topic of notice is touched partially covered a second §§ 4047-4049.

[264] Nelson v. Ware, 57 Ka 47 Pac. 540, modifying 4 Ka 258, 45 Pac. 923.

make a complaint and have a warrant issued in the nature of a mons.[265] Where the lease is from year to year the notice to quit t be given three months before the expiration of the current .[266] But if the lease is for a fixed definite period, to expire at a ain time, a notice before the expiration of the term is unnecessary; ne tenant do not then remove, the landlord may, after its expira-, give notice and proceed under this act.[267] The tenant may waive notice, but such waiver must be expressly found by the jury form- the inquisition.[268]

311. **Rhode Island.**—"Tenants of land or tenements at will or sufferance shall quit upon notice in writing from the landlord he day named therein." "Tenants by parol of lands, buildings, or s of buildings, from year to year, shall quit at the end of the year n notice in writing from the landlord, given at least three months r to the expiration of the occupation year." Tenants for less than ear shall quit upon notice given at least half the period of the n, not exceeding in any case three months, prior to the expiration he term. Notices given by the tenant to the landlord shall have same effect for all purposes as if given by the landlord to the nt.[269] Under this statute a tenant at sufferance is entitled to a no- to quit and the term "tenant at sufferance" is used in its technical mon law sense.[270] The Supreme Court of the state construed this ute to mean that a tenant strictly at will or by sufferance was en- d to a day's notice only. But if the notice were unreasonably short tenant might be entitled, after the tenancy was terminated, to ess and egress for the purpose of removing household effects or ng emblements, without making himself liable as a trespasser.[271]

Brightly's Purdon's Dig. St., Ed., p. 1163, § 17.

Lesley v. Randolph, 4 Rawle .) 123; Boggs v. Black, 1 Binn. .) 333; Fahnestock v. Fauste- er, 5 S. & R. (Pa.) 174; Logan Herron, 8 S. & R. (Pa.) 459; rd v. Cozens, 2 Ash. (Pa.) 131; sons v. Roumfort, 2 Pears. (Pa.)

Logan v. Herron, 8 S. & R. .) 459; Bedford v. McElherron, & R. (Pa.) 49; Evans v. Hast- , 9 Pa. St. 273.

Hutchinson v. Potter, 11 Pa. St. 472; Wilgus v. Whitehead, 89 Pa. St. 131.

[269] Gen. Laws 1896, ch. 269, §§ 1–5.

[270] Johnson v. Donaldson, 17 R. I. 107, 20 Atl. 242. The "notice in writing" to terminate lettings required by Gen. St. R. I., chap. 221, is an original notice, not a copy of the notice. Hence when it appears that the only notice served on defendant was such a copy, it was held that no notice had been given. Mathewson v. Thompson, 12 R. I. 288.

[271] Payton v. Sherburne, 15 R. I.

§ 312. South Carolina.—Every lease having a definite period for its determination shall end absolutely and unequivocally a time without any notice. In a tenancy strictly at will proceedi eject the tenant may be instituted ten days after he is notified to the premises.[272] In tenancies from year to year three months ha substituted as the customary period for notice in place of six m which the English law required. For tenancies of shorter contin which are generally of less valuable tenements, a shorter not required.[273]

§ 313. South Dakota.—A tenancy or other estate at will, ho created, may be terminated by the landlord's giving notice to th ant to remove from the premises within a period specified i notice, if not less than one month. The notice must be in w and must be served by delivering the same to the tenant or to person of discretion residing on the premises. If neither can be notice can be posted on the premises.[274]

§ 314. Virginia.—"A tenancy from year to year may be term by either party giving notice in writing prior to the end of any for three months, if it be of land within, and for six months, land without a city or town, of his intention to terminate the When such notice is to the tenant it may be served upon him or any one holding under him the leased premises, or any part th When it is by the tenant it may be served upon any one who, time, owns the premises in whole or in part, or the agent of owner, or according to the common law. This section shall not where, by special agreement, no notice is to be given; nor shall be necessary from or to a tenant whose term is to end at a c

213, 2 Atl. 300. The court say: "The natural construction of this section is that the tenant receiving notice shall quit on the day named, and that all he can require is that the notice shall give him a day. If this view be correct the notices were good. The defendants contend that the construction is too strict and that 'notice' means 'reasonable notice.' We should be inclined to construe the section so, if the language were that the tenants 'shall quit upon notice in writing from the lessor or owner,' without more; but the section ad the day named therein,' whi seems to us, clearly indicates tention to leave the length notice to the discretion of the or owner giving it. To hol 'notice' means 'reasonable is to open the door to cont such as it was the intenti [this] chapter . . . to ave

[272] Civ. Code 1902, §§ 2415, 2

[273] Godard v. South Caroli Co., 2 Rich. L. (S. Car.) 346.

[274] Civ. Code 1903, §§ 262, 26

[275] An agreement under seal by a tenant that he will surrender sion whenever a purchaser from the landlord requires it consti- him a tenant at will, or at sufferance, and he is not entitled to onths' notice to quit. If a tenant claims to hold adversely to his ord he is not entitled to notice.[276] But a tenant at will, as, for ple, a person put in possession of land under an agreement for ase, but who is in default in the payment of the purchase money, liable to be turned out of possession by ejectment without pre- demand or notice by the owner.[277]

15. **Washington.**—Tenancy from month to month or from l to period on which rent is payable may be terminated by writ- otice of thirty days or more preceding the end of any of said ns or periods given by either party to the other.[278] However, the le entry and detainer statute renders this provision for thirty notice practically nugatory by providing that when a lessee with nly or other periodic rent reserved continue in possession after d of any such month or period in cases where the landlord, more twenty days prior to the end of such month or period, has served e on him to quit, he is guilty of unlawful detainer.[279] In passing the length of the notice it was held to be sufficient to give twenty notice prior to the end of the month or period, excluding the day rvice. Thus a notice served the eleventh would be sufficient to nate a tenancy at the end of a month having thirty-one days.[280] a notice is not invalid because it gives the tenant all of the first f the succeeding month in which to vacate.[281] As a result of these es it seems that where the period between rent payment was e months, or where a tenancy from year to year was created by ss agreement, the holding could be terminated by twenty days' e given prior to the expiration of the year. "In all cases where ises are rented for a specified time, by express or implied con- the tenancy shall be deemed terminated at the end of such ied time."[282] A tenancy at sufferance shall terminate immedi- upon a demand for possession by the owner.[283]

ode 1887, § 2785.

Harrison v. Middleton, 11 Grat. 527.

ones v. Temple, 87 Va. 210, 12 404; Twyman v. Hawley, 24 (Va.) 512.

Ball. Code 1897, § 4569.

Ball. Code 1897, § 5527, sub-

[280] McGinnis v. Genss, 25 Wash. 490, 65 Pac. 755; Ferguson v. Hoshi, 25 Wash. 664, 66 Pac. 105.

[281] Harris v. Halverson, 23 Wash. 779, 63 Pac. 549.

[282] Ball. Code 1897, § 4570.

[283] Ball. Code 1897, § 4571.

§ 316. **West Virginia.**—"A tenancy from year to year r terminated by either party giving notice in writing to the othe to the end of any year, for three months, of his intention to te the same. When such notice is to the tenant it may be serve him or upon any one holding under him the leased premises, part thereof; when it is by the tenant, it may be served upon a who at the time owns the premises in whole or in part, or the a such owner, or according to the common law. This section sh apply where, by special agreement, no notice is to be given; no notice be necessary from or to a tenant whose term is to end a tain time."[284] Tenants at sufferance are not entitled to notice prior to the institution of an action of ejectment against them.[285]

§ 317. **Wisconsin.**—A tenancy at will or by sufferance r terminated by the landlord's giving one month's notice in wri the tenant requiring him to remove or by the tenant's givi month's notice in writing that he shall remove. When the r served in a lease at will is payable at periods of less than one such notice shall be sufficient if it be equal to the interval b the times of payment. In all cases of neglect or refusal to pay t on such a lease fourteen days' notice to remove, given by the la shall be sufficient to determine the lease.[286] A tenancy from year may be terminated at the end of any year by either party to the other party a notice in writing, not less than thirty day to the date of such expiration, that he elects to terminate suc at the end of such year.[287] Notice shall be served by deliverir the tenant or to some person of proper age residing on the pr If no one can be found, the notice may be posted on the premi the expiration of the time required after the service of such the landlord may reënter or proceed to recover possession by ac law.[288] The thirty days' notice which is intended to terminate to year holding must require the tenant to quit at the end of one yearly periods.[289]

[284] Code 1899, ch. 93, § 5.

[285] McClung v. Echols, 5 W. Va. 204.

[286] St. 1898, § 2183.

[287] St. 1898, § 2187. This changed the existing law as laid by the case of Brown v. Kayser, 60 Wis. 1, 18 N. W. 523, that six months was necessary to terminate ancy from year to year.

[288] St. 1898, § 2184.

[289] Peehl v. Bumbalek, 99 W 74 N. W. 545.

CHAPTER V.

COVENANTS IN LEASES.

istruction and Effect, §§ 318–35.
Renewal of Lease, §§ 336–48.
Quiet Enjoyment, §§ 349–71.
Regard to Building and Improvements, §§ 372–381.
5. Restricting Use of Premises, §§ 382–386.
6. As to Sale of Premises, §§ 387–388.
7. For Insurance, §§ 389–390.
8. For Repairs, §§ 391–410.
9. To Pay Taxes, §§ 411–420.

I. *Construction and Effect.*

18. A covenant is an agreement, convention or promise be- two or more parties, by deed, signed, sealed and delivered, by either of the parties pledges himself to the other that some- is either done or shall be done.[1] Blackstone says it is "a species press contract contained in a deed to do a direct act or omit Looking at the matter from a different point of view it has stated that any agreement under seal is a covenant, the seal the distinguishing feature between it and a simple contract.[3] true that a covenant can only be created by deed, but it may be ll by deed-poll as by indenture; for the covenantee's acceptance e deed is such an assent to the agreement as will render it bind- n him.[4] Where the instrument is in the form of an inden- and is intended to be signed by the lessee, but he fails to do he effect of delivery is not clear. The estate passes to the , but it has been suggested that he is not bound to perform ovenants because the lessor waives his right to insist on them by ing the lease to be put on record without the lessee's signature.[5] e it has been held that the technical action of covenant could e maintained against a grantee under a deed-poll, because he had

ack's Law Dict.
Bl. Comm. 155.
ndel v. President &c., 1 Harr.) 151.
reenl. Cruise Dig., ch. 26, tit. 32, § 3; Shep. Touch. 177; Spaulding v. Hallenbeck, 35 N. Y. 204; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35.

not sealed the deed,[6] it is commonly said that the preponder authority is the other way.[7] Platt, in his treatise on covenant stating his view that the proper rule is not to allow the actio on to say, "Perhaps, however, the doctrine has been too lon tioned (that such an action can be maintained) to be now re At all events, it is an introduction of an equitable principle court of law, the acceptance of a deed being considered equiva to an actual execution by the lessee."[8] "The doctrine is perfect settled," said Chief Justice Bigelow, "that when a party ac deed-poll or instrument in the nature of a deed-poll, by wh obtains a right or interest in property on condition or with a s tion that he shall pay a sum of money or perform a certain d becomes thereby bound to pay the money or perform the duty having signed and sealed the deed, he is not liable for bre covenant; but by accepting the deed he assumes the perform the condition or stipulation from which the law will imply a p on which the action may be maintained."[9]

§ 319. No particular form of words is necessary to const covenant. Whatever shows the intent of the parties to bind t the performance of a thing stipulated, may be deemed a co without regard to the form of expression used. Express co may be created by words which at first sight might appear to rather as conditions, qualifications, or defeasances of cove The law has appropriated no particular form of expression t creation; and any words are sufficient which show the inten the parties.[11] The words of a covenant are narrowed or exten the apparent object or intent of the parties.[12] To ascertain tention of the parties the court may not only look to the inst

[6] Libbey v. Staples, 39 Me. 166.

[7] Hinsdale v. Humphrey, 15 Conn. 431; Burnett v. Lynch, 5 B. & C. 589; Maule v. Weaver, 7 Pa. St. 329; Platt on Cov. 18.

[8] Atlantic Dock Co. v. Leavitt, 54 N. Y. 35.

[9] Platt on Cov. 18.

[10] Maine v. Cumston, 98 Mass. 317; quoted in Rising Sun Lodge v. Buck, 58 Me. 426; Huff v. Nickerson, 27 Me. 106.

[10] Campbell v. Shrum, 3 Watts (Pa.) 60, 63; Peers v. Consolidated Coal Co., 59 Ill. App. 59 Smiley v. McLauthlin, 138 363; James v. Cochrane, 7 170, s. c. 8 Exch. 556; Clap Moyle, 1 Lev. 155; Parker v. nor, 2 Dy. 150, And. 19, 1 C Burnett v. Lynch, 5 B. & 602.

[11] 4 Cruise's Dig. 447; D Lyman, 6 Conn. 249; Bull v. 5 Cow. (N. Y.) 170.

[12] Shep. Touch. 169; Brow Wright, 2 B. & P. 13, 1 Inst.

lf, but also to the circumstances attending its execution. It is missible to introduce parol evidence of surrounding circumstances, order to arrive at the real intention of the parties and to make a rect application of the words of the contract to the subject-matter.[13] e word "agree" in a deed will make a covenant; and, though in the nection it is applicable to both parties, it may be referred to that ty upon whom the doing or not doing the thing agreed upon de- ves.[14] If a lessee for years covenants to repair, etc., provided ays and it is agreed that the lessor shall find great timber, this is ovenant on the part of the lessor to find the timber and not merely ualification of the lessee's covenant.[15] A mere recital of the build- s on the premises, contained in the description clause in a lease, s not amount to a covenant that such buildings will continue to nd on the premises.[16] A provision that full rent should not be rged till certain improvements were made did not amount to a enant on the part of the lessor to make the improvement.[17] And ease of a brickyard did not raise an implied covenant on the part the lessee to make brick,[18] though the lease was a peculiar one, and only rent to be paid by the lessee was twenty-five cents per thousand k. The lessor maintained that he could recover damages for the usal of the lessee to manufacture brick, upon the ground that there an implied covenant in the lease to that effect. This depended on the intention of the parties. The rule of construction is that language must not merely show that the parties contemplated t the thing might be done, but must amount to a binding agree- nt upon them that the thing shall be done.[19] When parties have ered into an agreement with express stipulations, the presumption hat they have expressed all the conditions by which they intend to bound, and their covenants cannot be extended by implication,

Proprietors &c. v. Hilton, 11 y (Mass.) 407; Knecken v. tz, 110 Ill. 264; Vaughan v. Mat- k, 23 Ark. 9. In the latter case ease described a lot of land by tes and bounds "together with a -proof brick warehouse built reon and all singular and other urtenances thereunto belong- ." This was held to be the cove- nt that a warehouse was fire- of.

Randel v. Chesapeake, etc., nal Co., 1 Har. (Del.) 151, 172, citing Holder v. Taylor, 4 Cruise 448.

[15] 1 Roll. Abr. 518; 6 Viner 381, Tit. Cov't C. 22, 23.

[16] Branger v. Manciet, 30 Cal. 624.

[17] Gatch v. Garretson, 100 Iowa 252, 69 N. W. 550.

[18] Smiley v. McLauthlin, 138 Mass. 363.

[19] James v. Cochrane, 7 Exch. 170, s. c. 8 Exch. 556; Moyer v. Mitchell, 53 Md. 171.

unless the implication is clear and undoubted.[20] The more reas implication seems to be that it was the understanding of the p that the lessor took the risk of the lessee's manufacturing bric intended to make the rent dependent upon the success of an e ment.[21]

A covenant in a lease of land, "to provide the said lessee suitable right of way to and from said lot," is not a covenant o ranty or guaranty, and it is not performed by showing a right existed by necessity. The lessee is not obliged to litigate the qu of right of way by necessity, but may rely on the lessor's co to supply a suitable right of way. The lessor's covenant is brol his inaction irrespective of any possible right of way by nec he could have performed his covenant by purchasing a right o He could not perform it, however, by doing nothing, by leavi lessee to assume all the vexation and expense of litigation wi joining owners. To induce the lessee to accept the lease the conceded that no suitable right of way yet existed and covenan provide one. The lease having been accepted with that covenar lessor cannot now be heard to assert that such a right of way e already in fulfillment of the covenant.[22] An instrument gran right of way for a log and lumber tramway, on condition the should not extend longer than the premises are used for such poses, was held to constitute a leasehold interest on condition sequent.[23]

§ 320. **Joint covenantors.**—Where there are several person cuting a deed, it is not necessary to affix a separate seal for provided it appear that the seal affixed was intended to be adop the seal of all.[24] This has been held where a deed was execut an attorney for several parties,[25] and where a deed was execut one partner for several members of a firm.[26] If there is bu

[20] Aspdin v. Austin, 5 A. & E. (N. S.) 671, 48 E. C. L. 671; Rashleigh v. South Eastern R. Co., 10 C. B. 612, 70 E. C. L. 612; Dermott v. Jones, 2 Wall. (U. S.) 1, 8.

[21] Smiley v. McLauthlin, 138 Mass. 363. A covenant in the lease of a coal mine to pay royalty by a certain date did not bind lessee to mine coal by that time, but merely fixed a time for payment. King v. Edwards, 32 Ill. App. 558.

[22] Bunker v. Pines, 86 Me. 138, 29 Atl. 959.

[23] Krapp v. Crawford, 16 524, 48 Pac. 261.

[24] Van Alstyne v. Van Sly Barb. (N. Y.) 383; McDill Dill, 1 Dall. (U. S.) 63; Yar v. Monday, 2 Dev. L. (N. Car. Flood v. Yandes, 1 Blackf. 102.

[25] Townsend v. Hubbard, (N. Y.) 351.

[26] Ball v. Dunsterville, 4 Te 313; Mackay v. Bloodgood, 9 (N. Y.) 285.

a contract, it is presumed to be the seal of the party whose ure is prefixed to it, but upon proof of its being made by the rity of the other parties, it will be held to be their seal also.[27] a lease is executed by a firm composed of several parties, the nts thereof are several as well as joint, and each individual er of the firm is liable on them.[28]

1. **Covenants have been divided into express and implied cove-** and the latter depend for their existence upon the intendment onstruction of the law. There are some words which of them- do not import an express covenant, yet being made use of in contracts have a similar operation, and are called covenants in implied covenants.[29] They are implied by the law, from the certain words having a known legal operation in the creation estate. All covenants between lessee and lessor are either cove- in law or express covenants.[30] Illustrations of this class are to nd in the effect of the words *grant, demise, etc.,* from which w implies a covenant that the lessee shall hold and enjoy the es against all lawful incumbrances.[31]

wever, if a covenant is raised by inference from a construction instrument it is an express and not an implied covenant. The ion of the covenant is the same, whether the language be precise xpress, or whether it be a matter of inference and construction. parties agree to do or not to do a certain thing the agreement express covenant whether they have used the word *covenant,* or words from which their meaning is to be inferred. It is not ss an express covenant, because the meaning is obscurely ex- d, and therefore discovered with difficulty.[32] Thus a covenant y a certain sum of money for land on a certain day was held

ibler v. Cowman, 7 Gill & J. 284.

nn v. Jaffray, 36 Kan. 408, 13 81.

con Abr. Covenant, B.

ughan's Reports 188; Cr. 139, b.

encer's Case, 5 Coke 16; e v. Samson, 1 Ves. Sr. 100; w's Case, Cro. Eliz. 214; Mer- Frame, 4 Taunt. 329; Shep. . 160; Com. Dig. Cov. A. 4; v. Mason, 5 Ill. 84; Crouch v. Fowle, 9 N. H. 219, 32 Am. Dec. 350; Grannis v. Clark, 8 Cow. (N. Y.) 36; Barney v. Keith, 4 Wend. (N. Y.) 502; Stott v. Rutherford, 92 U. S. 107, 23 L. Ed. 486. The covenant arising out of the words "yielding and paying" in a lease is an implied covenant, and the lessee is not liable on it for rents accruing after an assignment of his term. Kimpton v. Walker, 9 Vt. 191.

[32] Lovering v. Lovering, 13 N. H. 513.

to amount to a covenant on the part of the owner to convey the
A covenant by a lessee that he would at all times and seasons o
ing lime, supply the lessor with lime at a stipulated price, w
to be a covenant that he would burn lime at all such seasons.[34]
a covenant in a lease that the tenant will fold his flock wh
shall keep on certain specified parts of the premises, is bind
him to keep a flock and fold it on the premises.[35] In anoth
the lessor agreed that the lessee should *hold* and *occupy* the p
for a certain term. The court were of opinion that these
amounted to a general covenant for quiet enjoyment duri
term.[36]

§ 322. The general rule for interpretation of covenants in
is to expound them so as to give effect to the actual intent of t
ties as collected from the entire context.[37] "The scope and
every matter is principally to be considered, and if the sco
end of the matter is satisfied, then is the matter itself and the
thereof also satisfied."[38] "And the words of an indenture a
words of either party," as the matter is put in Touchstone, "and
they be spoken as the words of the one party only, yet they a
his words alone, but may be applied to the other party if they d
properly belong to him; for every word that is doubtful shall
plied and expounded to be spoken by him to whom they wi
agree according to the intent of the parties, and they shall
taken most strongly against one or beneficially for the other,
words of a deed-poll shall."[39] In construing a covenant in a le
indenture, the words of the covenant are to be taken howe
down in the lease as the words of the parties to whom they p
belong, or if properly belonging to both, as the words of bot
words of an indenture being the words of either party and no
taken most strongly against the one or beneficially for the
as the words of a deed-poll are. Under this rule it was held th
clause "the said gangway to be kept open for the benefit of
hereby leased and also of the lots hereunto adjoining" was a co

[34] Pordage v. Cole, 1 Saund. 319, 1.
[35] Shrewsbury v. Gould, 2 B. & Ald. 487.
[36] Webb v. Plummer, 2 B. & Ald. 746.
[37] Ellis v. Welch, 6 Mass. 246.
[37] Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937, af
39 Ill. App. 453; Peers v. C
dated Coal Co., 59 Ill. App
Walker v. Physick, 5 Pa. St.
[38] Reniger v. Fogossa, Plo
18.
[39] Sheppard's Touchstone 5

he lessee as well as of the lessor.[40] Where an owner of land has enanted to lease for use as a pasture and covenanted to furnish fficient supply of water, this is a contract for as much water as is uired for the cattle the pasture will support.[41] The same principle applied where the lessor of a dairy farm agreed to furnish cows for dairying, "the number not limited," at so much per annum each cow. This was construed to bind the lessor to furnish ugh cows to stock the land leased.[42] Under a lease reserving one- d the net products of a dairy, the lessee was bound to pay the cost abor employed to make butter, but could deduct the cost of trans- tation to market.[43] On leasing a farm and stock on the shares er articles, like horses, tools, etc., should be returned in kind, stock, such as hogs, calves and chickens, need only be returned to equal value and of like description.[44]

he positive affirmation of a covenant is not qualified by the state- t of its purpose as for the benefit of the lot leased and of the ining lots. Such an avowal of the purpose of a positive covenant stitutes the purpose neither a condition nor limitation of the enant; but simply declares the motive or inducement of the ies to enter into it. The motive may have been a wise or foolish —it may exist or it may have ceased to exist,—yet the covenant, t be lawful, remains unaffected.[45] A clause in a lease that the or shall have the right to sell the demised premises at any time ered by the lease, by giving the lessor two months' notice and the ilege of purchasing, is enabling and not restrictive. Independ- y of and notwithstanding this clause he may sell the reversion. e whole effect of the clause is to enable him to terminate the e, and sell the whole estate, first giving the lessee the oppor- ity of purchasing.[46] A provision that in case of a sale of the leased perty by the lessor, he should forfeit to the lessee a certain sum damages, implies an agreement that the lessor may terminate the e by such sale.[47]

Beckwith v. Howard, 6 R. I. 1; dell v. President &c., 1 Harr. l.) 151.

Crabtree v. Hagenbaugh, 25 Ill.

Griffiths v. Henderson, 49 Cal. See also, Smith v. Niles, 20 315, 49 Am. Dec. 782.

Reybold v. Reybold, 6 Houst. l.) 420. Under lease for crop t exempting landlord from further expense for labor, he was liable for additional work not included in specifications and done at his request. Barnes v. Hogate, 103 Iowa 743, 72 N. W. 688.

[44] Brockway v. Rowley, 66 Ill. 99.

[45] Beckwith v. Howard, 6 R. I. 1.

[46] Callaghan v. Hawks, 121 Mass. 298.

[47] Johnson v. King, 83 Wis. 8, 53 N. W. 28.

§ 323. "Covenants are either dependent, concurrent and mu or independent. The first depends on the prior performance of act or condition, and until the condition is performed, the other is not liable to an action on his covenant. In the second, mutua are to be performed at the same time, and if one party is ready offers to perform his part, and the other refuses to perform h who is ready and offers, has fulfilled his engagement and may tain an action for the default of the other, though it is not c that either is obliged to do the first act. The third sort is, either party may recover damages from the other for the inju may have received by a breach of the covenants in his favor; and no excuse for the defendant to allege a breach of the covenants c part of the plaintiff."[48] Where the parties are to perform concu acts, and the plaintiff's act forms the basis or consideration c defendant's act, the defendant may always excuse himself by re on the failure of the plaintiff.[49] But where the defendant's act upon an independent consideration, he cannot excuse himse showing a failure to perform on the part of the plaintiff.[50] H not made performance by the other party a condition precedent liability; but has trusted to a remedy by action on the agreem If covenants are to pay rent by instalments and to pay taxes as become due, each goes only to a part of the consideration of the formance of the contract on the part of the lessor and cannot, t fore, be mutually dependent covenants; covenants to be depe must be mutual, and go to the entire consideration.[52] The ord covenant of a landlord to make repairs is an independent cove and a mere failure to make repairs to the extent of diminishin value of the use of the premises without destroying their value, not defeat the right of the lessor to recover rent.[53] In a lease o

[48] Bailey v. White, 3 Ala. 330, per Collier, C. J.

[49] Lawrence v. Dole, 11 Vt. 549; Day v. Essex Co. Bank, 13 Vt. 97; Morris v. Sliter, 1 Denio (N. Y.) 59.

[50] Day v. Essex Co. Bank, 13 Vt. 97; Boone v. Eyre, 1 H. Bl. 273, *n.*; Pordage v. Cole, 1 Saund. 319, i.

[51] Morris v. Sliter, 1 Denio (N. Y.) 59; Northrup v. Northrup, 6 Cow. (N. Y.) 296; West v. Emmons, 5 Johns. (N. Y.) 179; Parker v. Parmele, 20 Johns. (N. Y.) 130; Couch v. Ingersoll, 2 Pick. (M 292; Thruston v. Minke, 32 487; Hamilton v. Thrall, 7 210.

[52] Butler v. Manny, 52 Mo. Smith v. Busby, 15 Mo. 387; B v. Pixley, 7 Johns. (N. Y.) Robb v. Montgomery, 20 Johns Y.) 15; Tinney v. Ashley, 15 (Mass.) 546; Lewis v. Chisholm Ga. 40; Pordage v. Cole, 1 S 319, i.

[53] Lewis v. Chisholm, 68 Ga.

e as a bathing house, it was urged that a covenant by the lessee to air was dependent on an implied agreement by the lessor to keep otel and adjoining premises in suitable repair for a bathing place. is implication was based upon a recital in the lease, which stated t "the lessor has established a watering or bathing place, and has sed it to be laid off in blocks, . . . and whereas it is his ect that said grounds shall be kept in good order, etc." In this re was no covenant, either express or implied, that the lessor ild build or maintain a hotel or keep the grounds in good order table for a bathing place. Such was doubtless his intention, as ressed in the recital; but this was intended only for his own bene- and whether he would continue to do so or not was left to depend irely on his own will. The tendency of modern decisions is not to ply covenants which might and ought to have been expressed if ended. A covenant is never implied that a lessor will make any airs.[54] Here the supposed implied covenant on the part of the or is not for repairs to the property demised, but relates to other perty belonging to the lessor. In no case has a covenant of that d been implied. By the terms of the lease the right of the lessee ame forfeited, if the cottage should be suffered to remain out of air, and this duty of the lessee to repair was contingent on no dertaking or agreement of the lessor, but was an absolute obliga- n.[55]

§ 324. **Covenants in an agreement will be construed as conditions cedent or as independent agreements,** according to the intention of parties and the good sense of the case, and technical words must e way to such intention.[56]

Therefore, in determining how to class covenants, the safest and t course is to ascertain what was the intention of the parties from instrument they have executed, and then to give the covenants h a construction as will carry this intention into effect.[57] If it pears, on the whole, that any substantial part of the agreement

[54] Sheets v. Selden, 7 Wall. (U. 416, 423.

[55] Moyer v. Mitchell, 53 Md. 171.

[56] Parmelee v. Oswego &c. R. Co., N. Y. 74; Palmer v. Meriden &c. ., 188 Ill. 508, 59 N. E. 247; affirm- 88 Ill. App. 485; Davis v. Wiley, Ill. 234; Slocum v. Despard, 8 end. (N. Y.) 615.

[57] Howland v. Leach, 11 Pick. (Mass.) 151, 154; Manning v. Brown, 10 Me. 49; Lunn v. Gage, 37 Ill. 19; Hill v. Bishop, 2 Ala. 320; Moyer v. Michell, 53 Md. 171; Kingston v. Preston, 2 Doug. 689; Glazebrook v. Woodrow, 8 Term R. 371; Platt on Covenants, 72 to 80.

on one side is to be performed only on condition of performa
the other, the court is bound to construe the covenants accor
whatever may be the order in which they are placed in the inst
or the manner in which they are expressed.[58] Because a co
goes only to a part of the consideration it is not necessarily
pendent, the dependence or independence of covenants being
mined by the order of time in which performance is requ
But where a covenant goes only to part of the consideration o
sides, and a breach of such covenant may be paid for in dama
is an independent covenant, and an action may be maintained
breach of the covenant by the other party without averring perfor
in the declaration.[60] So, if there are a number of covenants o
side, the enjoyment by one party of a substantial performance
other has been held to prevent his insisting upon the non-perfor
of that which was originally a condition precedent.[61] A coven
a tenant to pay rent and by a landlord to repair are regularly h
be independent covenants, and therefore, a failure to repair do
work a forfeiture of the rent, but merely gives a right of action
recoupment, and a failure to repair does not at common law
action for rent.[62] The omission of the landlord to perform his
nant does not amount to an eviction and is no bar to his clai
rent. The lessee's remedy is either a plea of failure in diminut
the rent or an action to recover damages for the breach of the
nant[63] or to make such repairs himself as are suitable and nec
and charge their cost to the lessor.[64] Covenants to pay rent and
and to buy improvements at the end of the term have also bee
to be independent. The mere recital in the lease that the agree
in the lease to be performed by the lessees being performed, the
will at the expiration of the lease pay for the improvements, do
have the effect to make independent covenants in the lease depe

[58] Gardiner v. Corson, 15 Mass. 500.

[59] Grant v. Johnson, 5 N. Y. 247.

[60] Nelson v. Oren, 41 Ill. 18; White v. Gillman, 43 Ill. 502; Newson v. Smythies, 3 H. & N. 840.

[61] Pust v. Dowie, 5 B. & S. 20, 34 L. J. Q. B. 127; Carter v. Scargill, L. R. 10 Q. B. 564; Wiley v. Inhabitants &c., 150 Mass. 426, 23 N. E. 311; Lober v. Bangs, 2 Wall. (U. S.) 728.

[62] Lewis v. Chisholm, 68 Ga. 40; Christopher v. Austin, 11 N. Watts v. Coffin, 11 Johns. (495; Etheridge v. Osborn, 12 (N. Y.) 529, 13 Wend. 339; v. Percy, 24 Barb. (N. Y.) 3 v. Bishop, 2 Ala. 320; Wri Lattin, 38 Ill. 293; Belfour ton, 1 Term R. 310; Huff v. ham, 70 Ga. 284; Allen v. Wend. (N. Y.) 505; §§ 672–6

[63] Etheridge v. Osborn, 12 (N. Y.) 529.

[64] Lewis v. Chisholm, 68 Ga

provision for a penalty for failure to pay rent for sixty days shows t the covenants to pay rent and taxes are independent of the covet to pay for improvements at the end of the term.[65]

§ 325. Violations of independent covenants by a landlord will not uire an injunction to restrain a proceeding to dispossess a tenant ding over; especially is this true in the absence of any charge of olvency on the part of the person against whom the injunction is ght.[66] This question arose in a case where a landlord brought his tutory remedy to remove the tenant from the premises for non- ment of rent. The tenant filed a bill in equity, alleging that the tract of rent was upon condition that the landlord would repair premises, but that he had not done so, and they were not tenant- e, and that the tenant had been damaged; that the landlord was olvent and the tenant, by reason of his poverty, was unable to give bond and security on filing a counter affidavit, as required by law. erefore, he prayed an injunction restraining the landlord from ning him out of possession. A demurrer to this bill was sustained. asmuch as the law makes no exception," said Warner, J., "as to eviction of a tenant who is unable to give bond and security, on ount of his poverty, a court of equity cannot make one, but is as ch bound by the positive law of the land in such cases as a court law would be. Equity follows the law, where the rule of law is ap- cable, and the analogy of the law where no rule is directly ap- cable. The statute law of Georgia in relation to landlord and ant cannot be altered or changed by simply changing the forum which the remedy is sought."[67]

§ 326. The distinction between a covenant and a condition exists en when the agreement is to surrender the property. Thus a cove- nt to surrender premises upon a certain contingency does not of elf give the lessor a right to reënter upon the happening of the ntingency. Such a stipulation is not a condition, which upon ntry by the lessor, determines the lease, but a covenant, the breach which does not determine the lease, only gives the lessor a right action to recover damages of such breach.[68] If the lessee *cove- nts to surrender possession* on his failure to pay the rent or

[65] Butler v. Manny, 52 Mo. 497; Rohmeyer v. Zeppenfeld, 28 Mo. App. 268.

[66] Huff v. Markham, 70 Ga. 284.

[67] Hall v. Holmes, 42 Ga. 179.

[68] Wheeler v. Dascomb, 3 Cush. (Mass.) 285; Sloan v. Cantrell, 5 Cold. (Tenn.) 571; Bergland v. Frawley, 72 Wis. 559, 40 N. W. 372; Willson v. Phillips, 2 Bing. 13.

perform any of the covenants of the lease, no right under th tract is given the lessor to enter upon the premises, the only for such failure is by action on the covenant.[69] If one make for years by indenture, provided always, and it is covenant agreed between the parties that the lessee shall not alien, this a condition and covenant.[70] If the power of reëntry for the of a covenant not to assign be added to such covenant, it has th of a condition.[71] But where a lessee was to pay as rent a of the proceeds of his business, a stipulation that he would furn lessor with statements of the business monthly, or oftener if re took effect as a covenant and not as a condition.[72] A clause in to the effect that "Said lessee doth agree to deliver up said p . . . on three months' notice, by said lessor paying him a sum" is not a condition but a covenant.[73] It was stipulated in lease that the lessees should make certain improvements by a s time, and the lessees further agreed to forfeit the lease if th feited any of its stipulations. This was held to be a conditi not a mere covenant.[74]

§ 327. **The apt words of limitation** are *while, as long as, u during;* as when land is granted to a man *as long as* he is par *while* he continues unmarried, or *until,* out of the rents and he shall have made $500, and the like; or if it is declared in th that the same shall expire on the happening of any contingen such cases, whenever the contingency happens, the lease is mined by its own limitation, without any entry or other act to b by the lessor. But when an estate is, strictly speaking, on co in deed, the law permits it to endure beyond the time when th tingency happens, unless the grantor, or his heirs or assign advantage of the breach of the condition, and make either an or claim in order to avoid the estate.[75] Where the provision w after the breach of the condition by the lessee's non-performa

[69] Dennison v. Read, 3 Dana (Ky.) 586.

[70] Verplanck v. Wright, 23 Wend. (N. Y.) 506, citing Bacon's Abr. tit. Condition, G. Co. Litt. 203, b.; Ship. Touch. 122.

[71] Kew v. Trainor, 150 Ill. 150, 37 N. E. 223, 50 Ill. App. 629.

[72] Texas &c. Co. v. Lawson, 10 Tex. Civ. App. 491, 31 S. W. 843.

[73] Wheeler v. Dascomb, 3 (Mass.) 285.

[74] Winn v. State, 55 Ark. S. W. 375.

[75] 2 Black. Com. 155; Fift ciates v. Howland, 11 Metc. (99; Wheeler v. Dascomb, 3 (Mass.) 285; 4 Kent 132.

ıy of his covenants, the lessors may, lawfully, immediately or at ıy time whilst such neglect or default continues, and without further ɔtice or demand, enter into and upon the said premises, the lessee's tate continued until entry, notwithstanding the breach of the condi-ɔn. The estate of the lessee was not to cease or become forfeited his non-performance of the condition, before the entry of the ssors; and if no such entry had been made, the estate of the lessee ɔuld have continued till the end of the term. So, if the lessors had cepted rent in arrear, it would have been a waiver of the forfeiture.[76] ɔrd Coke has said that if there be express words of condition an-ɛxed to the estate, it cannot be construed a limitation.[77] But this ıle was denied by Lord Hale to be the rule of law in all cases,[78] ıd there seems to be a well founded exception to the general rule construction, that although the words be proper to create a condi-ɔn, yet, if upon the non-performance thereof, the estate be limited ɛr to another person, this shall be a limitation; for it shall not be the power of the grantor or lessor, by his not claiming or entering, defeat the interest of such person.[79]

§ 328. Running of covenants.—The common law restriction that ɔvenants would not run with the reversion[80] was removed by the stat-ɛe of Henry Eighth, which gave an action in such case both for and gainst the assignee of the reversion.[81] While the words of this act are ɛneral, it was held to extend only to covenants which touch or concern ıe thing demised and not to collateral covenants.[82] In order that the ssignee may be liable on the covenants in a lease, the covenants must, ıerefore run with the land; must be connected with, be attached to, or ıhere in the land. Whether a covenant runs with the land depends the first place upon the nature and character of the particular cove-ant and of the estate demised, as connected with the respective rights

[76] Fifty Associates v. Howland, 11 etc. (Mass.) 99.

[77] Portington's Case, 10 Co. 35, 41.

[78] Lady Anne Fry's Case, 1 Vent. 99, 203.

[79] 2 Wooddeson, 143, 144; 2 Crabb Real Prop., § 2136; Stearns v. odfrey, 16 Me. 158.

[80] "According to the accepted ɔinion, no covenants ran with the ɛversion at common law, because feudal reasons connected with alty, or the personal tie created from choice between a lord and vassal; which relationship the former could not transfer to another without the latter's consent." Hadley v. Berners, 97 Mo. App. 314, 322, 71 S. W. 451.

[81] 32 Hen. VIII, c. 34.

[82] Spencer's Case, 5 Coke 16; Webb v. Russell, 3 Term R. 393; Bream v. Dickerson, 2 Humph. (Tenn.) 126; Hadley v. Berners, 97 Mo. App. 314, 71 S. W. 451; Dolph v. White, 12 N. Y. 296, 302.

of lessor and lessee in reference to the subject-matter of the co
and in the next place upon the intent of the parties in the crea
the estate as shown by the language of the instrument creati

A covenant is said to run with the land when either the liab
perform it or the right to take advantage of it passes to the a
of that land, and to run with the reversion when either the liab
perform it or the right to take advantage of it passes to the assi
such reversion. The covenants to be within the statute must b
as touch the thing demised, and are not collateral to it, as to
for quiet enjoyment, and to surrender possession in good re
Familiar examples of covenants by the lessee which run with th
are covenants to pay rent and covenants to pay assessments or ta
the demised premises.[85]

The question whether a covenant runs with the reversion by
of the statute of Henry VIII is not to be confused with the di
one as to the covenants attaching a burden or a right to land a
mon law irrespective of privity or the mention of assigns, aft
analogy of commons or easements or the yet different one as
transfer of the benefit of warranties or covenants for title to a
who become privies in estate with the original covenantee.
cases not coming within the statute of Henry VIII it is ge
held that when the covenant is of a nature to inhere in and foll
land, the benefit of it will run with the land into the hands of
quent grantees of the covenantee, but the converse is not true. Th
den of the covenant will not follow the land into the hands
covenantor's grantee. Thus where an owner in fee of a buildin
veyed the top story absolutely for a perpetual annual rent and

[83] Masury v. Southworth, 9 Ohio St. 340.

[84] Scheidt v. Belz, 4 Ill. App. 431.

[85] Salisbury v. Shirley, 66 Cal. 223, 5 Pac. 104; Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3; Carley v. Lewis, 24 Ind. 23; Edmonds v. Mounsey, 15 Ind. App. 399; Breckenridge v. Parrott, 15 Ind. App. 411; Hogg v. Reynolds, 61 Neb. 758, 86 N. W. 479; Darmsteatter v. Hoffman, 120 Mich. 48, 78 N. W. 1014; Donelson v. Polk, 64 Md. 501; Hendrix v. Dickson, 69 Mo. App. 197; Grundin v. Carter, 99 Mass. 15; Trask v. Graham, 47 Minn. 571, 50 N. W. 917; Towey v. Wallis, 3 Cush. (Mass.) 442; Mason v. 131 Mass. 510; Constanti Wake, 1 Sweeny (N. Y.) 239 v. Kearney, 2 N. Y. 394, 51 Am 303; Smith v. Harrison, 42 O 180; Fennell v. Guffey, 139 341, 20 Atl. 1048; Bradford v. Blair, 113 Pa. St. 83, 4 A 57 Am. R. 442; State v. Mar Lea (Tenn.) 92; Shaw v. Par 17 Vt. 626, § 411.

[86] Jones v. Parker, 163 Mas 40 N. E. 1044; Norcross v. 140 Mass. 188, 2 N. E. 946; field v. Church Mills &c. C Mass. 267, 35 N. E. 780.

ted to repair the roof, the burden of this covenant did not run with rant of the entire parcel so as to make the grantee personally liable the covenant, and there was no remedy at law against him. But in ny instances in cases of this character equity has furnished relief inst such grantee by declaring the burden of the covenant a lien n the land itself.[87]

329. Rule in Spencer's case.—"When the covenant extends to a ng *in esse* parcel of the demise, the thing to be done by force of the enant is *quodammodo* annexed and appurtenant to the thing de-ed, and shall go with the land and shall bind the assignee though e not bound by express words; but when the covenant extends to a ng which is not in being at the time of the demise made, it cannot appurtenant or annexed to the thing which hath no being . . . therefore shall bind the covenantor . . . and not the as-nee." However, if the lessee had covenanted for himself and his gns for something to be done upon some part of the thing demised, would bind the assignee even though the covenant extended to a ng to be newly made, for the assignee is to take the benefit of it, and refore he is bound by the express words.[88]

This has been qualified by a later case when the covenant is to do ething conditionally, as to repair new buildings if there are any. en erected these buildings will be a part of the thing demised, and sequently the covenant extends to its support, and as the covenant rly binds the assignee to repair things *in esse* at the time of the e, so does it also those *in posse,* and consequently the assignee is nd. There is only one covenant to repair; if the assignee is included to part he should be included as to all.[89] But a covenant to erect ldings on the demised premises or indemnify the lessee, which did name assigns, was held not to be binding upon an assignee of the re-sion.[90] The same rule was applied to a covenant to buy fruit trees nted upon the premises at the end of the lease.[91]

In several cases in the United States covenants relating to things *in esse* have been held to be confined to the original parties and to incapable of being enforced by or against third persons, unless made pressly for and with assigns. It was consequently decided that a

[87] Rochester Lodge No. 21 v. Gra-n, 65 Minn. 457, 68 N. W. 789; st Nat. Bank v. Security Bank, Minn. 25, 63 N. W. 264.

[88] Spencer's Case, 6 Coke 10.

[89] Minshull v. Oakes, 2 H. & N. 793, 808.

[90] Doughty v. Bowman, 11 A. & E. (N. S.) 444, 63 E. C. L. 444.

[91] Grey v. Cuthbertson, 2 Chit. 482.

covenant by a landlord to pay for such buildings as might subse
be erected on the demised premises by the tenant, in which
were not named, could not be enforced by an assignee of the te
was not binding on a grantee of the reversion.[92] A covenant no
sign without license, in which assigns are not mentioned, d
run with the land, for it obviously contemplates that the land sl
pass into the possession of an assignee.[93] A covenant to supp
and light to leased premises is near the line, as it has been dr
tween covenants that will and those that will not pass under t
ute[94] in respect to their nature when assigns are not mentioned
in another case a covenant to tear down an old chimney and
place with a new one was held to run with the land to assigns,
they were or were not named.[96] And the entire distinction
cases where the assignee is expressly bound and those where h
mentioned has been said to be unsound and bad law.[97]

§ 330. A covenant in regard to a personal matter underts one party to a lease and contained in the instrument of demis binding upon the assigns of the covenantor. Although the c
be for him and his assigns, yet if the thing to be done be mer
lateral to the land and does not touch or concern the thing den

[92] Hunt v. Danforth, 2 Curt. C. C. 592; Tallman v. Coffin, 4 Comst. (N. Y.) 134; Thompson v. Rose, 8 Cow. (N. Y.) 266; Hansen v. Meyer, 81 Ill. 321; Verplanck v. Wright, 23 Wend. (N. Y.) 506; Cronin v. Watkins, 1 Tenn. Ch. 119. In Illinois this rule has been changed by a statute, Rev. St. 1874, p. 659, § 15, which has been held not to apply to covenants entered into before its passage. Hansen v. Meyer, 81 Ill. 321.

[93] Dougherty v. Matthews, 35 Mo. 520; Hazlehurst v. Kendrick, 6 S. & R. (Pa.) 446; Doe v. Peck, 1 B. & Ad. 428.

[94] St. 32 Henry VIII, c. 34, § 2.

[95] Cones v. Parker, 163 Mass. 564, 40 N. E. 564.

[96] Harris v. Coulborn, 3 Harr. (Del.) 338.

[97] Ecke v. Fetzer, 65 Wis. 55, 26 N. W. 266. Taylor J. said: "In none of the cases is any str upon the fact that the assi the lease was mentioned in enant. The cases all hold covenant runs with the l cause it relates to somet be done upon the land for provement, and not beca assignees of the covenantor tioned as being bound by enant. The cases also ho when the covenant does not run with the land, and enant has no relation to t leased, neither the assigne lease nor of the reversion, by such a covenant, though signees are mentioned in th The rule in Spencer's case, 16, . . . does not seem been followed by the Englis nor by many of the courts country."

way, then the assignee should not be charged. The reason why the gnees, though named, are not bound is because the thing covenanted e done has not the least reference to the thing demised.[98] The enant on a sub-lease of part of a lot of land subject to a charge for und rent that the sub-lessee would hold free from liability for any t of the ground rent, is not a real covenant running with the land ind the residue of the land with the entire ground rent after an gnment, but with respect to such residue it is a mere personal cove-t.[99]

The language of the resolutions in Spencer's case might convey the pression that real covenants are only such as relate to some physical ng to be made or done on the premises, but the meaning is that they such as affect the use and enjoyment of the premises by the tenant f the inheritance by the reversioner.[100] Many cases have held that covenant for quiet enjoyment and similar provisions in deeds, which not contemplate any change in the physical condition of the prem-, go with the land.[101] Although the covenant for a renewal of the e be made in terms merely in favor of the lessee, it is well settled t such a covenant runs with the land to one who, by assignment, nes to stand in the place of the covenantee. Since the covenant runs h the land, it is obligatory not only upon the covenantor but upon grantee.[102] A condition that no renewal need be made in case the or wished to use the land for building purposes would also run in or of assignees. The right to renewal, in the absence of a sale of the perty or of the death of the lessor, was still dependent on the ner's election to use the land; this condition was inseparable from covenant of which it was an integral part.[103] The stipulation in a se that if the leasehold premises should be sold during the term lessees would vacate and deliver up possession on thirty days' notice writing, shows on its face that it was intended to pass with the re-sion, for the purpose of it was to give the lessor the privilege of veying the property with its enjoyment undiminished by an out-nding term, so that the purchaser might enter into the possession mediately to make use of the premises as he desired.[104]

[98] Bally v. Wells, 3 Wils. 25.

[99] Wahl v. Barroll, 8 Gill (Md.) .

[100] Hadley v. Berners, 97 Mo. App. , 71 S. W. 451.

[101] Norman v. Wells, 17 Wend. . Y.) 136.

[102] Leppla v. Mackey, 31 Minn. 75, N. W. 470; Barclay v. Steamship Co., 6 Phila. (Pa.) 558; Cunningham v. Pattee, 99 Mass. 248; Gannett v. Albree, 103 Mass. 372; Blackmore v. Boardman, 28 Mo. 420.

[103] Leppla v. Mackey, 31 Minn. 75, 16 N. W. 470.

[104] Hadley v. Berners, 97 Mo. App. 314, 71 S. W. 451.

§ 331. Covenants affecting the mode of occupation and enjo of leased premises run with the land, and the assignee, thou named, may be restrained by injunction from violating the s Among covenants of this nature may be mentioned covenants to whether by the lessor or lessee,[106] to leave in repair,[107] to maint isting fences,[108] to leave land with certain crops planted,[109] not t or cultivate in a certain manner,[110] and to use land in a husb manner and leave it in like condition.[111] In this class would also cluded covenants to reside on the premises during the term,[112] carry on particular trades on the premises;[113] to erect only build a certain kind and use them only for a specified purpose,[114] and erect buildings in front of the demised premises.[115] The same d has been applied to a covenant to build on the premises,[116] a covenant to build and maintain an adjoining fence.[117] A coven a lessee to hold the lessor railroad harmless from fires set on the ises is near the line. But the court before which the questio finally held that such a covenant ran with the land and could forced in favor of an assignee of the reversion.[118] So a covena lessor railway to stop trains at a leased hotel at convenient ho meals ran with the land and could be enforced by the assignee lease. The agreement to stop trains for meals was not for a sin lated act or series of acts to be done for the benefit of the lessee but the acts were to be continuous, and ran with the land for the of an assignee of the lease.[119] In one case a covenant to sup

[106] Wertheimer v. Hosmer, 83 Mich. 56, 47 N. W. 47; Dunn v. Barton, 16 Fla. 765; Wheeler v. Earle, 5 Cush. (Mass.) 31; Miller v. Prescott, 163 Mass. 12, 39 N. E. 409; Gannett v. Albree, 103 Mass. 372; Crowe v. Riley, 63 Ohio St. 1; De Forest v. Byrne, 1 Hilt. (N. Y.) 43.

[108] Shelby v. Hearne, 6 Yerg. (Tenn.) 512; Allen v. Culver, 3 Denio (N. Y.) 284; Norman v. Wells, 17 Wend. (N. Y.) 136; Myers v. Burns, 33 Barb. (N. Y.) 401; Mitchell v. McNeil, 4 Colo. App. 36, 34 Pac. 84; Carley v. Lewis, 24 Ind. 23.

[107] Demarest v. Willard, 8 Cow. (N. Y.) 206; Myers v. Burns, 33 Barb. (N. Y.) 401.

[108] Kellogg v. Robinson, 6 Vt. 276; Hartung v. Witte, 59 Wis. N. W. 175.

[109] Hooper v. Clark, 8 B. &

[110] Cockson v. Cock, Cro. J

[111] Walsh v. Watson, Esp. 295.

[112] Tatem v. Chaplin, 2 H.

[113] Barron v. Richard, 3 E (N. Y.) 96.

[114] St. Andrews Lutheran C Appeal, 67 Pa. St. 512.

[115] Trustees &c. v. Cowen, (N. Y.) 510.

[116] Fisher v. Lewis, 3 Pa. L

[117] Bronson v. Coffin, 108 175.

[118] Northern Pac. R. Co. Clure, 9 N. Dak. 73, 81 N. W

[119] Cleveland &c. R. Co. v. M 74 Ill. App. 602.

ement demised with a sufficient quantity of good water was held to a covenant which respected the premises demised, and the manner of oyment, and therefore to run with the land. "The lease does not cifically point out the particular mode by which the water is to be plied," said Abbott, C. J., "whether by pipes, by collecting the water isterns, or by carrying it to the premises by buckets, but it is quite r that the covenant cannot be satisfied unless a sufficient quantity good water is brought upon the premises during the term. This is, refore, a covenant which respects the premises demised and the nner of enjoyment, and I have no doubt, therefore, that it is a cove- t which runs with the land."[120] An agreement reserving to lessee right to cultivate cleared land for a certain number of years runs h the land and is binding upon an assignee of the reversion.[121] Pre- tion often becomes necessary, not only for the protection of the mises from injuries which might otherwise be done to them, but prevent their respectability being lessened, and their good-will reby diminished. Covenants of this kind, as they effect the mode of upation and enjoyment, run with the land.[122]

§ 332. A covenant to buy improvements at the end of the term s with the reversion. If the lessor covenanted for himself and his gns it would bind an assignee without regard to the time when the provements were erected or to stipulations requiring their erec- n.[123] In one case the assignee was held to be bound although the les- did not covenant for assigns. In that instance the performance of covenant to build by the lessee was beneficial to the reversioner and no other person. The house was built at the time of the assignment the lease, and the right and title to it passed to the assignee at the of the term. The covenants respecting the house had direct and ecial reference to the land. From these considerations the lease was be construed in all respects the same as if the words "or assigns" re expressly written therein.[124] Conversely a covenant by a lessee to

[120] Jourdain v. Wilson, 4 B. & Ald. , 6 E. C. L. 420.

[121] Callan v. McDaniel, 72 Ala. 96, . 75 Ala. 327.

[122] Wertheimer v. Circuit Judge, Mich. 56, 47 N. W. 47.

[123] Bailey v. Richardson, 66 Cal. , 5 Pac. 910; Lametti v. Ander- , 6 Cow. (N. Y.) 302; Hunt v. nforth, 2 Curt. C. C. 592; Man- v. Norton, L. R., 22 Ch. Div. 769; Frederick v. Callahan, 40 Iowa 311; Coffin v. Talman, 8 N. Y. 465; Belden v. Union Warehouse Co., 11 N. Y. App. Div. 160, § 377.

[124] Frederick v. Callahan, 40 Iowa 311. But see Bream v. Dickerson, 2 Humph. (Tenn.) 126, where the opposite conclusion was reached. The court said: "A covenant to run with the land must touch and concern it, and it is difficult to con-

surrender the improvements on the premises at the end of the t one which runs with the land.[125] But a covenant to purchase c from a lessee is not; and therefore if a covenant by a lessor to p shortage of grain in a leased grain elevator is construed as a coven pay for chattels, it is only personal. But such would not be th construction of a lease which was peculiar in terms, the re being a fixed sum but a certain proportion of the earnings of the ness. It was practically an agreement that the rent should be inc or diminished by the surplus or shortage, as the case might be, should occur in the operations of the warehouse. If not techn rent, it so concerned the thing demised as to run with the land. view be correct, then the purchaser of the reversion would be res ble to the tenant for the amount of the shortage.[126] However, the covenant to purchase at the end of the term extends to pe chattels which are in no sense fixtures upon the demised premise a mere personal undertaking and will not run with the land. words "articles, matters and things" indicate movable chattels might be replaced. It is impossible to say that the chattels thus s of are confined to fixtures. If they had been the covenant would run with the land in case the lease required the tenant to ere provements.[127]

If lessors before assignment are in default in respect to a co to buy improvements they could be sued by the lessee for the bre covenant in spite of the subsequent assignment, and in that acti lessee could recover the whole value of the improvements.[128] A nant which provides for payment at the end of the term for bui erected on the demised premises is not a continuing covenant, a non-payment of the amount and failure to name an appraiser in to ascertain the amount is not a "continual breach," for whic grantee of the reversion would be liable though it did not happen time.[129] Although a covenant to repair is a continuing covenan so imposes an obligation to repair so often as occasion arises duri time, and notwithstanding prior breaches and recoveries there

ceive how a covenant to pay a pecuniary consideration for a house, if the tenant shall think proper to erect it, can be said to touch and concern the estate."

[125] Coburn v. Goodall, 72 Cal. 498, 14 Pac. 190, 1 Am. St. 75.

[126] Belden v. Union Warehouse Co., 11 N. Y. App. Div. 160.

[127] Gorton v. Gregory, 3 B. & S. 90.

[128] Church Wardens v. Sm Bur. 1271; Beddoe v. Wads 21 Wend. (N. Y.) 120; Fish ley, 6 Hill (N. Y.) 54; Stuy v. Mayor &c., 11 Paige (N. Y. Coffin v. Talman, 8 N. Y. 46

[129] Coffin v. Talman, 8 N. Y.

[130] Kingdon v. Nottle, 1 M. 355, 365; Astor v. Hoyt, 5 (N. Y.) 603.

re is no decided case in which the assignee of a lessee has been held ble upon any breach of a covenant to repair for which the lessee ght have been sued.[181]

§ 333. A covenant of guaranty for rent is collateral to the lease accompanies[182] and is not affected by the early statute in modifications of the common law.[183] A similar covenant was held by the Supreme Court of New York to pass to assigns,[184] but this decision was ted on the authority of an old English case,[185] where the distinction between covenants which take effect as easements and pass even disseisors and those pure contracts on which no one can sue except ties and privies. "Although rent savors of the realty, any warranty insurance of rent is a purely personal contract of which another n the original contractee can avail himself only on the principles of tract." After the death of the lessor his administrator can recover t under the guaranty as trustee for the heirs.[186]

A covenant in an instrument purporting to be a lease, to pay a low a sum of money annually in lieu of rent, in consideration of forbearing to exercise her right to dower, is a personal covenant l cannot run with the land so as to bind an assignee of the so-called se. The right of the widow to have dower assigned to her is not such estate as can be subject to a lease.[187]

§ 334. Running of covenants after breach.—Where a covenant ching the demised premises requires the performance of a single , or a series of contemporaneous acts, and not the performance of s at different times, such covenant will not run with the land after ach. The distinction is between such covenants as are entire and h as are of a continuing nature. The general rule that subsequent to reach a covenant will not run seems completely established.[188] A

[1] Coffin v. Talman, 8 N. Y. 465.
[2] Walsh v. Packard, 165 Mass. , 42 N. E. 577; Virden v. Ellsrth, 15 Ind. 144.
[3] Harbeck v. Sylvester, 13 Wend. Y.) 608.
[4] Allen v. Culver, 3 Denio (N. 284.
[5] Pakenham's Case, Y. B. 42 Ed. 3, pl. 14.
[6] Walsh v. Packard, 165 Mass. , 42 N. E. 577, per Holmes J.
[187] Croade v. Ingraham, 13 Pick. (Mass.) 33.
[188] Gerzebek v. Lord, 33 N. J. L. 240; Force v. Callahan, 8 N. J. L. G. 139; Mirick v. Bashford, 38 Barb. (N. Y.) 191; Day v. Swackhamer, 2 Hilt. (N. Y.) 2; Hintze v. Thomas, 7 Md. 346; Grescot v. Green, 1 Salk. 199; Church Wardens v. Smith, 3 Burr. 1271; Crane v. Batten, 28 E. L. & Eq. 137; Johnson v. Church Wardens, 4 A. & E.

leading case is that of *Grescot* v. *Green*,[139] in which a lessee cov for himself and his assigns to rebuild and finish a house *within* time, and after that time he assigned, the house not being bu finished; and Holt, chief justice, said: "This covenant shall n the assignee, because it was broken before the assignment, a broken after, as if the lessee had assigned before the time expi covenant by the landlord to do repairs which are specified must within a reasonable time, and will not run with the land after But where general repairs are agreed to be done during the tena certain time being indicated, a notice to perform is necessary the landlord in default.[140] A covenant to grade and inclose a prove premises is not a continuing covenant, but one which is to formed within a reasonable time. So a recovery in an actio breach of such a covenant, brought after the expiration of a rea time to perform the same, would be a bar to any further rec damages for the breach thereof, and would also be a bar to a equity for the specific performance of such covenant.[141] A rel a lessor of his lessee from "further" liability under his lease i release from liability for taxes already accrued and which by th of the lease the lessee had assumed to pay. The word "furth there used, means future.[142]

§ 335. **A covenant to insure which had for its object the be the lessor only, as where the money paid in the event of the los go to him, has been regarded as collateral**; but if the money i applied to repair or rebuilding, then it is in character like a c to repair which may run with the land.[143] What is this but i a modified covenant to repair and rebuild? The insurance is to up, so that in case of loss by fire the sum insured shall be imm applied to rebuilding the property on the premises. Being of thi acter, it would run with the land, just as would an ordinary an lute covenant to repair or rebuild.[144]

520; Hawkins v. Sherman, 3 C. & P. 459.

[139] 1 Salk. 199.

[140] Gerzebek v. Lord, 33 N. J. L. 240.

[141] Stuyvesant v. Mayer &c., 11 Paige (N. Y.) 414.

[142] O'Fallon v. Nicholson, 238.

[143] Masury v. Southworth, St. 340; Spencer's Case, 5 C

[144] Thomas v. Vonkapff, 6 G (Md.) 372.

II. *For Renewal of Lease.*

§ 336. A common form of lease fixes a short term for which the ee is bound to retain the premises and then gives him a right to upy them for a further period if he so desires. This can be ac-plished by providing that the duration of the term under the origi- lease shall be a variable or by a covenant on the part of the lessor execute a new and distinct lease. The mode adopted depends upon intention of the parties, as shown by the language used and the endant circumstances. The expression "renewal" suggests a distinct nise, while the phrases "continue" or "be extended" have the oppo- effect. The option of extending a term two or three years is a privi- e to be exercised by the tenant during the term, and not fixed by n as part of the lease. Such privileges are not uncommon, and ugh dependent on the will of one of the parties, they do not impair mutuality of the contract. Mutuality of a contract means an obli- ion on each party to do or permit to be done something in considera- n of the act or promise of the other. It does not imply that every ulation is absolute and unqualified.[145]

In case a lease provides that the lessee may hold the premises for additional term of one, two or three years at his election, there can but one election, which may be for a further term of one, two or ee years, but if the election is for one of the shorter periods, the vilege cannot again be exercised so as to embrace another year. ere is nothing in the language of such a lease which expressly gives lessee the privilege of electing more than once. Such a result st be reached by construction if at all. The language of the lease cludes the idea of two or three additional terms. Only one ad- ional term is provided for, and the construction that the privilege of three terms and three elections by the lessee cannot be adopted thout violence to the language used, while one term and consequently e election is in perfect harmony with such language.[146]

A lease for one year with an agreement that if the tenant should ntinue on the premises after the first year, then the lease should be force another year, and so on from year to year, does not create an dinary tenancy from year to year. The lessee would be tenant of the emises for one year, with the option of continuing from year to year another five years, and having enjoyed all that his option gave him, er six years the lessor is then entitled to the possession of the

[145] Spear v. Orendorf, 26 Md. 37. [146] Falley v. Giles, 29 Ind. 114.

premises. The contention that a tenancy for one year, and so on year to year, is a tenancy for two years at least and cannot be mined at the end of the first year, is not valid. That a lease for and so on from year to year is a lease binding but for one yea now be considered as the general rule.[147]

While an indorsement on the back of a lease of an agreement further holding would ordinarily operate as an extension of the nal lease over a further term, it might take effect as a new demis such was the case where the writing contained no exceptions or vations and did not import to be an extension of the previous New and valuable considerations entered into it. More propert included, and the lessor was getting valuable and permanent im ments made without cost to himself. The indorsement must, fore, be construed as a new leasing, and not as an extension of t lease. It superseded and cancelled the old lease.[148]

§ 337. **A distinction between a stipulation to renew a leas one to extend it for an additional period** beyond the original te usually made. The former requires the execution of a new leas latter does not. Where a lease provides for an extension on a and a verbal notice is intended, such notice will, *ipso facto,* exte lease for an additional term longer than one year, and is not with statute of frauds.[149] In an early case in Wisconsin a covenant further term provided that "in case the lessees signify their inte at the expiration of this lease, to have the same extended, the hereby covenant to extend the lease, provided an increased r paid." Dixon, J., pronounced one opinion of an equally divided to the effect that no new lease need be executed for the further He said: "The rule . . . is, not that the lease must clearly tive or deny the intention of the parties to make a new one, bu it must clearly and positively show on its face that such *was* th tention. If it be not so clearly and positively shown, the presun is that no new lease was intended and that the tenant was to co to hold under the original one."[150] "The verb to extend," con

[147] Jones v. Kroll, 116 Pa. St. 85; MacGregor v. Rawle, 57 Pa. St. 184; Boyd v. Pico, 1 Hawaii 398; Dod v. Monger, 6 Mod. 215.

[148] Walsh v. Martin, 69 Mich. 29, 37 N. W. 40.

[149] Tilleny v. Knoblauch, 73 Minn. 108, 75 N. W. 1039, citing Orton v. Noonan, 27 Wis. 272.

[150] Orton v. Noonan, 27 Wi 281. In this case the decision court below had been that lease must be executed, an the judges being equally d remained the decision of the and is the law of Wisconsin Kollock v. Scribner, 98 Wis. N. W. 776.

learned justice, "implies far less in this connection than the verb renew, found in other cases. In fact, it has nothing of the same ength and significance. To extend is to draw forth or stretch; to long; to protract; to continue. To renew signifies to make over, to ke anew; to give new life to; to restore; to recreate; to rebuild." e words used "are in no sense stronger or more conclusive for the rpose of showing that a new lease was intended than would have n the words *with the privilege to have, with the privilege of keep-, with the privilege if desired, or at the option of the lessee for the ther term of,* which operate as a continuous lease." On one hand, seems clear that the lease will operate as a continuous demise for original term and the extension when the expression used has been the words, "with the privilege to have," "with the privilege of keep-," "with the privilege if desired," or "at the option of the lessee the further term of."[151] On the other hand, the expression that the sor covenants to renew the lease indicates the intention of the par-s to execute a new instrument.[152] In accordance with the principle the foregoing decision, it has been decided that a covenant to renew es not give the tenant a right to retain possession after the end of original term. His remedy is an action for damages or for specific rformance.[153] A clause in a lease giving the lessee the option, on a rtain condition, to renew the lease for a year is not a demise to take ect at the end of the first lease; it is a mere covenant or undertak-g of the lessor to let the lessee have a second term, which may be forced on bill for specific performance, or upon which an action at v may lie for a breach.[154] Such a provision is one for a *renewal of lease,* and not one for an *extension* of the term, in spite of a sub-uent clause that "at the expiration of the lease, if not *extended* as retofore mentioned, the lessee agrees to quit and deliver up pos-sion."[155]

[151] Chretien v. Doney, 1 N. Y. 419; nson v. Wray, 7 Blackf. (Ind.) ; House v. Burr, 24 Barb. (N. 525; Kramer v. Cook, 7 Gray ass.) 550; Hall v. Spaulding, 42 H. 259. But see James v. Kib-, 94 Va. 165, 26 S. E. 417, contain-a dictum to the contrary.

[152] Orton v. Noonan, 27 Wis. 272; llock v. Scribner, 98 Wis. 104, N. W. 776.

[153] Finney v. Cist, 34 Mo. 303; not v. Alexander, 44 Mo. 25. A bond signed by one party only, executed at the same time as a lease for the year, which entitled lessee to renew for five years does not constitute a present demise of the property which can be enforced at law. Hunter v. Silvers, 15 Ill. 174.

[154] Sutherland v. Goodnow, 108 Ill. 528; North Chicago St. R. Co. v. Le Grand Co., 95 Ill. App. 435; Hunter v. Silvers, 15 Ill. 174.

[155] Shamp v. White, 106 Cal. 220, 39 Pac. 537.

So, where a lease provided that it should be optional with t see to take the premises for a further term of two years, a privilege was accepted, it was held to be one lease for the entir the additional two years is not a new demise, but a continuation old one.[156] In another case a renewal clause provided that th should be entitled to a four years' additional "lease;" but it w that the word "lease" must be taken to be equivalent to "ter this clearly carried out the intention of the parties. It was "lease" for the original and extended term.[157]

A lease giving the lessee the option of re-leasing the premises term of ten years, or any part thereof," could be made valid period beyond the original term without the execution of any n strument by the lessor. The tenant seasonably and formally gav ten notice to the landlord of his election to continue the tenancy the lease for a further period of three months. This was a re- for that period, and at the end of that time the term expired v further notice or other act. Such notice, accompanied by a con tion of possession, was sufficient to extend the term. According weight of authority, the clause in the lease for re-leasing sho construed as a present demise to take effect in the future at the of the lessee.[158]

§ 338. On the question whether a general provision to re lease calls for a new one, or whether at the option of the less extended by the force of the *covenant itself* and becomes, in e lease for the additional term, the latter construction was favo the New Hampshire Supreme Court, and its decision[159] has bee with approval by many courts and text writers. In holding th tinuance in possession constituted an election to hold under a n agreement, the Missouri court said: "It is true that the wo newal' is used, and not the words specifying that the term sha tinue' or 'be extended,' etc., but the context and the intention

[156] Fleischner v. Citizens' Inv. Co., 25 Ore. 119, 35 Pac. 174; Clarke v. Merrill, 51 N. H. 415.

[157] Harding v. Seeley, 148 Pa. St 20, 23 Atl. 1118.

[158] Willoughby v. Atkinson Furnishing Co., 93 Me. 185, 44 Atl. 612.

[159] Ranlet v. Cook, 44 N. H. 512; Hall v. Spaulding, 42 N. H. 259. The clause in one case was: "The lessee shall have the privilege of renewal for the further t two years from the expiratio of at an annual rental of e hundred dollars." The cou "We see no reason why un words quoted from the le tenant is not to be regarde of the additional term." F v. Jackson, 180 Mass. 557, 6 965.

arties must be regarded. The privilege of a renewal is given to the essee, and in case he accepts, the lease contains everything showing he contract of the parties."[160] On the contrary, there is authority hat the words "renew" and "extend" should be construed in accordnce with their ordinary meaning. Obviously, one means to prolong r to lengthen out, the other, to make over, to re-establish, to rebuild; nd those courts and writers that have construed them accordingly ertainly have the best of the argument, if the judicial construction is o follow the true definitions of the words. "We apprehend," said Iarshall, J., "that no one would seriously contend that an agreement o renew a note would be satisfied otherwise than by making a new ote in place of the old one. It would seem that the construction adered to in some jurisdictions, that to renew is equivalent to extend, iolates the rules of language to reach a judicial construction out of armony with the universally accepted meaning of the words as dened by lexicographers."[161] No inference can be made of an intention o have a new lease executed rather than to have the original one connue during the extension from the fact that notice of election may e given by word of mouth.[162]

§ 339. **Where a lessee is entitled to the renewal of his lease, he ust give notice promptly at or before the expiration of the first erm or according to the agreement.**[163] "Being a lease with a privilege of renewal," said Judge Henshaw in such a case, "it was incument upon the lessee, desiring to exercise his option, to give notice of is election before the expiration of the original term; while if the ease had provided merely for an extension, his remaining in possesion (no specific form of notice having been required) would have een sufficient notification of his decision."[164] "The contract was not hat upon the expiration of his term he might, if he so desired, connue in the occupancy of the premises for a further fixed period, so hat upon his election the further period would be only a continuation f the original term. . . . The contract was for a renewal of the ease for a period not fixed. . . . It was incumbent on him to notify

[160] Insurance &c. Co. v. National ank &c., 5 Mo. App. 333, affirmed 1 Mo. 58.

[161] Kollock v. Scribner, 98 Wis. 04, 73 N. W. 776.

[162] Orton v. Noonan, 27 Wis. 272.

[163] Thiebaud v. First Nat. Bank, 2 Ind. 212; Eaton v. Lyon, 3 Ves. 690; City of London v. Mitford, 14 Ves. 41; Rubery v. Jervoise, 1 Term R. 229; Darling v. Hoban, 53 Mich. 599, 19 N. W. 545.

[164] Shamp v. White, 106 Cal. 220, 222, 39 Pac. 537; Renoud v. Daskam, 34 Conn. 512; Delashman v. Berry, 20 Mich. 292.

his landlord. . . . Upon this being done, a new agreement v
cover the new term."[165]

The lessee's election to take the renewal, made the second day
the original term expired, was held to come too late. A contrar
struction would give the lessee too great latitude in regard to the
for his election and make the lessor run the hazard of losing th
for a year.[166] After the original term has been allowed to expire
out the lessee exercising his option to secure a renewal of the
his holding over after the expiration of the period first desig
would have the same effect as if there had been no renewal agre
at all, and he would become a tenant from year to year.[167] This
be changed by a provision for a penalty of double rent in case of
ing over. There a mere holding over for several years was pre
to be under the renewal agreement, and the rights of the parties
the same as if a new lease had been executed.[168] But a different r
applied in case of perpetual leases. Where the original term of a
for ninety-nine years, renewable forever, has expired, and the
of the leasehold interest has failed to obtain a renewal within the
according to the literal wording of the covenant for renewal,
will relieve him, and compel the owner of the reversion to exec
new lease, provided the application be made in a reasonable tim
all arrearages of ground rent be first paid. But *gross laches* o
part of the owner of the leasehold interest in seeking his relief w
an insuperable bar to relief.[169]

Where a lessor in a building lease has the option to buy the buil
at an appraised value or renew the lease, he must declare his el
to renew before the end of the term. But in the absence of agree
the fact of the election could be shown either orally or by writin
same as any other fact not required to be in writing. There was
fore no necessity for any formal tender of a new lease or for w
notice; and after the lessee had refused to sign a new lease, it wo
an idle ceremony to tender him one, and the law would not re
it.[170]

§ 340. When there is an option to lessee to have the same extended, no notice of an election to have the term continue is r

[165] Strousse v. Bank, 9 Colo. App. 478, 484, 49 Pac. 260, per Thompson J.

[166] Renoud v. Daskam, 34 Conn. 512.

[167] Thiebaud v. First Nat. Bank, 42 Ind. 212.

[168] Insurance &c. Co. v. Na Bank &c., 71 Mo. 58.

[169] Banks v. Haskie, 45 Md.

[170] Darling v. Hoban, 53 Mich 19 N. W. 545.

ry unless it is required by a clause in the lease. The additional rm is not a new demise, but a continuation of the old one.[171] Where e stipulation is for an extension, and no requirement for notice is ade, the tenant's mere continuance in possession and payment of nt, though without express notice, entitles and binds him to the ex-nsion.[172] Actual knowledge on the part of the owner of the rever-on that the lessee elected to continue the lease is all that is necessary make it good for the extension. No particular form of notice is re-ired by law in such cases, the controlling consideration being what the understanding and intent of the parties. Provided no particular rm is stipulated for in the lease, it does not seem to be one of the ssor's legal rights that knowledge of the lessee's election should be nveyed to him in any one given form more than another.[173] "What ore was wanted than knowledge of the lessee's intention? The con-olling consideration was the intention of the parties."[174] Thus, mere olding, even for a few days, amounts to an election to take advantage the option for the longer term. It would be presumed that the ssee intended to continue rightfully according to the terms of the ase, rather than wrongfully in defiance of its provisions.[175] Conse-iently, there are cases which decide that where the provision for an tension is at an increased rental, the holding over and the payment r a time of the increased rental is sufficient evidence of an election accept the extension.[176] It is proof of an election to renew that the ssee pays rent regularly after the expiration of the lease and the ndlord accepts it.[177] The same rule would apply where the privilege extension was conditional upon all parties agreeing.[178]

[171] Terstegge v. First German &c. c., 92 Ind. 82; Relying on Mont-mery v. Board &c., 76 Ind. 362; andler v. McGinning, 8 Kan. App. 1, 55 Pac. 103.

[172] Mershon v. Williams, 62 N. J. 779, 42 Atl. 778; Kimball v. oss, 136 Mass. 300; Stater v. Kim-o, 91 La. 217, 18 S. E. 296.

[173] Clarke v. Merrill, 51 N. H. 415.

[174] Doe v. Morse, 1 B. & Ad. 365; oe v. Biggs, 1 Taunt. 367.

[175] Holley v. Young, 66 Me. 520; surance &c. Co. v. National Bank ., 5 Mo. App. 333, affirmed 71 Mo. ; Delashman v. Berry, 20 Mich. 2; Ferguson v. Cornish, 3 Term R. 463; Dann v. Spurrier, 3 B. & B. 399, 442; Doe v. Dixon, 9 East 15; Cooper v. Joy, 105 Mich. 374, 63 N. W. 414; Lyons v. Osborn, 45 Kan. 650, 26 Pac. 31; Unger v. Bamberger, 6 Ky. R. 447; Voege v. Ronalds, 31 N. Y. S. 353; Scheelky v. Koch, 119 N. Car. 80, 25 S. E. 713.

[176] Kramer v. Cook, 7 Gray (Mass.) 550; Stone v. St. Louis &c. Co., 155 Mass. 267, 29 N. E. 623; Long v. Stafford, 103 N. Y. 274, 8 N. E. 522.

[177] Harris v. Howes, 75 Me. 436.

[178] Peehl v. Bumbalek, 99 Wis. 62, 74 N. W. 545.

§ 341. However the lessor has a right to call on the lessee t before the end of the term and after the lessee had done so a lessor had acted in reliance upon such election, the lessee wo estopped to change his intention.[179] Without regard to the la of the lease in regard to notice of the election to renew, a lessee change his mind after he has led the landlord to make expenditu the faith of his statements that he will not accept the renewal te But prior statements which are not acted upon by the lessor wou defeat his right to exercise his option up to the end of the ter a statement by the lessee made upon the occasion of the lessor's ful demand for an increased rent would not bind him. And g statements of an intention to leave made to third parties woul no effect in the absence of any notice to the lessor.[181] Yet the te announcement of his intention not to accept the extension override the presumption arising from his continuance in poss The mere occupancy of the land at and after the expiration term could not be deemed an election to hold it for the ext period, in the face of an express notification of a different elect Where a lessee gave notice to the lessor of his election not to the longer term, and entered into parol agreement to hold for a time till he could get a building completed, such parol contra valid, and the lessee could not be held for rent for the longer ter

§ 342. A requirement for notice of election must, in the a of waiver, be complied with, and a mere holding over woul extend the term. The rule seems to be well settled that where is required of the lessee's intention to claim the extended term, must be given, or the intention must be otherwise manifested, an a naked holding over is insufficient to warrant a finding that th has been extended.[184] The election to retain the premises for t larged term and the giving notice thereof to the lessor are cond precedent to the extension of the term. In case of failure to pe these conditions, the term expires by its own limitation, the leas becomes inoperative, and the lessor is entitled to the possession premises.[185] In one case there was a stipulation that by the

[179] Chandler v. McGinning, 8 Kan. App. 421, 55 Pac. 103; Barnett v. Feary, 101 Ind. 95.

[180] Greiner v. Cota, 92 Mich. 23, 52 N. W. 77.

[181] Hughes v. Windpfennig, 10 Ind. App. 122, 37 N. E. 432.

[182] Barnett v. Feary, 101 Ind

[183] Storch v. Harvey, 45 Ka 25 Pac. 220.

[184] Cooper v. Joy, 105 Mich 63 N. W. 414.

[185] Bradford v. Patten, 108 153.

f a certain notice the lease itself should cover an additional four ears. This was an unconditional lease for the first period and a conitional lease for four years thereafter. The condition was the giving f a certain notice by the lessee, but it might just as well have been the appening of an event over which neither party had control, such as he death of a person or the falling of a tree. When such required vent happened, the condition was satisfied and the lease became a ease for the additional period by its own terms. The act of the lessee n giving notice was not the making of an agreement, but the performnce of a condition.[186] Accordingly, the requirement for written noce may be waived by the lessor. There is a waiver when notice is given y parol and no objection is made because it is not in writing, there eing no reason why such a right as this should not be waived by parol. uch a waiver is not contrary to any principle of public policy or posive law. The circumstances in which rights stipulated for, whether in riting or otherwise, may be waived are numerous and variant, and esablished by many decisions. No question as to the application of the tatute of frauds arises. The right of extension was fixed by and was art of the original contract. The lease itself created and defined the xtension term, and the statute of frauds had nothing to do with the ase.[187] Moreover, it seems that, as far as the lessee is concerned, he lects to exercise the option for an extension of the term by the mere act f holding over. Though, of course, such acts do not bind the lessor be-

[186] Sheppard v. Rosenkrans, 109 Wis. 58, 85 N. W. 199.

[187] McClelland v. Rush, 150 Pa. St. 7, 24 Atl. 354; Bradford v. Patten, 08 Mass. 153; Stone v. St. Louis tamping Co., 155 Mass. 267, 29 N. E. 623. Judge Cooley reached the pposite conclusion on similar facts n the case of Beller v. Robinson, 0 Mich. 264. He said: "It is conended, however, that the requirement of a written notice was one he parties might waive, and that hey did waive it in this case when he defendants gave oral notice of heir intention to retain possession nd the plaintiffs allowed them to o so as if the notice were in due orm. But the difficulty with this greement is that it makes an estate for three years depend on its creation and existence upon a mere oral understanding. This is inadmissible under the statute which makes void all leases for more than one year which are not evidenced by writing. This statute was aimed at precisely such mischiefs as appear in this case, where an oral lease for years is set up against the denial on oath of the supposed lessees that they ever made it; and no mere waiver of the parties can obviate the necessity of obeying the statute in such a case."

The answer to these objections is that the requirement for written notice is created by the agreement, not by the statute. In dispensing with such notice, they vary the agreement, but not the statute.

cause there has been no compliance with the requirement for no
writing. But by accepting the rent the lessor has been held to wa
requirement for notice.[188] Acceptance of a notice not seasonably
is a waiver of the condition as to the time of giving notice. The
few cases where the time within which an act is required to be don
not be waived by the parties where the rights of others are not af
and acceptance of the notice and action upon it without objection
an undoubted waiver.[189]

A provision for giving notice of election prior to the end of th
is for the benefit of the lessor merely. In a lease where thirty
notice of an election to renew at an increased rent was required,
provided that a mere holding over should be at the same rent.
held over, paying increased rent, but without giving the re
notice. It was held he had elected to accept the extension by so
No writing was necessary, and no formal action, if in fact the
elected to hold for the longer term, and if he gave thirty days'
of the election, or the lessor waived the giving of notice. Th
vision that if the lessee held over the rent should be at the or
rate made the payment of increased rent significant. These fact
enough to justify a jury in finding an election to continue the le
In one case a lease for the term of one year provided that it sho
deemed to be renewed and in force for another year and so on
year to year unless sixty days' notice to quit was given. It wa
that sixty days' notice prior to the end of the first year must be
to terminate tenancy, even though the lease contained a covena
part of lessee to deliver peaceable possession at the end of the ter

§ 343. Validity of covenants to renew.—A covenant to rene
another term carries with it by implication an agreement to ren
the same terms and conditions as to all the essential conditions
lease. Such a covenant is not void for uncertainty because of th
ure to specify the terms. The words used imply the same ter
those contained in the first lease, except any provision for furth
newal which would tend to create a perpetual lease. Such a pro
must be supported by language clear and certain, and could n
deduced by construction from a general agreement.[192] The wor

[188] Probst v. Rochester &c. Co., 171 N. Y. 584, 59 App. Div. 625, 64 N. E. 504; Long v. Stafford, 103 N. Y. 274, 8 N. E. 522.

[189] Sheppard v. Rosenkrans, 109 Wis. 58, 85 N. W. 199.

[190] Stone v. St. Louis Sta Co., 155 Mass. 267, 29 N. E.

[191] Wilcox v. Montour &c. C Pa. St. 540, 23 Atl. 840.

[192] Kollock v. Scribner, 9 104, 73 N. W. 776; Rutgers v

termini" import the giving a new lease like the old one, with the me terms and stipulations, at the same rent, and with all the essenal covenants.[193] To this rule there is one exception, equally well estabished with the rule itself. The renewal covenant is not to be inserted the new lease; that agreement is satisfied and exhausted by a single enewal. An agreement to renew *toties quoties* will not be inferred in e absence of words clearly pointing to that intention.[194] Still, a coveant in a lease for the perpetual renewal thereof is valid, and passes an incidental when the lease is assigned by a proper description.[195] he rule in England, as deduced from all the authorities, has been id to be "that a covenant to receive the construction of perpetual reewal must be plain and distinct, and such as to bear no other conruction without force and violence done to the words and the conext."[196] In accordance with the rule that an ordinary covenant for reewal does not imply a perpetual renewal and it is sufficient to give a enewal for one term only, a lessor agreeing to renew or pay for nprovements satisfies his agreement by a single renewal, and after he renewal term expires can recover the premises without paying for nprovements.[197] However, a lessor's covenant to buy improvements t the end of the term or renew the lease binds him to make a renewal or a substantial period, and his covenant is not satisfied by making a enewal for one day. "It would be worse than farcical," say the court, to hold that within the contemplation of the parties to this lease an xtension of one day would meet its requirements." The evident inention was that the lessor should buy the improvements or renew the ease for the period of the original term, and the word "extension"

er, 6 Johns Ch. (N. Y.) 215; Cuningham v. Pattee, 99 Mass. 248; anlett v. Cook, 44 N. H. 512; Mcdoo v. Callum, 86 N. Car. 412; racy v. Albany Exch. Co., 7 N. Y. 72; Western Transp. Co. v. Lansng, 49 N. Y. 499; Hughes v. Windfennig, 10 Ind. App. 122; Carr v. ellison, 20 Wend. (N. Y.) 178. *Contra*, Laird v. Boyle, 2 Wis. 431.

[193] Cunningham v. Pattee, 99 Mass. 48; Willis v. Astor, 4 Edw. Ch. N. Y.) 594; Rutgers v. Hunter, 6 ohns. Ch. (N. Y.) 215; Carr v. Elson, 20 Wend. (N. Y.) 178; Pigot v. Mason, 1 Paige (N. Y.) 412; racy v. Albany Exch. Co., 1 N. Y. 472; Whitlock v. Duffield, Hoffm. Ch. (N. Y.) 110; Price v. Assheton, 1 Y. & Col. Exch. 82; Rickards v. Rickards, 2 Y. & Col. Ch. 419, 427.

[194] Hyde v. Skinner, 2 P. Wms. 196; Davis v. Taylors Co., 3 Ridg. P. C. 395; Tritton v. Foote, 2 Bro. Ch. 636, s. c. 2 Cox Ch. 174; Moore v. Foley, 6 Ves. 232; Iggulden v. May, 9 Ves. 325, s. c. 7 East 237.

[195] Blackmore v. Boardman, 28 Mo. 420; Diffenderfer v. St. Louis Pub. Schools, 120 Mo. 447, 25 S. W. 542.

[196] Browne v. Tighe, 8 Bligh N. S. 272; Banks v. Haskie, 45 Md. 207.

[197] King v. Wilson, 98 Va. 259, 35 S. E. 727.

was used with that meaning. The construction claimed by th would make the contract very one-sided.[198]

Many adjudications may be found to the effect that cover renew must specify the terms and conditions of the renewal or want of certainty, but that requisite is met and satisfied by t struction of the general promise to renew in connection with t to which it refers. When the agreement for a renewal conta guage other than that appropriate to a general promise, so resort to the settled rules for construction the language of the covenant to renew and conditions of the renewal cannot be ma tain, then such covenant fails for want of certainty.[199] The o meaning of a renewal clause is that the lessees may have the p for the same rent they have been paying. To allow the lessor to the terms of the proposed renewal is to remove the binding forc obligation altogether.[200]

Where it appeared that the owners had been in the habit of re a lease from time to time, an attempt was made to give this aspect of an English customary tenant right. But the evidence showed that the landlords and the tenants were mutually satisf were likely to keep on together. Changeable intentions are not terest in land, and although no doubt such intentions may hav practically to the value of a holding, they could not be taken count in estimating damages. They added nothing to a tenant rights, and legal rights are all that must be paid for. Even intentions added to the saleable value of the lease, the addition represent a speculation on a chance, not a legal right.[201] In case the opposite result was reached, on the ground that it wa question of the permanency of the title, but of the saleable v such interest as the lessee had. It could be shown that the pr though held by a precarious tenure, had a large market valu the jury had a right to consider the probability of a renewal term.[202]

§ 344. A renewal agreement cannot be made to apply t divisions of the premises but must be claimed in its entirety.

[198] Phillips v. Reynolds, 20 Wash. 374, 55 Pac. 316.

[199] Tracy v. Albany Exch. Co., 7 N. Y. 472; Kollock v. Scribner, 98 Wis. 104, 73 N. W. 776; Whitlock v. Duffield, Hoff. Ch. (N. Y.) 110; Abeel v. Radcliff, 13 Johns. (N. Y.) 297.

[200] McAdoo v. Callum, 86 419.

[201] Emery v. Boston Termi 178 Mass. 172, 59 N. E. 763.

[202] Mayor &c. v. Rice, 73 M 21 Atl. 181.

rivilege of another term is of the entire premises, it follows that, by oluntarily surrendering a part of them, the lessee, in the absence of n agreement to the contrary, waived his right to a renewal or exten- on of the lease. The option would be for a lease of the entire prem- es, and not of a part of them.[203] However, a lessor cannot refuse to rant a renewal on the ground that parts of the premises have passed different owners. A lease with a privilege of renewal contained a ovenant upon the part of the lessee to sublet to certain persons who ere in possession of different parts of the premises under ground ases. The original lease was assigned, and the assignee and the vari- us sub-tenants applied for a renewal of the lease. It was granted hat, as the lessee could not renew for a part of the premises, his as- gnee could not do so. But all the assignees might join in asking the essee to secure a renewal and force him to act in their behalf. So the ndlord, after leading the assignees to believe he would deal with hem directly and not insist on action by the lessee, could not deny he renewal right to any one of the various parties claiming it.[204]

§ 345. Parties bound and parties entitled under renewal agree- ents.—In case there are several lessees, one of them has no power in he absence of special authority to extend a renewal agreement by iving the required notice. There could be no action without the con- urrence of all. Any one of the lessees had the right to object to the xtension of the lease, or to have a voice in saying what terms were atisfactory if a new lease were entered into.[205] But where a lessor who is under obligations to grant a renewal lease dies, the lessee is en- itled to have the lease renewed by every one who had or claimed to ave an interest in the property as the representative of the lessor. All real and supposed interests should unite in the renewal of the ease, and leave it open for future decree to determine their inter- sts.[206] On the other hand, the death of the lessee does not render the

[203] Barge v. Schiek, 57 Minn. 155, 8 N. W. 874.

[204] Cook v. Jones, 96 Ky. 283, 28 . W. 960. In one case there was a ease of a farm of eighty acres for stipulated sum, fifty acres being n grain and the rest being in pas- ure, with option in lessee to lease or two years longer for same sum r for crop rent. This was a contract for the entire renting and the grain rent would pay for the pasture land during the continuance of the re- newal term. Miller v. Finch, 12 Ill. App. 170.

[205] Howell v. Behler, 41 W. Va. 610, 24 S. E. 646.

[206] Bratt v. Woolston, 74 Md. 609, 7 Atl. 563.

covenant invalid or inoperative; the legal transferee of the ter exercise the right to have a renewal.[207]

§ 346. Where there is an agreement for arbitration to f amount of rent in a renewal lease and the landlord is ready t ceed, but the lessee refuses to do so after being notified, the la can collect the rent which he notified a tenant he should charg the expiration of the former term.[208] But the landlord could r for a reasonable rent without showing that he had tried and fa have an appraisal made, as provided in the lease. In case th under a lease is to be fixed by appraisal, then, if the referees app under the contract or lease to make the appraisal are unable to it, the lessor will be entitled to sue for a reasonable rent. Thi to sue depends upon a condition precedent, namely, his having t get the rent fixed in pursuance of the terms of the lease, and fai do so.[209] At the end of the term the parties failed to agree upon or renewal in one case, and referees were chosen, who made and upon the lease the following indorsement: "This lease is renew arbitration, for the term of five years, at the yearly rent . . able on the same terms as the first five years, excepting from t eration of this lease any assessment for stone pavements." The of this award was held to be plain enough, and while the lessee be at liberty to refuse to abide by it because it bound him to pa nary taxes, after he accepted it the lease was renewed upon the o terms, with the exception made by the referees themselves a further exception of the provision for renewal which had spent it

A contract to renew at a rate of rent fixed by arbitration will specifically enforced in equity until the arbitration is complete well settled that courts of equity will never entertain a suit to parties specifically to perform an agreement to submit to a tion.[211] So the real ground of the difficulty is that the contract

[207] Kolasky v. Michels, 120 N. Y. 635, 24 N. E. 278; Kolasky v. Michels, 2 Silv. (N. Y.) 581, affirming 46 Hun 677.

[208] Wells v. DeLeyer, 1 Daly (N. Y.) 39.

[209] Sherman v. Cobb, 16 R. I. 82, 12 Atl. 232; Phippen v. Stickney, 3 Metc. (Mass.) 384, 389; Stose v. Heissler, 8 West. R. 441, 445; Uhrig v. Williamsburg City Fire Ins. Co., 101 N. Y. 362, 4 N. E. 745.

[210] Brand v. Frumveller, 32 215.

[211] Greason v. Keteltas, 17 491; City of Providence John's Lodge, 2 R. I. 46; I Greene, 4 R. I. 285; Gourlay v of Somerset, 19 Ves. 429; Mi Gery, 14 Ves. 400; Blundell v targh, 17 Ves. 232; Morgan man, 17 E. L. & Eq. 203.

omplete, the parties not having fixed the amount of rent to be paid, ich is an essential ingredient in the lease to be made. The contract ich the court is called on to enforce is not an existing contract. Its ms are still to be settled by arbitrators.[212] However, there seems to a doctrine in the later cases that equity will, to prevent a failure of tice, apply its own remedies, and thus, where the substantial terms a contract are agreed upon, arrive approximately at the minor de- ls and then specifically enforce the contract.[213] In the case of a enant of this kind, it is obvious that it is not of the essence of the ntract that the valuation should be made by appraisers rather than a court of equity. That is an immaterial detail, and a mode as ectual and fair can be found.[214] The case presents a slightly differ- t aspect when the option lies with the lessor to renew or to buy or l the premises at an appraised valuation. Where the lessor failed exercise his option, and the lessee elected to buy, it was held that an ion for rent during the renewal period would be enjoined until the sor had appointed an appraiser to value the land in accordance with e terms of the lease.[215]

The weight of American authority supports the conclusion that in ses of the same general character as this equity will take jurisdiction d grant such relief as may seem to be most expedient or most in cord with the spirit of the agreement looking to the sale of the operty.[216] So, where a lease provided that there should be a revalu- ion for rent every ten years, and such revaluation became impossible cause of the infancy of some of the parties, it was held that a party jured could resort to a court of equity for redress and to have a oper valuation made under the direction of the court. Such action not equivalent to an award or arbitration within the technical mean- g of those terms.[217]

§ 347. A conditional covenant to renew upon the termination of e lease is not a present demise to take effect upon the termination the first year, but a mere covenant to execute a lease in the future.

[212] Hopkins v. Gilman, 22 Wis. 476.
[213] Strohmaier v. Zeppenfeld, 3 Mo. pp. 429; Backus' Appeal, 58 Pa. . 186, 193; Parker v. Taswell, 2 e G. & J. 559; Norris v. Jackson, Gif. 396.
[214] Strohmaier v. Zeppenfeld, 3 Mo. pp. 429.
[215] Coles v. Peck, 96 Ind. 333; Tscheider v. Biddle, 4 Dill. (U. S.) 55.
[216] Lowe v. Brown, 22 Ohio St. 463; Tobey v. County of Bristol, 3 Story (U. S.) 800; Biddle v. Ramsey, 52 Mo. 153; Hug v. Van Burkleo, 58 Mo. 202.
[217] Holmes v. Shepard, 49 Mo. 600.

The evident intention of the parties, as disclosed by such a st tion, is that if the contingency named does not occur a new leas be executed for a second year. It is merely an executory covena a lease, and not an executed covenant passing a present interest. lessee never accepts a renewal of the lease, but refuses to do s vacates the premises at the end of the original term, the lessor maintain an action for rent. His only remedy would be either tion to enforce specific performance of the covenant by compelli lessee to accept a renewal or an action on the covenant for dama its breach.[218] Where there was a lease for a year and agreemer if it were satisfactory the premises would be leased to him a year, it was held that the tenant did not have an estate in the la the second year.[219] In the absence of conditions, however, a having exercised his right to demand a renewal of an expiring le entitled to it, and to remain in possession as long as he complie its requirements and conditions. Although a provision for rene not itself a renewal so as to vest an estate in the lessees for th cessive term, it gives them an equity which will be recognized a fense to a proceeding for the ejectment of the lessees under the mary process provided in the statute against tenants holding ove the expiration of their term. But the lessees asserting their ri retain the possession must take it *cum onere* and pay the rent.[220]

Stipulations that a lessee should notify the landlord of his e before a certain date, and that he should secure future rent o date to the satisfaction of the landlord, take effect as condition çedent to the renewal, and the lessee is bound to comply with without notice or demand. Such conditions are most evidently dent to the renewal or continuance in force of the lease, and they are performed the instrument ceases to operate for a future The one act—notice—is no more essential than the other, and could be omitted both could be. A demand upon the lessee is un sary to defeat the lease upon his failure to perform its cond The instrument was not to become forfeited upon failure to gi notice and security, but was to be kept in force by these acts. became forfeited upon a failure to perform, then a demand fo formance might be required. But as these acts were to renew, t it in force, no demand was necessary. In the first case, it wou have been forfeited except upon the act or option of the lessor;

[218] Sutherland v. Goodnow, 108 Ill. 528; Swank v. St. Paul City R. Co., 61 Minn. 423, 63 N. W. 1088.

[219] Mullen v. Pugh, 16 Ind 337, 45 N. E. 347.

[220] McAdoo v. Callum, 86 N 419.

st, it ceased to operate unless certain acts were done by the lessee, ıd no act of the lessor was required to terminate its operation. The ssee's acts being necessary to keep the instrument in force, he was ound to perform them without notice or demand.[221]

§ 348. **Happening of contingency.**—A covenant by lessees to take further term in the premises in case the lessor purchased them would ıly become binding upon the lessor acquiring the legal title. The ıly contingency upon which the lessees were required to renew was ıat the lessor should, during the term mentioned in the lease, "purıase the title in fee simple to the premises." This condition was not ıtisfied by a mere agreement for such title, and a title acquired subequently was not available to the lessor.[222] Where a lease contained an ption to the lessee to renew provided lessor did not sell the farm, it as held that an open sale was intended, and that in the absence of otice of a sale brought home to lessee, the vendee with notice of the ease would be bound by the contract in regard to the option entered ıto between the lessor and lessee.[223] Where a lease for the term of one ear with the privilege, if both parties are suited, of longer lease for a rm of eight years, reserves the right to sell part or all, the fair conruction is that the lease should terminate upon a sale of the premises r, if of a portion of them, as to the part sold.[224] In case a covenant for enewal was to be void if the premises were sold, it was held that the ale might take place before or after the renewal began to run, and evertheless have the effect of nullifying the covenant for renewal. y the fair construction of the language used, the privilege of the two ears was to be void in case of a sale of the premises at any time either efore the two years should commence or after they were running. here was no limitation of time within which the sale spoken of should ake place in order to terminate the privilege.[225]

A stipulation in a lease for two years that if the lessor sells within ıe first year the sale shall be subject to the lease for that year, and if fterwards that it shall be subject to the lease for the two years, or to uch compromise as the parties shall enter into, requires the lessee to ive up possession at the end of the first year if sale is made within hat year.[226]

[221] McFadden v. McCann, 25 Iowa 52.

[222] Elevator Co. v. Brown, 36 Ohio t. 660.

[223] Starkey v. Horton, 65 Mich. 96, 1 N. A. 626.

[224] Wallace v. Bahlhorn, 68 Mich. 87, 35 N. W. 834.

[225] Knowles v. Hull, 97 Mass. 206.

[226] Jochen v. Tibbells, 50 Mich. 33, 14 N. W. 690.

III. *For Quiet Enjoyment.*

§ 349. When implied.—To give value to the interest of a les is essential that his possession of the premises should not be distu by one holding a paramount title or by the lessor himself. T often provided for by an express covenant in the lease, or such a nant is raised as an implication of law from the words used to tra the estate. Leases were not originally regarded as estates in the but as contracts for the perception of the profits. The possession c lessee was not regarded as in his own right, but as the possessi the grantor, and the destruction of the freehold was attended the destruction of the lease, giving a lessee no means of redress e upon the contract. A warranty, therefore, is implied in a lease different sense from the implied warranty in a freehold. The depends on tenure, the former on contract. The remedies, too, originally different. Hence a warranty is implied from any cor for the possession of lands amounting to a lease for years, no m in what words it is framed; but a warranty of a freehold is not im except from the feudal term of donation. No other word will ans the words "grant, bargain and sell" raise no warranty of a f But the words "grant and demise"[228] and, when standing alone word "demise" in a lease import a covenant on the part of the less good right and title to make the lease and for quiet enjoyment.[229]

The prevailing rule in the United States seems to be that a cov for quiet enjoyment by the lessor is implied in every demise of lan years, by whatever form of words the agreement is made.[230] Alth

[227] Young v. Hargrave, 7 Ohio 394.

[228] Barney v. Keith, 4 Wend. (N. Y.) 502.

[229] Harms v. McCormick, 132 Ill. 104, 22 N. E. 511; Hamilton v. Wright, 28 Mo. 199; Crouch v. Fowle, 9 N. H. 219; Style v. Hearing, Cro. Jac. 73; Merrill v. Frame, 4 Taunt. 329; Adams v. Gibney, 6 Bing. 656; Conrad v. Morehead, 89 N. Car. 31. The word "demise" in a pleading imports a title in the lessor and implies a covenant for quiet enjoyment. The point here was entirely one of pleading, and the lease itself was not in evidence. Wells v. Mason, 5 Ill. 84, citing Hill v. Saunders, 4 B. & C. 529, 10 L. 689.

[230] Arkansas: Pickett v. Ferg 45 Ark. 177. California: McD v. Hyman, 117 Cal. 67, 48 Pac Illinois: Field v. Herrick, 1 App. 591; Streeter v. Streete Ill. 155. Maryland: Baugh Wilkins, 16 Md. 35; Sigmu Howard Bank, 29 Md. 324. York: Mack v. Patchin, 42 167, 1 Am. R. 506; Burr v. Ste 43 N. Y. 462. Indiana: Hoa v. New York &c. R. Co., 111 441, 12 N. E. 83; Avery v. D erty, 102 Ind. 443, 2 N. E. 1 Am. R. 680; Smith v. Dodds, 3

he words "grant and demise" were not used in a lease, but the word *lease*" was used instead, it was held that a covenant for quiet enjoyment could be implied from this word as well as from the other two.[231] As far as the tenant's rights are concerned, according to this doctrine, it is immaterial whether the lease contains such a covenant or not.[232] The law will imply a covenant against paramount title and against such acts of the landlord as destroy the beneficial enjoyment of the lease.[233] On the other hand, there is a more restricted doctrine that a covenant for quiet enjoyment is not to be implied from the mere relation of landlord and tenant, but only arises from the use of certain special words. This is the rule in England, and is supported by some cases in the United States.[234] According to this doctrine, the mere use of the words "to let" and "to lease" in a written agreement of letting or leasing will not give rise to an implied covenant for quiet enjoyment. In order to give rise to such a covenant, the words "demise," "grant," or other words of like import must be used in the lease. The words "to let" and "to lease" are not of such import.[235] The New Hampshire court, considering this question in 1843, made the sweeping assertion that "No case is to be found where the words 'let and lease' imply a covenant for quiet enjoyment."[236]

If the parties to a lease contemplate a possible sale of the premises under a right reserved in the lease, and a consequent termination of the tenancy, it would be against the intention of the parties to imply a covenant which amounts to a warranty against an eviction by a purchaser of the land. A provision allowing the lessee to remove his improvements in case of a sale, which were otherwise to be left on the premises, supports this construction, and compensates the lessee for the loss of the balance of the term.[237]

§ 350. The rule that where an instrument contains an express covenant, in regard to any subject, no covenants are to be implied in

52. **Ohio:** Young v. Hargrave, 7 Ohio 394. **Oklahoma:** Hanley v. Banks, 6 Okla. 79, 51 Pac. 664. **Pennsylvania:** Maule v. Ashmead, 0 Pa. St. 482. **Wisconsin:** Eldred v. Leahy, 31 Wis. 546. **United States:** Owens v. Wight, 18 Fed. 65; Rawle Cov. Tit. (5th Ed.) 272.

[231] Hamilton v. Wright, 28 Mo. 199.

[232] Hanley v. Banks, 6 Okla. 79, 51 Pac. 664.

[233] Wade v. Halligan, 16 Ill. 507; Hayner v. Smith, 63 Ill. 430; Berrington v. Casey, 78 Ill. 317; Field v. Herrick, 10 Ill. App. 591.

[234] Gano v. Vanderveer, 34 N. J. L. 293; Mershon v. Williams, 63 N. J. L. 398, 44 Atl. 211; Granger v. Collins, 6 M. & W. 458.

[235] Mershon v. Williams, 63 N. J. L. 398, 44 Atl. 211.

[236] Lovering v. Lovering, 13 N. H. 513.

[237] O'Connor v. Daily, 109 Mass. 235.

respect to the same subject, has been declared to be too familia
quire more than its statement.[238] "An express covenant," it is
in Cruise on Real Property, "will qualify the generality of
plied covenant, and restrain it so that it shall not extend farthe
the express covenant."[239] But at common law other covenants
implied in addition to express covenants, provided they are not
sistent with those which are expressed.[240] Since the days of
Coke it has been considered settled law that, although there
both express and implied covenants in a lease, yet the covenan
plied from the use of the words of demise will be modified
strained by express covenants.[241] The implied covenant for qu
joyment arising from the use of the word "demise" in a lease is
fied and restrained by the presence of an express covenant on th
of the lessor to the effect that he covenants against interrupt
himself or his successors. "The parties having entered into e
agreements, it cannot be supposed that they intended by any g
language of the deed anything inconsistent with those express
nants or which might otherwise have implied an undertakin
more enlarged character."[242] But an express and unqualified g
covenant for quiet enjoyment in a lease is not limited by a subs
special covenant reciting that certain persons had an interest
premises and binding the lessor to hold the lessee harmless a
such claims.[243]

A guardian leasing land of ward cannot bind his ward's est
a general covenant for quiet enjoyment; like executors and tr
he can only covenant against having suffered any act which
impeach the title. Therefore, when a guardian covenants genera
quiet enjoyment, he is personally liable on his undertaking, a
ward's estate is not bound by it.[244]

[238] Burr v. Stenton, 43 N. Y. 462; Vanderkarr v. Vanderkarr, 11 Johns. (N. Y.) 122; Frost v. Raymond, 2 Caines (N. Y.) 188; Blair v. Hardin, 1 A. K. Marsh. (Ky.) 231; Crouch v. Fowle, 9 N. H. 219; Line v. Stephenson, 5 Bing. N. C. 183.

[239] Cruise Dig, Vol. 4, p. 370, § 17.

[240] Sumner v. Williams, 8 Mass. 162, 201; Gates v. Caldwell, 7 Mass. 68; Christine v. Whitehill, 16 S. & R. (Pa.) 98.

[241] O'Connor v. City of Memphis, 7 Lea (Tenn.) 219; Nokes' Coke 80.

[242] Crouch v. Fowle, 9 N. H Browning v. Wright, 2 B. & 26; Tooker v. Grotenkemper, C. R. (Ohio) 88; Groome v. City Corporation, 10 Utah Pac. 90; O'Connor v. City of phis, 7 Lea (Tenn.) 219.

[243] Sheets v. Joyner, 11 Ind 205.

[244] Chestnut v. Tyson, 105 Al 16 So. 723.

§351. Statutory provisions against implied covenants.—In New York it is provided by statute that a covenant is not to be implied in a conveyance of real estate, whether the conveyance contains any special covenant or not.[245] It has been held that this section was not applicable to leases for years, that such leases were not conveyances of land within the meaning of the statute, and that in such leases covenants for quiet enjoyment were implied.[246] As used in this section, the term real estate has been defined to mean "lands, tenements and hereditaments," while in another place it was defined by the legislature to embrace all chattels real except leases for a term not exceeding three years. "In comparing these two definitions with each other, we arrive at a pretty satisfactory conclusion that the legislature understood the words 'lands, tenements and hereditaments' as excluding terms for years in land." The legislature was dealing with words of art, and is presumed to have used them in their technical sense. The word lands always refers to something corporeal, and a term for years is not in law a tenement or a hereditament.[247]

A statute of like import exists in Wisconsin which was modeled after the New York act.[248] However, the legislature has provided that "the term 'conveyance' as used in this chapter shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except wills and leases for a term not exceeding three years."[249] Considering these statutes, there is no ambiguity. The words and the intent of the legislature are clear to the effect that no covenant shall be implied in any conveyance of real estate, and that a lease for more than three years is

[245] Rev. St., p. 3052.

[246] Burr v. Stenton, 43 N. Y. 462; Stone v. Brace, 11 Paige (N. Y.) 166; Vernam v. Smith, 15 N. Y. 327. A contrary doctrine was followed in the earlier case of Kinney v. Watts, 14 Wend. (N. Y.) 38. It was there said "That a lease like this for ten years is a conveyance of *real estate* is shown conclusively by the definition of those terms in a subsequent part of the revised statutes. In 1 R. S. 762, § 36, it is declared 'That the term "real estate" as used in this chapter shall be construed as co-extensive in meaning with lands, tenements, and hereditaments, and as embracing all chattels real, except leases for a term not exceeding three years,' and such would be the legal import of the terms, I apprehend, without any legislative declaration on the subject. . . . The lease . . . is a conveyance of real estate."

[247] Mayor &c. v. Mabie, 13 N. Y. 151; 1. Co. Litt., by Thomas, 219; Boreel v. Lawton, 90 N. Y. 293. In Coffin v. City of Brooklyn, 116 N. Y. 159, 22 N. E. 227, however, it was said that no covenant would be implied if a lease was for 100 years.

[248] Stat. 1898, § 2204.

[249] Stat. 1898, § 2242.

such a conveyance. The court held, therefore, that in a lease fo
than three years there was no implied covenant to defend from
ruption of the use by the acts of the lessor upon adjoining premi

§ 352. The legal implication of the covenant for quiet enjo
is that the landlord has an adequate title to the estate created
lease, and that he will permit the tenant to enjoy, without di
ance or interruption, the interest, title or privilege demised, s
to all such rights as are expressly or by natural implication re
to the lessor.[251] Such a covenant in a lease for years, being
futuro, runs with the land, and will pass with it to any person w
assignee in law, becomes legally possessed of the term.[252] On the
hand, the burden of the covenant passes to the transferee of the
sion, and, therefore, an assignee of a term is liable to a tenant
sublet from the original lessee, on a covenant for quiet enjo
after the sub-tenant has attorned to the assignee.[253]

Although the words "grant and demise" will in a lease cre
implied covenant against the lessor, yet it is nowhere considere
the same words will create an implied covenant against the assig
a lease. And so the assignor is not liable to the assignee for the
of the covenants by the original lessor.[254] This view of the qu
was taken by the Massachusetts court, which says that it "can fi
case of an action by an assignee against an assignor upon a cov
in law for an eviction in consequence of an act done by the or
lessor."[255]

§ 352a. On the lease of the surplus water in a canal, the cov
for quiet enjoyment which the law annexed to the lease was that s
as the canal was used for purposes of navigation and while there
surplus of water, the lessors agreed that they would do no acts to
rupt or deprive the lessee of its enjoyment. On the abandonme
the canal for navigation, the lessors were under no obligation t
tinue to keep it in repair.[256]

[250] Koeber v. Somers, 108 Wis. 497, 84 N. W. 991. A contrary dictum in the case of Shaft v. Carey, 107 Wis. 273, 83 N. W. 288, was expressly withdrawn.

[251] Hoagland v. New York &c. R. Co., 111 Ind. 443, 12 N. E. 83.

[252] Shelton v. Codman, 3 (Mass.) 318, § 330.

[253] Coulter v. Norton, 100 389, 59 N. W. 163.

[254] Blair v. Rankin, 11 Mo. 4

[255] Waldo v. Hall, 14 Mass.

[256] Hoagland v. New York Co., 111 Ind. 443, 12 N. E. 83.

§ 353. It is sufficient in many cases that a lease contains an implied covenant which is a good warranty by the landlord against his own acts; and it is then unnecessary to consider whether a covenant ould be implied amounting to a warranty against incumbrances or a aramount title, or against any rightful claims of third persons. Every grant carries with it an implied undertaking, on the part of the rantor, that so far as he is concerned he will do not act to interrupt he free and peaceful enjoyment of the thing granted.[257] Thus, every ease carries with it the implication that the lessor shall not proceed o impair the character and value of the leased premises. Consequently, where rooms in a building were leased, the lessor could not nake alterations which would affect the value of the rooms by shutting hem off from the street. By the alterations the subject of the lease vas so materially changed that the rooms no longer answered to the escription of them in the lease, regard being paid to the conditions nd situation of the premises. Alterations of such character would be nconsistent with the rights of a lessee under a lease, and constitute a reach of the implied covenants in the lease.[258] An implied covenant f this nature only applies to conditions in existence at the time of he leasing; as a general rule it does not extend to things not *in esse* t the time of the demise.[259] However, it would apply where the leased uilding was adapted to the needs of the tenant at the time of hiring, nd the landlord knew it was hired for a particular business. If injuries, caused by the acts of the landlord, rendered the building useless or this purpose, the tenant would be deprived of the beneficial use of he building, and there would be a breach of the landlord's implied ndertaking.[260] Furthermore, the landlord cannot interrupt the tenant's enjoyment either directly or indirectly, as by using an adjoining eld for such purpose as to defeat the object for which the premises vere leased.[261] Entering upon demised premises and digging up the oil under a building so as to render it permanently unsafe and unfit or occupancy, in consequence of which the tenants were unable to ccupy it and abandoned it, constitutes an eviction.[262]

[257] Dexter v. Manley, 4 Cush. (Mass.) 14.

[258] Brande v. Grace, 154 Mass. 210, 1 N. E. 633; Salisbury v. Andrews, 28 Mass. 336.

[259] Shaft v. Carey, 107 Wis. 273, 77, 83 N. W. 288, per Bardeen, J.

[260] Adams v. Werner, 120 Mich. 432, 79 N. W. 636; Young v. Collett, 63 Mich. 331, 29 N. W. 850; Pridgeon v. Boat Club, 66 Mich. 326, 33 N. W. 502.

[261] Henly v. Neal, 2 Humph. (Tenn.) 551.

[262] Shally v. Shute, 132 Mass. 367.

§ 354. The rule as to the breach of a covenant for quiet ment is that there can be no breach without an eviction ac constructive. What acts will constitute an eviction, it is ofte cult to determine, but it is settled, however, that there need no tual dispossession of the tenant from the leased premises.[263] Th lord's acts, though not amounting to a physical expulsion, may theless, be of so pronounced and offensive a character as to c nuisance, which would directly affect the consideration of the c between them.[264] On the other hand, a mere trespass by the la without any intention of depriving the tenant of the enjoymen premises, will not constitute an eviction.[265] In 1855 Chief Jervis, speaking for the Court of Common Pleas, said: "It tremely difficult at the present day to define with technical a what is an eviction. Latterly the word has been used to denc which formerly it was not intended to express. In the lang pleading, the party was said to be expelled, amoved and put ou word 'eviction' came from 'evincere,' to evict, to dispossess by cial course, and was formerly used to denote an expulsion by th tion of a title paramount and by process of law. But this sort tion is not necessary to constitute a suspension of the rent; be is now well settled that if the tenant loses the benefit of the ment of any part of the demised premises by the act of the la the rent is thereby suspended. The term 'eviction' is now po applied to every class of expulsion or amotion. Getting rid, t the old notion of eviction, I think it may now be taken to mea not mere trespass and nothing more, but something of a gra permanent character done by the landlord with the intention priving the tenant of the enjoyment of the demised premi

[263] McAlester v. Landers, 70 Cal. 79, 11 Pac. 505; Royce v. Guggenheim, 106 Mass. 201; Hayes v. Ferguson, 15 Lea (Tenn.) 1; Whitbeck v. Cook, 15 Johns. (N. Y.) 483; Levitzky v. Canning, 33 Cal. 299; St. John v. Palmer, 5 Hill (N. Y.) 599; Smith v. Raleigh, 3 Camp. 513; Upton v. Townend, 17 C. B. 30, 84 E. C. L. 30.

[264] Sully v. Schmitt, 147 N. Y. 248, 41 N. E. 514; Edgerton v. Page, 20 N. Y. 281; Boreel v. Lawton, 90 N. Y. 293; Dyett v. Pendleton, 8 Cow. (N. Y.) 727.

[265] McFadin v. Rippey, 8 Mo. 738; Tiley v. Moyers, 43 Pa. St. 40 ward v. Ramge, 33 Neb. 83 W. 229; Elliott v. Aiken, 4 30; Hunt v. Cope, Cowp. 24 ren v. Wagner, 75 Ala. 188; v. Baldwin, 69 Ill. 210; Lo v. Snyder, 31 N. Y. 514; Ma v. Mable, 13 N. Y. 151; Mc Spalsbury, 66 N. J. L. 60, 1026.

[266] Upton v. Townend, 17 C 84 E. C. L. 30, quoted with a in Tunis v. Grandy, 22 Gra 109, 130, and in Hayner v. 63 Ill. 430.

ts of a grave and permanent character, which amount to a clear dication of intention on the lessor's part to deprive the tenant of the joyment of the demised premises, will constitute an eviction.[267] here must be an actual expulsion of the tenant, or an intentional sturbance by the landlord, which so seriously disturbs the tenant's ssession as to compel an abandonment of the demised premises, or hich deprives the tenant of the beneficial enjoyment of them.[268] If wrongful acts of a lessor upon the demised premises are such as permanently deprive the lessee of the beneficial enjoyment of them, d the lessee, in consequence thereof, abandons the premises, it is an iction; and the intent to evict is conclusively presumed.[269]

§ 355. The question of eviction or no eviction depends upon the rcumstances, and is in all cases to be decided by the jury.[270] The ection of a fence barring a tenant's access to premises does not, as matter of law, amount to an eviction if the tenant continues to use d occupy them.[271] And so fencing off a portion of the demised emises for a short time by mistake does not relieve the lessee from bility for rent.[272]

Where a room and power were let together in one contract, the room ight be so situated with reference to the source of the power and so nnected with it, that a right to have the power could be treated as part of the premises let. To cut off the power would be a breach of e lessor's implied contract for quiet enjoyment, and an eviction om an important part of the premises let, which would entitle the ssee to recover such damages as they had suffered.[273] A building as let to be used as a distillery and the United States revenue law quired the written consent of the owner of the premises before they uld be used for such purpose. The parties did not intend that the ssee should make use of the distillery in violation of law. There-

[267] Meeker v. Spalsbury, 66 N. J. L. , 48 Atl. 1026; Keating v. Spring- , 146 Ill. 481, 34 N. E. 805; Bar- tt v. Boddie, 158 Ill. 479, 42 N. E. 3; Kistler v. Wilson, 77 Ill. App. 9; Anderson v. Winton, 136 Ala. 2, 34 So. 962.

[268] Hyman v. Jockey Club W. L. C. Co., 9 Colo. App. 299, 48 Pac. 1.

[269] Skally v. Shute, 132 Mass. 367; herman v. Williams, 113 Mass. 481.

[270] Hayner v. Smith, 63 Ill. 430; Lynch v. Baldwin, 69 Ill. 210; Patterson v. Graham, 140 Ill. 531, 30 N. E. 460; Upton v. Townend, 17 C. B. 30, 84 E. C. L. 30; Collins v. Karatopsky, 36 Ark. 316; Young v. Burhaus, 80 Wis. 438, 50 N. W. 343; Sully v. Schmitt, 147 N. Y. 248, 41 N. E. 514.

[271] Boston &c. R. Corp. v. Ripley, 13 Allen (Mass.) 421.

[272] Mirick v. Hoppin, 118 Mass. 582.

[273] Brown v. Holyoke &c. Co., 152 Mass. 463, 25 N. E. 966.

fore the obligation of the lessors to give their consent as deman
law could be implied as a necessary incident to the lease, as f
if there had been a positive stipulation to that effect. The
as much bound to give their written consent, as to allow the ter
take possession of the distillery and premises which was an i
covenant affecting the lease.[274]

Any default as well as any overt act of the lessor that r
the tenement dangerous to the life or health of the tenant n
treated by the lessee as an eviction. Thus, evidence of the l
neglect to drain the cellar was admissible.[275] Where there is a
in an admitted undertaking by a landlord in regard to the co
of leased premises, the failure to put them in proper shape wi
reasonable time after receiving notice of the defect will justi
tenant in leaving the premises and refusing to pay any more r
Whether the consequences flowing from the breach of the l
covenant to repair are serious enough to justify the lessee in
doning the premises on the ground that there has been a const
eviction is also for the jury to determine.[277] The tenant is n
charged from liability for rent because of non-repair amountin
constructive eviction, when he elects to continue in possession.[27
a breach of a covenant to perform special services, such as furn
heat and light for the tenant, would not amount to an eviction.[2

§ 356. **An eviction may be actual, as where there is a pl
expulsion, or it may be constructive,** as where, though amount
an eviction at law, the tenant is not deprived of actual occu
Where a house, in which there were leased rooms, was moved
joining land, it was held that the eviction caused thereby w
actual but constructive. The tenant had no interest in the la
had a mere easement for support, and interference with an eas
is not an actual physical eviction.[280] A tenant cannot retain th
session of the leased premises and refuse the payment of rent
ground of a mere constructive eviction. Such an eviction may
an abandonment of the premises, but, unless there is an actual

[274] Grabenhorst v. Nicodemus, 42 Md. 236.

[275] Alger v. Kennedy, 49 Vt. 109.

[276] Young v. Collett, 63 Mich. 331, 29 N. W. 850.

[277] Young v. Burhaus, 80 Wis. 438, 50 N. W. 343; Barrett v. Boddie, 158 Ill. 479, 42 N. E. 143.

[278] Talbott v. English, 156 In 59 N. E. 857; Keating v. Sp 146 Ill. 481, 34 N. E. 805.

[279] Bean v. Fitzpatrick, 67 225, 38 Atl. 722.

[280] Lieferman v. Osten, 167 47 N. E. 203, affirming 64 Ill 578.

ment, it will not defeat an action for rent.[281] If the tenant fails act within a reasonable time he waives his right to abandon.[282] ere can be no defense as for a constructive eviction, except there is actual abandonment of the building or a portion of it by the ten- on that account. The acts of the landlord must be such as to rant an abandonment, and there must be, in fact, an abandonment the premises, or of the portion complained of.[283] But the mere ention of keys by a tenant who claims to have been evicted does not ount to a constructive possession by him.[284] By paying rent subse- ntly to the time an annoyance on the leased premises amounting constructive eviction exists, a tenant waives his right to abandon mises for that cause.[285] In fact, a constructive eviction may be ved by the tenant's mere continuance in possession, and liability rent under the lease continues as long as the tenant remains in session.[286]

Where one room in an apartment house was rented and was in the lusive possession of the tenant, it was held to constitute an evic- n to have a strong odor of coal gas come from an upper tenement, l smoke from a lower one and to have explosions in a water tank on roof which cracked the walls so that the building was declared un- e by the city inspectors; the landlord was under no covenant to re- r and it is to be observed that tenant continued to occupy the lding. Still the majority of the court thought there was an evic- n, suspending the lessee's liability for rent. They reason that "if explosions proceeded from the water tank and . . . produced result stated, it was clearly a nuisance, and it was the lessor's duty abate it and remove the cause of the trouble. The tank was a part the building, designed and intended in its use for the accommoda- n of the tenants. If the noises and explosions proceeded from it, nuisance was of plaintiff's own creation."[287]

[281] Patterson v. Graham, 140 Ill. 30 N. E. 460; Humphreville v. inger, 62 Ill. App. 125; Talbott English, 156 Ind. 299, 59 N. E. ; Leiferman v. Osten, 167 Ill. 93, N. E. 203, affirming 64 Ill. App.

[282] Crommelin v. Thiess, 31 Ala. ; Beecher v. Duffield, 97 Mich. 56 N. W. 777.

[283] Witte v. Quinn, 38 Mo. App. ; Kistler v. Wilson, 77 Ill. App. ; Edgerton v. Page, 20 N. Y. 281; Keating v. Springer, 146 Ill. 481, 34 N. E. 805; Barrett v. Boddie, 158 Ill. 479, 42 N. E. 143.

[284] Harmony Co. v. Rauch, 64 Ill. App. 386.

[285] Orcutt v. Isham, 70 Ill. App. 102.

[286] Barrett v. Boddie, 158 Ill. 479, 42 N. E. 143; Kistler v. Wilson, 77 Ill. App. 149.

[287] Tallman v. Murphy, 120 N. Y. 345, 24 N. E. 716. Strong dissenting opinion by Vann J. A weak

The inability of a lessee to obtain a renewal of his liquor li the leased premises is not an eviction. To constitute an evictio will operate either to annul a lease or to suspend the rent s must have been done by the landlord or by his procurement intention and effect of depriving the lessee of the use and en of the demised premises in whole or in part.[288] So it has b that even though the lessor influence the public authorities away the tenant's liquor license, such action does not const eviction by the lessor.[289] Consequently a vote for no license, it had a direct bearing on the passage of a no license law, w amount to an eviction justifying an abandonment of a leas by the lessee.[290]

§ 357. Physical expulsion.—Where, by the procurement lessor, the lessee was excluded from access to the leased ro the effect of depriving him of the use of it and the lessee yi such exclusion and abandoned the occupation of such room, clusion in law would amount to an eviction.[291] Excavations lot owned by the landlord adjoining the leased premises for pose of laying a new party wall may amount to a breach of nant for quiet enjoyment.[292] But it was held that the owne adjoining houses who had let one and tore down the other was sponsible to the tenant for exposing his premises by tearing a entire wall when such acts were not done negligently.[293]

A covenant for quiet enjoyment is broken by tearing dow mised building, which has been condemned by the authorities than remedying the defect by making repairs. The covenan the lessors not to do any unnecessary thing to disturb the po of the lessee. If it was necessary to take down the building sons of safety then it might be taken down. But if the could be made safe and secure without taking it down, the would violate the lessee's rights by taking it down. The

point in majority opinion was that landlord was not connected with the disturbing circumstances.

[288] Miller v. Maguire, 18 R. I. 770, 30 Atl. 966.

[289] International Trust Co. v. Schumann, 158 Mass. 282, 33 N. E. 509.

[290] Barghman v. Portman, 12 Ky. L. R. 342.

[291] Grove v. Youell, 110 M 68 N. W. 132; Pendill v. Mich. 657, 35 N. W. 754; v. Canning, 33 Cal. 299; Thompson, 9 Pa. St. 338.

[292] Collins v. Lewis, 53 M 54 N. W. 1056. See Trus Palmer, 171 Ill. 383, 49 N.

[293] Rotter v. Goerlitz, 16 Y.) 484.

ection as to the mode of obeying the requirement of the statute, was nited by the covenant in the lease.[294]

Taking possession of furniture in a leased hotel by the landlord nder a chattel mortgage to secure rent is not an eviction. Such interrence by him does not clearly indicate an intention on his part that e tenant shall no longer continue to hold the premises.[295] Under an tachment for rent wrongfully obtained, a lessor sold all of his tent's personal property in a rented hotel so that he was disabled from ntinuing in business. Nevertheless, the tenant could not elect to eat this as an eviction, because to constitute an eviction, the acts of e landlord must relate to the premises themselves, making them nfit for occupancy. A personal assault on a tenant rendering him unle to continue business would not be an eviction.[296]

§ 358. Entry by landlord under claim of privilege.—A landlord ay by contract lawfully restrict his tenants' use of the property and a trespass is committed in preventing their use for a purpose prohibited by the lease, such trespass does not constitute an eviction.[297] nterruption by a landlord of his tenants' occupation, without evicting him does not suspend the rent, either in whole or in part.[298] But has been held that a landlord would be liable to his tenant for an nterruption of his possession, even though the landlord entered to epair an unsafe wall.[299] When the parties to a lease contemplate hanges in the leased premises and bind the lessor to make them on a rtain contingency, no covenant will be implied against an interruption of the lessees' enjoyment caused by the making of the proposed terations. As long as the lessor is not at fault in performing his ndertaking, he will not be liable because the interruption of the lessee's enjoyment continues for a longer period than was anticipated.[300] When the consent to occupy a space adjacent to leased premises is a here license to do so, an express covenant for quiet and peaceable ossession cannot be regarded as having application to that clause. n determining what was a mere license, the power and authority of he lessor is entitled to weight; as where sidewalk space could not be

[294] Kansas Inv. Co. v. Carter, 160 Mass. 421, 36 N. E. 63.

[295] Morris v. Tillson, 81 Ill. 607.

[296] Marchand v. York, 10 Ky. L. R. 12.

[297] Hayward v. Ramge, 33 Neb. 836, 1 N. W. 229.

[298] Fuller v. Ruby, 10 Gray (Mass.) 285.

[299] Goebel v. Hough, 26 Minn. 252, 2 N. W. 847.

[300] McCormick v. Milburn & Stoddard Co., 57 Minn. 6, 58 N. W. 600.

leased without the consent of city authorities.[301] Where lease
ises were partially destroyed by fire, and the landlord, with
parent consent of the tenant, enters and repairs them, this is
eviction even though the tenant is obliged to remove his effec
the house, and the tenant is not justified in abandoning the p
but will still be liable for rent.[302]

In a case where a vein of coal was leased, it was held not t
eviction for the lessor to mine coal from another part of the
long as he interfered in no way with the operations carried or
lessee.[303]

It has been laid down that, as a general rule, the bringin
action for possession of the demised premises operates as a
and a final election by the lessor to terminate the tenancy. A
there has been no judgment in the ejectment suit, the lessor
afterwards maintain an action for rent due or covenants br
But this result does not follow if the ejectment suit was r
founded, and was subsequently dismissed and the lessee has re
in continuous enjoyment of the demised premises.[305] So it w
that a right of action for breach of a covenant of quiet enjoyn
not accrue at the time a petition was filed but only after an inj
had issued against the continued occupation of the premises
lessee.[306] A formal entry by a landlord, followed by an ac
ejectment which the tenant successfully defends, would not be
tion, provided the tenant remained in occupation till the end
term.[307]

§ 359. Interference with light and air.—Although it is
that actual physical expulsion is not necessary to constitute
tion, the American doctrine that easements for light and air c
be created by express grant[308] produces the result that inte
with such rights by the landlord is not an eviction.[309] The m

[301] Brown v. Schiappacasse, 115 Mich. 47, 72 N. W. 1096.

[302] Humiston v. Wheeler, 70 Ill. App. 349.

[303] Tiley v. Moyers, 43 Pa. St. 404.

[304] Jennings v. Bond, 14 Ind. App. 282; Cones v. Carter, 15 M. & W. 718.

[305] Agar v. Winslow, 123 Cal. 587, 56 Pac. 422; Madox v. Humphries, 24 Tex. 195.

[306] Madox v. Humphries, 195.

[307] International Trust Shumann, 158 Mass. 287, 3 509.

[308] Collier v. Pierce, (Mass.) 18; Rogers v. Sa Gray (Mass.) 376.

[309] Witte v. Quinn, 38 M 681.

f the erection of a building by a landlord on his adjoining land, so s to obstruct and darken the tenant's windows, is not an eviction.[210] till, if the building was erected upon part of the curtilage included n the lease, closing the windows so as to make a part of it uninhabitable, the lessee could certainly treat this as an eviction, because it ould be the erection of a permanent structure on part of the demised remises, materially changing the character and beneficial enjoyment ereof. In such a case the landlord would be responsible for the effect f his wrongful act, without further proof of unlawful intent.[211] urthermore, this would take effect as an actual physical ouster from portion of the premises, so that the lessee could continue to occupy he balance of the premises and yet claim to be evicted. The only uestion is whether the yard or place upon which the lessor enters and rects his structure is a part of the demised premises. It is error to xclude evidence throwing light on this question.[212] The erection of a arty wall by an adjoining owner, by which windows in a leased building are closed up, is not an eviction by the lessor, nor any defense to he payment of rent under the lease, even though the lessor knew of he intention of the adjoining owner to build at the time of entering nto the lease and concealed it from the lessees.[213]

The fact that the owner of leased premises consents to the erection f an elevated railroad along the street in front of the same, and that he operation of such railroad seriously discommodes the tenant and nterferes with the transaction of his business, does not constitute such n eviction as will justify the tenant in abandoning the premises.[214]

§ 360. Eviction by nuisance on adjoining premises.—From the octrine that a landlord is not responsible for the acts of strangers, would follow that an act done by one tenant in a tenement house, ithout the authority, consent, or connivance of the landlord, cannot e treated as an eviction by other tenants.[215] In an early case in

[210] Palmer v. Wetmore, 2 Sandf. (N. Y.) 316; Myers v. Gemmel, 10 Barb. (N. Y.) 537. See also, Edgerton v. Paige, 1 Hilt. (N. Y.) 320, 0 N. Y. 281, § 381.

[211] Boyce v. Guggenheim, 106 Mass. 201.

[212] Witte v. Quinn, 38 Mo. App. 31. Back yards and passage-ways will usually pass as appurtenances to a lease of the principal building. Oliver v. Dickinson, 100 Mass. 114. Or the lease may take effect as a grant of an easement for light and air, which is supplied by the open space above the yard. Doyle v. Lord, 64 N. Y. 432.

[213] Hazlett v. Powell, 30 Pa. St. 293.

[214] Kistler v. Wilson, 77 Ill. App. 149.

[215] Conrad Seipp &c. Co. v. Hart, 62 Ill. App. 212.

New York, however, the principle was established that when a creates a nuisance in the vicinity of the demised premises, guilty of acts which precluded the tenant from the beneficial ment of the premises, in consequence of which the lessee aba the premises, such act is deemed a virtual expulsion of the and equally with an actual expulsion bars the recovery of rent reason of the rule is that the tenant has been deprived of the ment of the demised premises by the wrongful act of the lan and thus the consideration of his agreement to pay the re failed.[316] This principle has also received the support and ap of the courts in other jurisdictions.[317] So it has been held to a to an eviction for a landlord to let an adjoining tenement t women when he knew, or ought to have known, that it would l for purposes of prostitution, and to take no steps for the rem such tenants after being informed that their conduct was so l ous and offensive that the peace and quiet of the tenant was des and the building made disreputable and infamous. Such facts justify the tenant in abandoning the premises and relieve hir further liability for rent.[318] However, where a tenant had con in occupation during the disturbance, he could not set up the ance of improper neighbors as a defense against his liability rent. If there is no actual ouster and no intention on the part lessor of depriving the lessee of the use and occupation of mised premises, the liability to pay rent will continue.[319]

[316] Dyett v. Pendleton, 8 Cow. (N. Y.) 727. This case was approved and followed in Cohen v. Dupont, 1 Sandf. (N. Y.) 260; Edgerton v. Page, 20 N. Y. 281; Home &c. Ins. Co. v. Sherman, 46 N. Y. 370; Sully v. Schmitt, 147 N. Y. 248, 41 N. E. 514.

[317] Leadbeater v. Roth, 25 Ill. 587; Jackson v. Eddy, 12 Mo. 209; Dougherty v. Seymour, 16 Colo. 289, 26 Pac. 823; Lay v. Bennett, 4 Colo. App. 252, 35 Pac. 748; Rowbotham v. Pearce, 5 Houst. (Del.) 135.

[318] Dyett v. Pendleton, 8 Cow. (N. Y.) 727; Lay v. Bennett, 4 Colo. App. 252, 35 Pac. 748. But see Townsend v. Gilsey, 1 Sweeny (N. Y.) 155.

[319] De Witt v. Pierson, 112 Mass. 8. Endicott J. said in the course of the opinion: "The case o v. Pendleton, 8 Cow. (N. . . . was decided upon a v ferent state of facts, and co many elements, necessary to tute an eviction, which are in the case at bar. The de there, under a lease for yea been in more than a year w plaintiff, who occupied an ing room under the same ro self created the disturbanc nuisances complained of, a defendant within a month doned his tenement. The in evict, and actual abando might well have been found, hold there was an eviction would be to go far beyond t cision."

A tenant whose enjoyment and use of the premises is interfered ith by the landlord's operating boilers below, making the floors and alls uncomfortable and unhealthy, may recover damages for breach covenant of quiet enjoyment.[320] But oppressive heat coming from boiler room would not be a breach of covenant for quiet enjoyment, hen the amount of artificial heat had not been increased since the anting of the lease.[321]

§ 361. **Under a covenant for quiet enjoyment, the lessor does not venant against the acts of wrong-doers;** and to constitute a breach this covenant, the person who does the act must have some lawful terest or right in the realty whereby the tenant is evicted, and not erely a title to some chattel that happens to be upon it. A general venant in a lease for quiet enjoyment extends only to entries and terruptions by those who have lawful title but not by wrong-doers; r the tenant has his remedy by action for all tortious entries and sturbances.[322] Hence, it may be stated as a general rule that a venant for quiet enjoyment in a lease, whether express or implied, es not render the lessor liable for the tortious acts of strangers to the le.[323] The acts of strangers, claiming under no title, cannot con- itute a technical eviction of the tenant.[324] The responsibility of the ndlord under such a covenant does not extend to indemnity against jury from the acts of a mere trespasser; but is confined to acts of ose claiming under the lessor.[325] Even though the third party be a antee from the landlord of a part or of the whole of the property, s interference with the tenant is not a violation of the covenant for iet enjoyment.[326] But if the landlord authorizes an adjoining ner to do acts on the demised premises, as to excavate for a party all, the landlord is responsible for such acts which would constitute breach of his covenant for quiet enjoyment.[327] It is the right and

[320] Boyer v. Commercial Bldg. Inv. ., 110 Iowa 491, 81 N. W. 720.

[321] Chicago Warehouse Co. v. Illi- is &c. Co., 35 Ill. App. 144.

[322] Kimball v. Grand Lodge &c., 1 Mass. 59; Ellis v. Welch, 6 ass. 246; Sigmund v. Howard ank, 29 Md. 324; Baugher v. Wil- ns, 16 Md. 35; Dudley v. Folliott, Term R. 584.

[323] Abrams v. Watson, 59 Ala. 524; estnut v. Tyson, 105 Ala. 149, 16 . 723; Branger v. Manciet, 30 Cal. 4; Underwood v. Birchard, 47 Vt. 305; Perry v. Wall, 68 Ga. 70; Hayes v. Bickerstaff, Vaughan 118, 2 Mod. 35.

[324] Meeks v. Bowerman, 1 Daly (N. Y.) 99.

[325] Baugher v. Wilkins, 16 Md. 35; Sigmund v. Howard Bank, 29 Md. 324.

[326] Gazzolo v. Chambers, 73 Ill. 75; Kelly v. Dutch Church, 2 Hill (N. Y.) 105.

[327] Collins v. Lewis, 53 Minn. 78, 54 N. W. 1056.

duty of a lessee who, in contemplation of law, is in possessio
the moment the lease takes effect, to eject a trespasser, and r
duty of the lessor, and if the lessee fails to do so, he cannot cl
abatement of rent by reason of an eviction.[328] However, it is
fense to a tenant's claim that his rights under the lease hav
invaded and infringed upon, to say that the invasion and in
ment were the acts of another tenant, when they have been per
with the landlord's consent and active concurrence.[329] The
sion that a tenant can only excuse himself from paying rent
evicted by a paramount title, means that he can only excuse h
when he is kept out of possession by one who has the legal r
do so, and not a mere trespasser against whom he has his rem

Covenants for title and for quiet enjoyment merely exact
lessor that he shall have such a title to the premises at the t
shall enable him to give a free unincumbered right for the te
mised, and there is no express or implied warranty against th
of strangers; hence, if the lessee be ousted by one who has n
the law leaves him to his remedy against the wrong-doer. It w
judge that the lessor covenanted against the wrongful acts of str
unless the covenant be full and express to the purpose.[331]

Before a lessee can recover damages for a disturbance of h
session by a third person, he must give personal formal notice
lessor and call him in warranty.[332]

**§ 362. A taking of the demised premises by the sovereign
the right of eminent domain is not an eviction.**[333] The Su

[328] McNairy v. Hicks, 3 Baxt. (Tenn.) 378.

[329] City Power Co. v. Fergus Falls &c. Co., 55 Minn. 172, 56 N. W. 685; Twiss v. Baldwin, 9 Conn. 291; Clement v. Gould, 61 Vt. 573, 18 Atl. 453.

[330] Hoopes v. Meyer, 1 Nev. 433. *Paramount title.* Where premises owned by two tenants in common were leased by one of them and the other got hold of part of the premises and kept the lessee out, this amounted to an eviction and the tenant would be *pro tanto* excused from paying rent. For if the other tenant in common got possession without fraud or force, it could not be recovered back fro
Hoopes v. Meyer, 1 Nev. 433.

[331] Gardner v. Keteltas, 3 H
Y.) 330; Dudley v. Folliott, 3
584; Hayes v. Bickerstaff, V
118.

[332] Fox v. McKee, 31 La. A
Sheets v. Joyner, 11 Ind. Ap
38 N. E. 830.

[333] Frost v. Earnest, 4
(Pa.) 86; Ross v. Dysart,
St. 452; Schuylkill &c. R.
Schmoele, 57 Pa. St. 271; I
Wightman, 66 Pa. St. 425; I
Jones, 70 Pa. St. 83; Ellis v.
6 Mass. 246; Parks v. City
ton, 15 Pick. (Mass.) 198;
v. Feeley, 132 Mass. 346; Stu

Court of Ohio said in an early case: "Whilst there are a few cases, chiefly in Missouri and Louisiana, which hold a contrary view, the correct doctrine, both on principle and by the decided weight of authority, seems to be that a condemnation of a part of a leasehold estate for a public use does not at law amount to an eviction; and whether the fee or a mere easement be taken, the tenant still remains liable under his covenants to pay the rent originally reserved, because nothing short of a surrender, a release or an eviction will discharge him from his covenant in this behalf. . . . A condemnation by eminent domain of part of the landlord's reversion is not in law an eviction or partial eviction, for an eviction is the act of the landlord or of a third person holding under a paramount title."[334] A tenant, as the owner of an estate for years, is guaranteed just compensation before his title can be divested under the power of eminent domain. He takes the term as any other interest in land is taken, subject to the exercise of that power. If he suffer loss, or is deprived of his estate, he is provided with the same remedy that is given to all other owners, and holds his title subject to this right the same as his landlord holds his title.[335] A covenant for quiet enjoyment is designed to indemnify the lessee for a lawful eviction by reason of defect of title in the lessor and any disturbance thereon. In case of a taking by eminent domain the remedy of the lessee is to look to the legislative provisions made for his indemnity, and not to the covenant for quiet enjoyment, which was introduced into conveyances for purposes entirely different.[336] Considering the covenant to pay rent as unaffected by the proceedings of the state to appropriate the land, it is true in strictness of law that the landlord is only entitled to the present value of his reversion, subject to the term; and that, on the same principle, the tenant remaining personally bound, but being deprived of the use of the premises, is entitled not merely to the value of the term, subject to a rent, but to a sum of money which will indemnify him against the loss arising from his covenant to pay *in futuro*.[337]

v. Village of Evanston, 136 Ill. 37, 26 N. E. 577, 11 L. R. A. 839; Corrigan v. City of Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; Folts v. Huntley, 7 Wend. (N. Y.) 210; Foote v. City of Cincinnati, 11 Ohio 408; Gluck v. Mayor, etc., of Baltimore, 81 Md. 315, 32 Atl. 515. See § 680. Ouster by power of eminent domain is not an eviction of a tenant even though the lease was executed after the statute conferring the power of eminent domain had been passed. Frost v. Earnest, 4 Whart. (Pa.) 86.

[334] Foote v. City of Cincinnati, 11 Ohio 408.

[335] Corrigan v. City of Chicago, 144 Ill. 537, 33 N. E. 746.

[336] Frost v. Earnest, 4 Whart. (Pa.) 86.

[337] Foote v. City of Cincinnati, 11

But in equity this sum of money belongs to the lessor beca would be deprived of all recourse to the land, either by distress entry, and would have to rely on the personal responsibility tenant. The consequence of awarding such damages to the la is to release the tenant from his obligation to pay rent. All at once are compensated for their actual loss. The damages a take the place of the land, the relation of landlord and tenant tinguished and all covenants growing out of that relation are sarily at an end.[338] So it has been held that when the entire pr included in the demise are taken, the obligation of the tenant rent ceases, and he may plead the termination of the estate as fense.[339] The measure of the lessee's damages is the value of th minus the rental which he has undertaken to pay.[340]

In Rhode Island it is provided by statute[341] that, in case on of any land under lease is taken all contracts respecting the should, from the time of election, cease and determine and b lutely discharged as to the part taken but should remain vali the residue, and the rents should be apportioned for such r Under this act it was held that no eviction by a city or attor to it was necessary to end a lessee's liability for rent which on the vesting of the title in the city. The lessor could not use or occupation, though the lessee continued in occupation entire estate.[342]

§ 363. An outstanding title which is paramount to that landlord is no defense by a tenant to an action for rent. There be ouster or disturbance by means of it amounting to an evict After tenant has enjoyed his term and received all the bene cannot be permitted to set up his landlord's want of title as a d in an action for rent.[344] To constitute a defense, tenant must not only a paramount title but also that he was evicted by vir it.[345] Thus, in one case two distinct tracts of land, a large

Ohio 408; Parks v. City of Boston, 15 Pick. (Mass.) 198; Folts v. Huntley, 7 Wend. (N. Y.) 210.

[338] Dyer v. Wightman, 66 Pa. St. 425.

[339] Corrigan v. City of Chicago, 144 Ill. 537, 33 N. E. 746; O'Brien v. Ball, 119 Mass. 28; Dyer v. Wightman, 66 Pa. St. 425.

[340] Corrigan v. City of Chicago, 144 Ill. 537, 33 N. E. 746.

[341] Pub. Laws R. I., Feb. 22

[342] McCardell v. Miller, 22 R 46 Atl. 184.

[343] Russell v. Fabyan, 27 529; Crawford v. Jones, 5 429; Hayes v. Ferguson, 1 (Tenn.) 1.

[344] Hodson v. Sharpe, 10 Ea 353.

[345] Sneed v. Jenkins, 8 Ir (N. Car.) 27.

small tract, were leased for a series of years at a certain rental. The smaller tract was in litigation, which fact the lessees knew, and during the term the lessors lost the suit, whereupon the lessees abandoned the land and notified the lessors that they rescinded the contract, contrary to the wishes of the lessors who stated to the lessees that they should be protected in their possession. The lessees were still liable for rent because the loss of the suit did not constitute an eviction.[346]

However, actual force is not essential to a wrongful eviction of a tenant by a landlord. Such eviction may be effected by the serving of a notice to quit at a specified time, the moving of property into the buildings without tenant's consent and the abandonment of the premises in consequence thereof.[347] Service of summons in ejectment suit against a tenant by his landlord is a constructive eviction. It is a demand by the landlord for the possession of the premises and the tenant has a clear right in response to such demand to yield the possession, and no act of the former landlord could subsequently restore between the parties the relation of landlord and tenant. The landlord could recover no more rent.[348] Where a landlord of a tenant at will insisted upon his right to have a sub-lessee hold directly from him, this was a breach of the covenant for quiet enjoyment in the lease by the tenant. When the tenant sued for rent, the sub-lessee could recoup in damages.[349]

So in an action for breach of covenant for quiet enjoyment, it is not necessary for lessee to prove an actual forcible eviction. Proof of demand for possession by persons holding a title paramount to that of the landlord, and surrender of possession in acquiescence to such demand entitles the tenant to a recovery.[350] Lessees have a right to yield to a demand for possession by one having a paramount right without losing their remedy against their lessors on the covenant for quiet enjoyment.[351] If a landlord has no right to lease, tenants need not wait until they are evicted by judgment. They might yield to a paramount title without suit and would be discharged from further obligation to pay the rent reserved in the lease.[352] Entry by one

[346] Hayes v. Ferguson, 15 Lea (Tenn.) 1.

[347] Tarpy v. Blume, 101 Iowa 469, 70 N. W. 620.

[348] Jennings v. Bond, 14 Ind. App. 282, 42 N. E. 957.

[349] Holbrook v. Young, 108 Mass. 83.

[350] Tyson v. Chestnut, 118 Ala. 387, 24 So. 73; Kane v. Mink, 64 Iowa 84, 19 N. W. 852.

[351] King v. Bird, 148 Mass. 572, 20 N. E. 196; Duncklee v. Webber, 151 Mass. 408, 24 N. E. 1082.

[352] Mussey v. Holt, 24 N. H. 248; Morse v. Goddard, 13 Metc. (Mass.) 177.

having a paramount title is equivalent to an eviction by legal pr
A tenant is not bound to retain possession until actually expell
legal process; but may quietly yield possession, incurring the ri
being able to show that the entry was under a paramount tit
Where a tenant in possession was ordered off by a sheriff havi
writ of restitution based on the judgment against the landlord
the tenant and his family moved away and commenced to take
goods away and then the parties entitled to possession execut
lease to him, there was such an eviction by judgment of law tha
tenant was excused from paying rent to the first landlord.[354]

§ 364. Eviction suspends rent.—After a tenant has been ev
there can be no recovery of rent during the continuance o
eviction.[355] The possession and quiet enjoyment of the pre
by the lessee, without hindrance on the part of the lessor,
implied condition to the obligation to pay rent.[356] In every
of land, the lessor is so far bound by implication, for the
and enjoyment by the lessee, that his right to the rent is depe
thereon. Where the tenant is evicted from a part of the land
stranger on title paramount, it operates as a suspension of the
pro tanto.[357] But an eviction does not forfeit rent already ac
and overdue at the date of the eviction,[358] and the only remedy
lessee in such case is to recoup in damages.[359] The rule is the
although the rent is payable in advance and the eviction occurs b
the expiration of the period in respect to which the rent claime
crues.[360] But, ordinarily, the evicted tenant is released from al
bility to pay rent from the commencement of the quarter in
the eviction occurred.[361] If a lessee, who has covenanted to pay
in advance, is evicted on a rent day, he is discharged from his ol

[354] Marsh v. Butterworth, 4 Mich. 575.

[355] Montanye v. Wallahan, 84 Ill. 355.

[356] Leopold v. Judson, 75 Ill. 536; Hunter v. Reiley, 43 N. J. L. 480; Ogilvie v. Hall, 5 Hill (N. Y.) 52; Bennet v. Bittle, 4 Rawle (Pa.) 339; Morrison v. Chadwick, 7 C. B. 266, 62 E. C. L. 266; Salmon v. Smith, 1 Saund. 202, 204; Briggs v. Thompson, 9 Pa. St. 338.

[357] Field v. Herrick, 10 Ill. App. 591.

[357] Poston v. Jones, 2 Ired (N. Car.) 350.

[358] Livingston v. L'Engle, 27 502, 8 So. 728; La Farge v. H 1 Bosw. (N. Y.) 171; Hunt Reiley, 43 N. J. L. 480.

[359] La Farge v. Halsey, 1 (N. Y.) 171.

[360] Giles v. Comstock, 4 N. Y. Hunter v. Reiley, 43 N. J. L.

[361] Chatterton v. Fox, 5 Due Y.) 64; Fitchburg &c. Co. v. M 15 Mass. 268.

on.[362] For rent which by the terms of the demise would accrue ring the continuance of the eviction, the landlord can neither sue r can he distrain for the rent reserved or any part of it; nor can recover for use and occupation, although in either case the tenant s continued in possession of the remaining part of the premises mised.[363] A partial eviction which would suspend the entire rent, es not, however, necessarily terminate the lease or put an end to ner obligations under it, such as the tenant's covenant to repair.[364] ne same rule would seem to hold good where the tenant continues ble for rent for the part of the premises he continues to occupy, d he would hold such part under the original lease.[365]

§ 365. If a tenant is evicted from a material part of the premises, has a legal right to abandon the whole. It is implied that the nant shall have free use of the whole premises; if he is ousted from y material part of them he may treat it as an eviction and rescind e lease.[366]

In England the law has been settled that an eviction of a tenant the landlord from part of the demised premises suspends the en- re rent, although the tenant continues in possession of the re- ainder.[367] In Massachusetts the question was left open by early

[362] Smith v. Shepard, 15 Pick. Mass.) 147.

[363] Morris v. Kettle, 57 N. J. L. 8, 30 Atl. 879; Neale v. MacKen- e, 1 M. & W. 747; Hunter v. Rei- y, 43 N. J. L. 480; Morrison v. adwick, 7 C. B. 266, 62 E. C. L. 6; Salmon v. Smith, 1 Saund. 202.

[364] Smith v. McEnany, 170 Mass. , 48 N. E. 781; Leishman v. White, Allen (Mass.) 489.

[365] Skaggs v. Emerson, 50 Cal. 3.

[366] Avery v. Dougherty, 102 Ind. 3, 2 N. E. 123; Miller v. Michel, Ind. App. 190, 41 N. E. 467; Rice Dudley, 65 Ala. 68; Hayner v. nith, 63 Ill. 430; Mayor &c. v. abie, 13 N. Y. 151; Skally v. ute, 132 Mass. 367; Upton v. eenlees, 17 C. B. 51, 84 E. C. L. 51.

[367] How v. Broom, Gouldsb. 125; ton v. Townend, 17 C. B. 30, 64, E. C. L. 30; Christopher v. Aus- , 1 Kern. (N. Y.) 216. In 1814 it was held by Chief Justice Dallas, at *nisi prius*, that the whole rent was not suspended, in such a case, if the tenant continued in possession of the residue of the demised premises, but that he would be liable on a *quantum meruit*. Stokes v. Cooper, 3 Campb. 514, *n*. And this was stated as the law in the treatises, afterwards published, on the law of landlord and tenant, by Claydon, Comyn, Archbold, Smythe and Taylor; in 2 Roscoe on Real Actions 410; Crabb on Real Property, § 205, and in numerous other books. And the king's bench in Ireland, in the case of Grand Canal Co. v. Fitzsimons, 1 Hud. & Br. 449, distinctly adjudged this point in the same way, on the authority of Stokes v. Cooper. But Mr. Baron Parke in Reeve v. Bird, 1 C. M. & R. 31, 36, and 4 Tyrw. 614, questioned the decision of Chief Justice

cases,[368] but it is now settled in that state that a tenant evicte landlord from part of the demised premises is no longer liabl for rent or for use and occupation.[369] In case of a partial evic general rule in the United States is that, if the landlord is sible, the entire rent is suspended, while, if the partial evi caused by the act of a stranger, the rent is only abated *pro* Ordinarily, an eviction by the landlord will operate to rel tenant from any further liability to pay rent, even for so the leasehold as he may continue to occupy.[371] The ancient that if a tenant was evicted from any part of the demised prem entire rent was suspended during such eviction. The reason wa landlord ought not to be encouraged to injure his tenant whom policy of the feudal law, he ought to protect. The modern given is that in such case he cannot apportion his own wrong.[3] was law until the statute allowing an action of use and occ Since then the impression prevailed for a while that the could bring use and occupation against tenants who had been from part of premises. However this impression has not be ported by the decided cases and the established rule seems to a landlord who has ousted his tenant from part of the premi not recover on a *quantum meruit* the value of the part which ant still continues to occupy.[373] The partial eviction of a from the demised premises by a third person having a paramou is only a bar *pro tanto* to the recovery of the rent reserved, su being apportionable.[374] Thus a tenant evicted from a part

Dallas, and the recent case above cited from 17 C. B. shows that it is not the law of England.

[368] Shumway v. Collins, 6 Gray (Mass.) 227; Fuller v. Ruby, 10 Gray (Mass.) 285.

[369] Leishman v. White, 1 Allen (Mass.) 489; Smith v. McEnany, 170 Mass. 26, 48 N. E. 781. But see Fitchburg &c. Co. v. Melvern, 15 Mass. 258, 271.

[370] Collins v. Karatopsky, 36 Ark. 316; Hyman v. Jockey Club &c. Co., 9 Colo. App. 299, 48 Pac. 671; Skaggs v. Emerson, 50 Cal. 3; Colburn v. Morrill, 117 Mass. 262; Fillebrown v. Hoar, 124 Mass. 580; Smith v. McEnany, 170 Mass. 26, 48 N. E. 781; Leishman v. White, 1 Allen (Mass.) 489; Lewis 4 Wend. (N. Y.) 423; Ver Austin, 2 E. D. Smith (N. Morris v. Kettle, 57 N. J. L Atl. 879; Wreford v. Kenr Mich. 389, 65 N. W. 234; E Hall, 4 Leigh (Va.) 484; Grandy, 22 Grat. (Va.) 109

[371] Mack v. Patchin, 42 N. 1 Am. R. 506; Bentley v. Ill. 414; Smith v. Wise, 58 Hoagland v. New York &c. 111 Ind. 441, 12 N. E. 83.

[372] Hodgkins v. Robson, V

[373] Leishman v. White, (Mass.) 489; Vermilya v. 2 E. D. Smith (N. Y.) 203; v. Hall, 4 Leigh (Va.) 484.

[374] Willard v. Tillman, 1

ised premises during his term, under a mortgage of which he had tice when taking the lease, is liable for a due proportion of the rent r the part of the premises which he continues to occupy. A reverən is a thing in its nature severable, and the rent as incident to it ay be divided and ought to be paid to those who have the land. A versioner may sell his estate in different parts to as many different rsons and the tenant will be bound to pay to each his due proporən of rent.[375] But a wrongful eviction by the landlord from a part the demised premises suspends the rent until the possession is reored and the landlord cannot recover a portion of the rent agreed on or any compensation for the part of the premises occupied by e tenant while the eviction continued.[376] However in Alabama the le is different. In that state, when the landlord enters and dissesses the tenant of a part of the premises, a discharge of the enre rent will not result, unless it be shown that the tenant surrenred or abandoned possession entirely. Nothing less than an entire andonment or surrender will operate a dissolution of the tenancy, d a suspension or discharge of the entire rent. The rent is disarged only *pro tanto,* to the extent of the value of the use and ocpation of that part of the premises of which the tenant is dispossed, if he remains in undisturbed possession of the rest.[377]

§ 366. If the lessor give to his lessee a complete and perfect right possession to the demised premises, he has done all that he is reired to do by the terms of an ordinary lease and the tenant assumes e burden of enforcing such right to possession as against all wrongl possessors, even against a former tenant who holds over.[378] Upon e well-settled construction of the covenants of title and quiet enyment, it is not the duty of the landlord, when the demised premes are wrongfully held by a third person, to take the necessary steps put the lessee in possession. The latter, being clothed with the le by virtue of the lease, ought to pursue such legal remedies as

N. Y.) 358; Fillebrown v. Hoar, 4 Mass. 580; Fitchburg &c. Co. Melven, 15 Mass. 268.

[375] Cheairs v. Coats, 77 Miss. 846, So. 728.

[376] Hayner v. Smith, 63 Ill. 430, 5; Briggs v. Hall, 4 Leigh (Va.) 4; Dyett v. Pendleton, 8 Cow. (N.) 727; Leishman v. White, 1 Al- n (Mass.) 489; Shumway v. Collins, 6 Gray (Mass.) 227, 232; Smith v. Raleigh, 3 Campb. 513.

[377] Warren v. Wagner, 75 Ala. 188; Crommelin v. Thiess, 31 Ala. 412; Chamberlain v. Godfrey, 50 Ala. 530; Crossthwaite v. Caldwell, 106 Ala. 295, 18 So. 47; Anderson v. Winton, 136 Ala. 422, 34 So. 962.

[378] Becker v. DeForest, 1 Sweeny (N. Y.) 528; Ratkowski v. Masolowski, 57 Ill. App. 525.

the law has provided for gaining possession.[379] According doctrine a lessee who is kept out of possession by the holding a former tenant cannot bring an action against his lessor fo of the covenant of quiet enjoyment.[380] The omission of a to perform his covenant to put the lessee into possession amount to an eviction and where tenant enters into possessio his failure to acquire the whole is no bar to the lessor's c rent.[381] In arguing in support of this doctrine the New Yo said: "I admit the covenant of quiet enjoyment means to i the lessee a legal right to enter and enjoy the premises and prevented from entering into the possession by a person al under a paramount title, the action may be sustained. . . if the party holding is a wrong-doer, the remedy of the les perfect and effectual to dispossess him after, as that of the le before, the execution of the lease. . . . Upon the well-set struction of covenants of title and quiet enjoyment, it is not of the landlord, when the demised premises are wrongfully h third person, to take the necessary steps to put his lessee i session."[382] The right to possession at the end of the existi is in the lessee under the new lease and not in the lessor.[383]

§ 367. In direct opposition to the law as just stated it lished in England and in several jurisdictions in the Unite that the lessor is bound to put the lessee in possession.[384] A to this doctrine there is an implied covenant on the part of t that, when the time comes for the lessee to take possession u lease, according to the terms of the contract, the premises open to his entry. In other words, that there shall be no im

[379] Gardner v. Keteltas, 3 Hill (N. Y.) 330; Pendergast v. Young, 21 N. H. 234; Sigmund v. Howard Bank, 29 Md. 324; Underwood v. Birchard, 47 Vt. 305; Gazzolo v. Chambers, 73 Ill. 75; Cozens v. Stevenson, 5 S. & R. (Pa.) 421; Playter v. Cunningham, 21 Cal. 229.

[380] Gazzolo v. Chambers, 73 Ill. 75; Pendergast v. Young, 21 N. H. 234.

[381] O'Brien v. Smith, 13 N. Y. S. 408, 37 N. Y. St. 41, affirmed without opinion, 129 N. Y. 620, 29 N. E. 1029.

[382] Gardner v. Keteltas, 3 Y.) 330.

[383] Beidler v. Fish, 14 Ill.

[384] Coe v. Clay, 5 Bing. 44 v. Edwards, 11 Exch. 775 sier v. Zallee, 24 Mo. 13; v. Hood, 50 Mo. 350; King olds, 67 Ala. 229; Spencer ton, 5 Blackf. (Ind.) 57; Butt, 26 Ind. 236; Vincen field, 98 Mich. 84, 56 N. Hertzberg v. Beisenbach, 262.

his taking possession.[385] This view makes it the duty of the lessor put the lessee in possession and until he does so he cannot recover it. Consequently a lessee is under no obligation to bring suit for ssession of the leased premises against a third person in possesn.[386] The foundation of this rule has been summed up in the rk that "he who lets agrees to give possession, and not merely the ance of a law suit."[387] "One who accepts a lease expects to enjoy e property, not a mere chance of a law suit. A lease for a year a term of years is not a freehold. It is a chattel interest. The ime motive of the contract is that the lessee shall have possession; much so as if a chattel were the subject of the purchase. Delivery one of the elements of every executed contract."[388] The fact of joyment or of the tender of the privilege to enjoy made by the sor to the lessee ought to be averred in the declaration, because oof of such facts at the trial would be preliminary to the plaintiff's ght of recovery.[389] Failure to put a lessee in possession justifies n in refusing to be bound by the lease, and in rescinding the conact.[390] Where land in the possession of a tenant is leased to anher, and the lessor covenants to put the second lessee into possesn, the lessee acquires the right to maintain an action to recover ssession from the former tenant holding over but he is not bound exercise this right, and if the landlord fails to put him in possesn, tenant is not liable for rent. The landlord has committed a each *in limine*.[391] The new lessee may bring ejectment against the nant holding over or he may sue the lessor for breach of his covent to deliver possession.[392] The right of the lessee to bring ejectent has been recognized in the older cases,[393] and under a forcible tainer statute, it has been held that a lessee can recover possession premises from a former lessee of the same landlord who held over ongfully. The junior lessee's right to the possession and his right recover rent is as absolute as if he were the sole owner of the fee. eing the sole party entitled to possession or to the rents he must the real party in interest.[394] In the same jurisdiction it was de-

[385] King v. Reynolds, 67 Ala. 229.
[386] Brandt v. Phillippi, 82 Cal. 0; 23 Pac. 122.
[387] Coe v. Clay, 5 Bing. 440.
[388] King v. Reynolds, 67 Ala. 229, 3, per Stone, J.
[389] Mulford v. Young, 6 Ohio 295. *ntra*, Douglass v. Branch Bank, Ala. 659.
[390] Dengler v. Michelssen, 76 Cal. 125, 18 Pac. 138; Spencer v. Burton, 5 Blackf. (Ind.) 57.
[391] Kean v. Kolkschneider, 21 Mo. App. 538.
[392] Hughes v. Hood, 50 Mo. 350.
[393] Gazzolo v. Chambers, 73 Ill. 75; Gardner v. Keteltas, 3 Hill (N. Y.) 330.
[394] Capital Brewing Co. v. Crosbie, 22 Wash. 269, 60 Pac. 652.

cided that while the tenant may institute his action to recove sion, the obligation of the landlord is to deliver the possessio and, therefore, the landlord has sufficient interest in the p to maintain the action.[395] It has been determined in unla tainer by a landlord against a tenant holding over, that an o ing lease by the landlord to a third person under whom th does not claim, is no defense.[396]

§ 367a. Where the lessor is in possession of the leased and refuses to vacate after the beginning of the lease, the le abandon the premises and escape further liability for rent. of law is clear that a lessee may abandon a contract of lease w lessor has refused to perform.[397] In case a lessor, after exec instrument of demise, died before the beginning of the term ministrator would be bound by the lease, and for him to lea other would be a breach of the implied covenant for quiet en for which an action would lie.[398] This disposes of those cas some wrongful act of the lessor himself prevents the lessee tering into possession; for it seems clear that, under such stances, the lessee can sue his lessor for breach of an expres plied covenant for quiet enjoyment. Such was the case where owner executed a second lease and put the second lessee in p to the exclusion of the prior one. The first lessee had his el remedies either to sue his lessor on the breach of covenant enjoyment or to bring ejectment against the second lessee.[399] class of cases under consideration, the lessors themselves d right and refuse to permit the lessee to occupy, in accorda their own lease. In such cases it seems very obvious that t should not be driven to his ejectment, but should be allowed his action for the damages sustained.[400] The same result w low when there was a valid outstanding lease and the lessor have the power to confer possession according to the terms of tract.[401]

But the implied covenant does not extend to any period be day when possession is to be delivered. If, after that time, a trespasses on the premises, and, obtaining possession, withholds

[395] Schreiner v. Stanton, 26 Wash. 563, 67 Pac. 219.

[396] Vincent v. Defield, 98 Mich. 84, 56 N. W. 1104; King v. Reynolds, 67 Ala. 229.

[397] Reed v. Reynolds, 37 Conn. 469.

[398] Clark v. Butt, 26 Ind.

[399] Berrington v. Casey, 78

[400] Trull v. Granger, 8 N.

[401] Cohn v. Norton, 57 C 18 Atl. 595.

e lessee, his remedy is against the stranger and not against the land-rd.[402]

§ 368. Tenant's remedy by action.—A breach of a covenant for iet enjoyment is caused by an eviction which justifies the tenant abandoning the premises and allows him to escape further liability r rent. But this is not the only effect of the breach of such a cove-nt. If, through an act of the lessor, the tenant is removed before e expiration of the term without fault on his part he is entitled to aintain an action for damages against the lessor.[403] The law is ttled that where a landlord unlawfully evicts a tenant, takes pos-ssion of the premises and deprives him of the beneficial use and en-yment, a cause of action arises in favor of the tenant;[404] or the ten-t may recoup his damages when sued by the landlord for rent under e contract of lease.[405] A defense by way of recoupment for breach a covenant of quiet enjoyment is a privilege not a duty, and the ssee is entitled to resort to a cross action, not being debarred from eking damages for a breach of that covenant by a failure to plead in defense of an action for rent.[406] Furthermore the lessor, after sisting upon the validity of the lease for the purpose of collecting s rent, cannot treat it as invalid for the purpose of avoiding liability his implied covenant for quiet enjoyment. He cannot treat the ase as valid for one purpose and invalid for another.[407]

In North Carolina it has been held that there is no implied contract at the lessor will not molest the lessee in his possession; but there an implied condition to that effect, upon a breach of which the ssee is discharged from his obligation to pay rent. If the lessor nters upon the lessee during the term and dispossesses him, the medy of the latter is an action *ex delicto*.[408]

For a groundless injunction against a tenant's enjoyment of leased

[402] Hertzberg v. Beisenbach, 64 ex. 262; King v. Reynolds, 67 Ala. 9.

[403] Maule v. Ashmead, 20 Pa. St. 2.

[404] Wacholz v. Griesgraber, 70 inn. 220, 73 N. W. 7; Cannon v. ilbur, 30 Neb. 777, 47 N. W. 85; ack v. Patchin, 42 N. Y. 167, 1 m. R. 506.

[405] Mayor &c. v. Mabie, 13 N. Y. 1; Ives v. Van Epps, 22 Wend. (N. Y.) 155; Batterman v. Pierce, 3 Hill (N. Y.) 171.

[406] Riley v. Hale, 158 Mass. 240, 33 N. E. 491; Hunt v. Brown, 146 Mass. 253, 255, 15 N. E. 587; Fiske v. Steele, 152 Mass. 260, 25 N. E. 291.

[407] Riley v. Hale, 158 Mass. 240, 33 N. E. 491; Bradley v. Brigham, 149 Mass. 141, 21 N. E. 301; Ormsby v. Dearborn, 116 Mass. 386.

[408] Barneycastle v. Walker, 92 N. Car. 198.

premises, which has been dissolved, the tenant may, in addition remedy on the injunction bond, recover damages by an action case for the injury done him by being improperly enjoined.[409]

§ 369. Where the lessee has actually been deprived of the sion or use of demised premises, damages resolve themselv three elements; first, the loss of the bargain; second, expense a incident to removal; and third, the loss of profits which th could have made if he had been allowed to continue in pos In regard to the first element of damages, the rule origina down was that the lessee who had been evicted could not rec part of his damages the value of the term.[410] On analogy t where sales of real estate fell through and the vendees cou recover, beyond deposits made and expenses incident to exam of title, nominal damages, the recovery of the lessee was lim like manner. At an early day certain cases were said to be exc to this rule; as if the vendor is guilty of fraud, or can con will not, or if he has covenanted to convey when he knew he authority to do so, or where it is in his power to remedy a defec title and he refuses to do so. In all these cases the vendor o was liable to the vendee or lessee for the loss of the bargain rules analogous to those applied in the sale of personal prop In England the original rule, as applicable to an evicted les been repudiated in two well-considered cases.[412] In each o cases the court held, after elaborate argument, that a lessee, covenant for quiet enjoyment, was entitled to recover the valu term lost, as well as for mesne profits paid to the owner of th mount title. The same principle has been applied by courts United States so that the present doctrine as to this element o age is, that the lessee is entitled to recover the value of the le estate minus the rent reserved.[413]

[409] Hubble v. Cole, 88 Va. 236, 13 S. E. 441.

[410] Kelly v. Dutch Church, 2 Hill (N. Y.) 105; Moak v. Johnson, 1 Hill (N. Y.) 99; Baldwin v. Munn, 2 Wend. (N. Y.) 399.

[411] Bush v. Cole, 28 N. Y. 261; Trull v. Granger, 8 N. Y. 115; Driggs v. Dwight, 17 Wend. (N. Y.) 71; Brinckerhoff v. Phelps, 24 Barb. (N. Y.) 100; Tracy v. Albany Exchange Co., 7 N. Y. 472; Chatterton v. Fox, 5 Duer (N. Dean v. Roesler, 1 Hilt. 420; Greene v. Tallman, 2 191; Conger v. Weaver, 2 140; Lock v. Furze, L. R. 441; Engel v. Fitch, L. R. 314.

[412] Williams v. Burrell, 1 S. 402, 50 E. C. L. 401; Furze, 19 C. B. (N. S.) 96, C. L. 94.

[413] Mack v. Patchin, 42 N.

"The measure of damages is the difference between the actual rental alue and the rent reserved. The rule is the same, whether the leased roperty is a farm, a dwelling house or hotel, or business premises."[414] Rental value" and "value of use" of premises means substantially ie same thing; the term rental value, as used to measure damages, as been deemed to be the equivalent of actual damages in its legal gnification. It is the commercial value of the use of a thing and ie fact is ascertainable by direct proof of what it would rent for, or y the proof of facts from which a fair rental value may be known. he one is as direct and certain as the other. It may be assumed in idicial proceedings that the results of profits, if they are reasonable, efinite and certain, arising from the use of real estate, afford a proper asis for fixing a rental value.[415] Where a lessee for a crop rent rought an action against his lessor for failure to let him into pos-ession, evidence of the average yield, of the cost of production and utting on the market, together with the market value of the crops, as held competent to show the measure of damages.[416] Where rent as been paid in advance[417] or where a lessee has been excluded from ossession and has nevertheless been compelled to pay rent during ie period of such exclusion, the amount so paid is to be added in omputing damages; otherwise the lessee's actual loss, by reason of ie breach of the implied covenant, will not be made good.[418] Thus, here a lessee was to clear land in payment for the use of it, and fter clearing the land was evicted, the value of his labor in making

Am. R. 506; Trull v. Granger, 8 . Y. 115; Myers v. Burns, 35 N. . 269, 272; Tyson v. Chestnut, 118 la. 387, 24 So. 73; Jefcoat v. Gun-er, 73 Miss. 539, 19 So. 94; Cannon Wilbur, 30 Neb. 777, 47 N. W. 5; Kenny v. Collier, 79 Ga. 743, 8 E. 58; Hodges v. Fries, 34 Fla. 3, 15 So. 682; Adair v. Bogle, 20 owa 238; Leick v. Tritz, 94 Iowa 22, 62 N. W. 855; Taylor v. Cooper, 04 Mich. 72, 62 N. W. 157; Knowles Steele, 59 Minn. 452, 61 N. W. 57; Jonas v. Noel, 98 Tenn. 440; ewbrough v. Walker, 8 Grat. Va.) 16; Engstrom v. Merriam, 25 Vash. 73, 64 Pac. 914; Serfling v. ndrews, 106 Wis. 78, 81 N. W. 01. This rule as to the deduction rent payable from the amount of damages has been applied where a crop rent was reserved. Jefcoat v. Gunter, 73 Miss. 539, 19 So. 94.

[414] Sedg. Dam. (8th ed.), § 185; Dobbins v. Duquid, 65 Ill. 464; Taylor v. Cooper, 104 Mich. 72, 62 N. W. 157; Shuman v. Smith, 100 Ga. 415, 28 S. E. 448; Adair v. Bogle, 20 Iowa 238; Riley v. Hale, 158 Mass. 240, 33 N. E. 491.

[415] Leick v. Tritz, 94 Iowa 322, 62 N. W. 855; Alexander v. Bishop, 59 Iowa 572, 13 N. W. 714.

[416] Chew v. Lucas, 15 Ind. App. 595, 43 N. E. 235.

[417] Cohn v. Norton, 57 Conn. 480, 18 Atl. 595; Leick v. Tritz, 94 Iowa 322, 62 N. W. 855.

[418] Riley v. Hale, 158 Mass. 240, 33 N. E. 491.

the clearing was added to the lessee's damages.[419] Yet it
held that the use of the term "market value" to characterize
of the leasehold interest is improper where a leasehold canno
to have a market value. In determining the value of the
it has been declared that its worth is not the amount it wou
if offered for sale in open market but the value to the le
other words, it is the sum which he would be obliged to pay f
of equal duration in premises equally desirable for his bu
for the use he intended to make of it.[420] It follows from
for estimating them that no damages can be recovered if the
served for the unexpired term will exceed any possible pro
the lessee could hope to make out of the use of the premise

For a breach of the covenant that a lessor had such title a
him to give a good lease of the premises, the lessee could onl
nominal damages as long as he remained in uninterrupte
sion.[422] In a case of partial disturbance and interruption,
fixes no precise rule of damages; but the lessee's recovery is
ited to the amount of rent reserved, for that may be nomi
and not express the real consideration for the lease.[423]

In a Delaware case it has been stated that if an unlawful e
attended by circumstances of aggravation the jury may awa
plary damages.[424]

**§ 370. In regard to the second element of damage the rul
measure of damages is that the tenant is entitled to recover
loss as results directly and necessarily from the breach of the**
and is capable of being accurately estimated.[425] It seems th
profits which the lessee had been compelled to pay over to th
of a paramount title would be included under this head. For
to allow the lessee to occupy according to agreement, the le
ders himself liable in damages, the general rule for the me
damages in such cases being the difference between the rent

[419] Carter v. Lacy, 3 Ind. App. 540, 29 N. E. 168.

[420] Jonas v. Noel, 98 Tenn. 440, 39 S. W. 724.

[421] O'Connor v. City of Memphis, 7 Lea (Tenn.) 219; Leick v. Tritz, 94 Iowa 322, 62 N. W. 855.

[422] Harms v. McCormick, 132 Ill. 104, 22 N. E. 511.

[423] Dexter v. Manley, 4 Cush. (Mass.) 14.

[424] Bonsall v. McKay, (Del.) 520.

[425] Cohn v. Norton, 57 C 18 Atl. 595; Hodges v. Fla. 63, 15 So. 682; Adair 20 Iowa 238; Kelly v. Dav L. R. 647; Poposkey v. M 68 Wis. 322, 32 N. W. 35; ton v. Fox, 5 Duer (N. Snow v. Pulitzer, 142 N. Y N. E. 1059.

and the value of the premises for the term. If the rent reserved is the full value of the premises, the lessee can recover only nominal damages, even though the refusal of the landlord is without just cause. But if the tenant has sustained in addition a particular loss which is the direct and necessary or natural consequence of the breach of contract by the landlord he may recover therefor.[426] In case the lessor fails to put the lessee into possession according to the terms of the contract, the proper measure of damages seems to be that the lessee is entitled to recover rent paid in advance, the difference between the rent agreed to be paid and the value of the term, and such special damages as would arise naturally and generally from such a breach of contract. If special circumstances under which the contract was made were stated at the time and known to both parties, then the amount of damages which would ordinarily follow from a breach of the contract under those special circumstances could be recovered.[427] An evicted lessee may also recover damages for the interruption of an established business. The measure of such damages is what gain he can show with reasonable certainty that he would have made, that being what he is entitled to recover for. The profits actually realized in the preceding years under the lease may be shown as tending to prove the value of the premises to him.[428] But profits resulting from a criminal violation of the Sunday laws, can form no legal basis for the estimation of damages for the eviction of a lessee,[429] and the recovery is limited to such loss as could not reasonably be avoided.[430]

Where a covenantee is evicted by a stranger, holding a paramount title, by judgment of law, the measure of damages includes the expenses of the covenantee in defending the suit, including fees paid to counsel.[431]

§ 371. **Loss of prospective profits,** the third element of damage, seems not to be properly recoverable in the case of eviction. Taking the rule that damages for the breach of a contract are limited to such as may be reasonably considered to have been in contemplation by the parties, at the time of the making of such contract, as the probable re-

[426] Adair v. Bogle, 20 Iowa 238.

[427] Cohn v. Norton, 57 Conn. 480, 18 Atl. 595.

[428] Taylor v. Cooper, 104 Mich. 72, 62 N. W. 157.

[429] Raynor v. Valentine Blatz &c. Co., 100 Wis. 414, 76 N. W. 343.

[430] Dobbins v. Duquid, 65 Ill. 464.

[431] Levitzky v. Canning, 33 Cal. 299; Swett v. Patrick, 12 Me. 9; Pitkin v. Leavitt, 13 Vt. 379.

sult of a breach of it,[432] it follows that expected profits from the
the demised premises are too remote to be recovered and cann
used as a basis for estimating damages.[433] In order that the
may recover for loss of prospective profits or for expenditure
attempting to move in, knowledge of the situation must be br
home to the lessor at the time the lease was made. Without
knowledge, it cannot be said that loss of profit could have been
the contemplation of the parties when the lease was entered in
However, it has been held that, where a tenant was evicted by
act that amounted to a trespass on the part of the landlord, prosp
profits in the plaintiff's business during the balance of the term
be made an item of recovery.[435] This ruling was based on the
trine that anticipated profits could be recovered as damages
action of trespass.[436]

Where a new lessee seeks to recover possession and damages f
former lessee, who previously had a term in the premises, the a
of his recovery is not limited to the rent reserved in the new
during the period which the former tenant occupies but he m
cover the reasonable value of the premises to him during that per

IV. *In Regard to Buildings and Improvements.*

§ 372. A general covenant by a lessee to build is satisfied
erection of the building at any time before the end of the term
the lessor before the expiration of the term can have no legit
cause of complaint.[438] Where the lessee covenanted to make c
improvements, it was held he had the whole term to make them,
time was specified, and his declarations of intention were i
terial.[439] So an agreement by a lessee to clear land might pr
be performed any time during the continuance of the lease a

[432] Guetzkow Bros. Co. v. Andrews, 92 Wis. 214, 66 N. W. 119; Bradley v. Chicago M. & St. P. R. Co., 94 Wis. 44, 68 N. W. 410.

[433] Kenny v. Collier, 79 Ga. 743, 8 S. E. 58; Smith v. Phillips, 16 Ky. L. R. 615; Kelly v. Davis, 9 Ky. L. R. 647; Newbrough v. Walker, 8 Grat. (Va.) 16; Throop v. Broaddus, 15 Ky. L. R. 812; Denny v. Marksbury, 15 Ky. L. R. 400; Cleveland &c. R. Co. v. Mitchell, App. 206.

[434] Serfling v. Andrews, 106 78, 81 N. W. 991.

[435] Snow v. Pulitzer, 142 N. 36 N. E. 1059.

[436] Schile v. Brokhahus, 80 614.

[437] Baldwin v. Skeels, 51 Vt.

[438] Chipman v. Emeric, 5 Cal.

[439] Palethorp v. Bergner, 5 St. 149.

action for a breach of the agreement could not be maintained until its termination without the fulfilment of the undertaking.[440] But the case is different where the covenant by the lessee is to build within a certain time. It is not, then, a continuing covenant. There is nothing in the nature of a covenant to build by a given time, that indicates that a continued failure to perform the covenant will produce a succession of breaches. It more clearly resembles, in this respect, the covenant not to assign, or for a reëntry in case of the bankruptcy of the lessee, in either of which cases the breach, if it takes place, is once for all. So the receipt of rent accruing after the end of the time given for building would be a waiver of the forfeiture.[441] Furthermore, in case the lessee is under obligation to build and at the same time entitled to a renewal of the term, the fact that he is allowed to hold over on sufferance without building does not waive the lessor's right to recover damages for the breach of the covenant to build, and the lessee does not have the right to complete the addition during the time of holding over.[442] Where a tenant covenanted to build and leave buildings in repair, and after being built they were destroyed by fire, it was held that equity would compel the lessee either to rebuild or to pay the value of the buildings.[443]

§ 373. In the absence of agreement a landlord is not liable for the value of improvements made by his tenant upon the demised premises.[444] And it would necessarily follow that a lessee could not recover from the landlord for repairs or improvements made on the premises against the owner's protest.[445] A covenant to pay for improvements erected by the lessee is, however, binding on the lessor, and if he is acting in a representative capacity and had no authority to make such a covenant, it would nevertheless be binding on him personally. A guardian's covenant to purchase improvements at an appraised value binds him absolutely, and he cannot refuse to submit to a valuation unless the lessee agrees to have the award subject to

[440] Gates v. Hendrick, 54 Hun (N. Y.) 92, 7 N. Y. S. 229.

[441] McGlynn v. Moore, 25 Cal. 384; Stuyvesant v. Mayor &c., 11 Paige (N. Y.) 414.

[442] Pollman v. Morgester, 99 Pa. St. 611.

[443] Pasteur v. Jones, Conf. R. (N. Car.) 194.

[444] Wilkerson v. Farnham, 82 Mo. 672; Hopkins v. Ratliff, 115 Ind. 213, 17 N. E. 288; Mull v. Graham, 7 Ind. App. 561, 35 N. E. 134; Guay v. Kehoe, 70 N. H. 151, 46 Atl. 688; Sigur v. Lloyd, 1 La. Ann. 421; Kline v. Jacobs, 68 Pa. St. 57; Smith v. Brown, 5 Rich. Eq. (S. Car.) 291.

[445] Jones v. Hoard, 59 Ark. 42, 26 S. W. 193, 43 Am. St. 17.

the approval of the probate court.[446] An agreement by a landl pay a tenant's predecessor in possession for the building on th upon termination of the lease may be enforced in a proper pr ing, but it does not operate to extend the tenancy of such cessor.[447]

Under the law of landlord and tenant the doctrine is very that there must be some distinct agreement to entitle a tenant for improvements and such an agreement must have the eleme certainty about it. It must be equally certain with any other co of employment.[448] The tenant is presumed to repair and in for his own benefit; and his only right to the fruits of his labo pended for that purpose, is to enjoy the enhanced value of the ises during the term, and within certain limitations to remove t provements before its expiration. While a special promise o part of the landlord to pay for improvements might be implied his conduct, the mere fact that the landlord permits the ten make permanent improvements without protest or warning th will not pay, raises no presumption of such a special promise for improvements.[449] If the tenant enlarges the building for h convenience, even though it be by the persuasion of the landlo does not, in the absence of agreement or promise, thereby acq right to charge the landlord with the expense of the improveme Provided there is no mistake in regard to the nature of his t mere tenant at will or tenant from month to month, making im ments without the request of his landlord, has no equity again landlord for such improvements upon an abrupt termination holding.[451] Although the terms of a lease require the lessee to buildings, if there is no agreement for their removal by the he has no right to remove them.[452] Under a provision that im ments should be made at the expense of the tenant and that th ant should surrender the premises to the lessor at the end o

[446] Nichols v. Sargent, 125 Ill. 309, 17 N. E. 475.

[447] Almy v. Allen, 22 R. I. 595, 48 Atl. 934.

[448] Leslie v. Smith, 32 Mich. 64; Wilson v. Scruggs, 7 Lea (Tenn.) 635.

[449] Gocio v. Day, 51 Ark. 46, 9 S. W. 433; Woolley v. Osborne, 39 N. J. Eq. 54; Dunn v. Bagby, 88 N. Car. 91.

[450] Hopkins v. Ratliff, 115 In 17 N. E. 288; Estep v. Est Ind. 114; Purcell v. English, 8 34, 44 Am. R. 255; Lucas v. C 104 Ind. 81, 3 N. E. 622.

[451] Pomeroy v. Lambeth, 1 Eq. (N. Car.) 65.

[452] Peirce v. Grice, 92 Va. 7 S. E. 392.

rm, all improvements which became a part of the realty belong to e landlord.[453] By a stipulation that a lessee may remove all improvements he may erect, he contracts as to the mode of compensaon for improvements he may make, and it would follow that the ssor in no other mode should be held to make compensation. If the ssee was not prevented from removing his improvements, he could t set off the value of them when sued for rent.[454] A provision in a ase of a water lot that all improvements erected by the lessee should come the property of the lessor at the end of the term, was held cover a wharf erected by the lessee, extending beyond the limits the lessor's land upon tide lands not owned by him.[455] But a stipation to pay for improvements and repairs to wharves made by the ssee, binds the lessor to pay their value as contained in the wharf, d not merely their value as second-hand materials.[456]

§ 374. Authority to build.—The erection of a building by a lessee t authorized by the lease would be a mere voluntary act which would rnish no consideration for and give no right to a renewal. The thority for the lessee to build is commonly accompanied by an obliation on his part to do so. However, the obligation to build could be scharged by a release and yet the right to build during the term be reserved so that the lessee having built became entitled to the exerse by the lessor of the option to buy or renew provided by the lease. triking out of the lease the covenant of the lessee to build, there reains the agreement that if the lessee shall build and the building all be standing on the demised premises at the end of the term, the ssor would either pay the appraised value or renew the lease.[457] In der to make the lessor liable for the cost of the buildings erected, the ssee must comply with the specifications in the lease as to the charter and cost of the contemplated structure. This is the necessary conruction of such a contract. No sane man would make a contract by hich he would incur liabilities unlimited in extent, by the mere acts agents he could not control. The lessee was bound only to a given ttent as to improvements; his will and that of the lessor met as to is term; the obligations were reciprocal, the benefits and burdens

[453] Gett v. McManus, 47 Cal. 56.
[454] Worthington v. Young, 8 Ohio 1.
[455] Brown v. Carkuk, 14 Wash. 443, Pac. 887.
[456] Ladd v. Hawkes, 41 Ore. 247, 68 Pac. 422.
[457] Smith v. Rector &c., 107 N. Y. 610, 14 N. E. 825; McIntosh v. Rector &c., 120 N. Y. 7, 23 N. E. 984.

equal, and the terms of the whole contract closed, and the right parties liquidated and ascertained. But the contrary construct poses a contract, the terms and results of which are uncertain where a covenant in a lease bound the lessor to pay for impro erected by the lessee, the general words of the covenant were by a specification as to what improvements the lessee should e was clear that the landlord, although he agreed to pay for all i ments placed upon the lot, had reference only to such as he l viously authorized to be made. The tenant had no power to pla what he pleased, and then ask compensation for them. Th never have been the intention of the parties, or they would r previously specified the buildings the tenant might erect.[459] T tion of a different sort of buildings puts the lessor under no ob to pay their appraised value at the end of the term.[460] But u agreement in a lease for the lessor to purchase improvements er the lessee under certain conditions, it was held that impro erected by a sub-tenant must be considered as erected by the himself.[461] A tenant is entitled to be allowed for improvemen were virtually made by him. Thus where a tenant claiming t owner gave a bond for title and the vendee entered and made i ments, the tenant was entitled to have those improvements him according to his contract as they had been virtually r him.[462]

A lessor cannot countermand an authority in a lease for th to erect buildings which are to be paid for by the lessor. Th has the right to build and set off the appraised cost against t though notified by the lessor not to do so and that it would paid for.[463]

§ 375. Rights under alternative options.—Where a leas term of years contains a covenant on the part of the lessor tha expiration of the term the lessee shall be paid the appraised the building or a new lease at an appraised rent shall be gran lessee at the expiration of the term is entitled to retain the po till the covenant shall be performed by the lessor.[464] But in

[459] Woodward v. Payne, 16 Cal. 444.

[460] Berry v. Van Winkle, 2 N. J. Eq. 390.

[461] McIntosh v. Rector &c., 120 N. Y. 7, 23 N. E. 984; Deishler v. Golbaugh, 2 Ky. L. R. 231.

[462] Wheeler v. Hill, 16 Me

[463] Williams v. Kinsman, 521.

[464] McVicker v. Dennison, St. 390.

[464] Van Beuren v. Woth 164 N. Y. 368, 57 N. E. 633.

covenant for a landlord to pay for improvements does not give him an alternative right to grant a renewal, the tenant is not entitled to continue in possession of the premises till payment is made or tendered.[465]

Certain rights in regard to the removal of buildings or the renewal of the term may be conferred upon the lessee and yet the lessor be placed under no obligation to purchase improvements. Thus an alternative provision that houses erected by the lessee may be removed by him or sold to the lessor at a certain per cent. of their cost is not sufficient to support an action against a lessor for refusal to purchase.[466] Where a lease provided that upon its expiration or if lessee failed to perform its conditions, the lessor might purchase lessee's property at appraised valuation, the lessee could not by acts that entitled the lessor to declare a forfeiture of the lease compel such purchase.[467]

However, a lessor, who has promised, in consideration of a lessee's making improvements, to allow him to continue in possession as long as he pays a stipulated rent, cannot go back on his promise without accounting for the value of the improvements.[468] This result was reached though the promise was by parol and void by the statute of frauds. It nevertheless constituted a valid defense in an action by the landlord to oust his tenant from the premises.[469] But a tenant in possession under a verbal lease, who puts permanent and valuable improvements on the land under a promise of a written lease, is not entitled to recover the value of such improvements merely because the landlord refuses to execute the written lease, where there has been no eviction.[470]

A lease with mutual covenants for an appraisal of improvements contained a separate covenant by the lessor to renew the lease or pay for the building at the lessee's election, but no covenant on the part of the lessee to accept a new lease if tendered. On this state of facts the court applied the rule that a covenant will not be implied unless it clearly appears from the words used that one was intended. Here was a covenant by the lessor only, an agreement to give a new lease, but there was none by the lessee to accept it. If it had been intended to bind both, or to impose a correlative obligation on the other, a clear

[465] Coatsworth v. Schoellkopf, 160 N. Y. 114, 54 N. E. 665, reversing 37 App. Div. 295.

[466] Anderson v. Swift, 106 Ga. 748, 32 S. E. 542.

[467] Kelly v. Chicago &c. R. Co., 93 Iowa 436, 61 N. W. 957.

[468] Lewis v. Effinger, 30 Pa. St. 281; Brockway v. Thomas, 36 Ark. 518.

[469] Oneal v. Orr, 5 Bush (Ky.) 649.

[470] Yates v. Bachley, 33 Wis. 185.

statement should have been made not only that one would giv
that the other would accept a lease. So the court held that the t
was not bound to accept a new lease, but had the option to accep
in case the lessor did not take advantage of his right to pay fo
building.[471] In a case where the lessor was given an option to
the lease instead of paying for improvements, and the lessee was l
to accept the renewal term, the time of the election was held to
the essence. So the lessor was required to declare his election to
before the end of the term or he would be compelled to buy th
provements.[472] Where a lessor agrees to purchase improvemer
case the lease cannot be continued, the action of the parties in co
ing the lease forfeits the right of the lessee to be paid for the imp
ments.[473] A single renewal would ordinarily be a compliance
the option to buy or renew, and the acceptance of a renewal le
the lessee would constitute a waiver of any further rights on hi
in regard to a purchase of the improvements by the lessor.[474] Thi
true, although the renewal was for a short term and the re
agreement provided that the lease should be renewed "with all it
ditions unchanged and unimpaired."[475] Still it is perfectly po
to provide for a series of renewals or even for a perpetual renew
the original agreement.[476]

§ 376. **Improvements as part of realty.**—A building constr
upon land by the lessee thereof under an agreement whereby the
was to pay the cost of the materials upon the termination of the
and the building was to remain upon the land, becomes a part
realty upon forfeiture by failure to pay rent.[477] A provision f
newal of the kind under consideration does not prevent the lessor
terminating the lease for non-payment of rent according to aut
conferred by a clause in the lease. In such an event the lessee h
claims under the alternative provision that the lessor shall bu
improvements at an appraised value unless he renews the lease.
legal title to the building belongs to the lessor. The well-s

[471] Zorkowski v. Astor, 156 N. Y. 393, 50 N. E. 983; Bruce v. Fulton Nat. Bank, 79 N. Y. 154; Booth v. Cleveland &c. Co., 74 N. Y. 15; Hudson Canal Co. v. Pennsylvania Coal Co., 8 Wall. (U. S.) 276.

[472] Bullock v. Grinstead, 95 Ky. 261, 24 S. W. 867.

[473] Parker v. Page, 41 Ore. 579, 69 Pac. 822.

[474] Peirce v. Grice, 92 Va. 7 S. E. 392.

[475] Kash v. Huncheon, 1 Ind 361.

[476] Kutter v. Smith, 2 Wal S.) 491, 17 L. Ed. 830.

[477] Switzer v. Allen, 11 Mont 27 Pac. 408.

ule is that such erections become a part of the land as each stone or rick is fastened to the structure. The contract in question here oes not change this rule. The agreement to purchase means nothing ore than that, in a certain event, the lessor will pay the lessee the alue of the building, but there is no implication of any general title ownership in the lessee apart from that event. This contingency as not occurred, and that it can never occur is the fault of the lessee. n regard to the supposed hardship of taking the building without mpensation, the reply is that it is from the lessee's own fault that is right arises.[478] Under a provision that, if the lessor did not exercise an option to buy improvements at an appraised value, the lessee ight remove them, the building was annexed to the land as part of e realty, and the interest of the lessee in each was a chattel real. If, the expiration of the term the lessor did not buy the building, the ssee's right to remove would arise and the building would become a ere chattel.[479]

An agreement in a lease that all buildings should belong to the ssee, and that he could remove them at the end of the term, does ot prevent him from removing them at any time during the term if e wishes.[480] A permit, authorizing a lessee to erect a building upon e leased premises and allowing him "to take away or sell upon the round, said building so erected at his own expense, at the termination of said lease" limits the right *to take away* the building, but not e right *to sell* it. After such building becomes the property of a ird person, the cancelling of the lease cannot affect his rights; but e may take it away at the end of the term for which the lease was iginally given.[481]

§ 377. Such covenants run with the land. In accordance with e general rule regarding the running of covenants, an undertaking the lessor to pay the value of improvements on the expiration of e term runs with the land and the right to enforce such payment asses to the purchaser of the leasehold estate as incident to the rm.[482] Had a lessee covenanted to erect buildings upon a demised

[478] Kutter v. Smith, 2 Wall. (U. .) 491, 17 L. Ed. 830; Newhoff v. Mayo, 48 N. J. Eq. 619, 23 Atl. 265; aine v. Trinity Church, 7 Hun (N. .) 89.

[479] Newhoff v. Mayo, 48 N. J. Eq. 19, 23 Atl. 265.

[480] Alexander v. Touhy, 13 Kan. 1.

[481] Adams v. Goddard, 48 Me. 212.

[482] Stockett v. Howard, 34 Md. 121; Hunt v. Danforth, 2 Curt. 592, 12 Fed. Cas. No. 6887; Woodward v. Payne, 16 Cal. 444, § 332. A contrary result was reached in Peterson v. Haight, 1 Miles (Pa.) 250, on the ground that there was no privity of contract between a sec-

lot, not only the lessee, but the assignee and the executors of
signee, would have been liable in an action for a breach of the c
If the assignee would be liable on such a covenant, surely he m
a right of action for the violation of a corresponding covenan
part of the lessor.[483] But the covenant would not run unless
were expressly named and in that event an action for the valu
improvements must be brought in the name of the original less
subject of the covenant was not *in esse* at the date of the le
was to pay for buildings to be erected, not to repair existin
ings.[484] So it has been held that a covenant on the part of a les
at the end of the term he will pay the lessee the appraised
the improvements placed thereon by the latter, is not one th
with the land and is not enforceable against a grantee of the l
But if covenants are reciprocal and assignees are expressly me
there seems to be no valid reason why the assignee of a lessor sh
be bound by a covenant to purchase improvements or new build
The case would be different where there was no covenant on
of the lessee to improve. A covenant to run with the land mu
and concern it and it is difficult to see how a covenant to pay a
ary consideration for a house, if the tenant shall think proper
it, can be said to touch and concern the land.[487] Where the
terminate a lease was conditional upon the payment of the le
improvements erected by him, the sum could be paid into court
the lease had been assigned and it was not necessary for the l
decide whether the lessee or his assignee was entitled to the s
paid. Payment into court was sufficient to establish the right
minate the lease.[488] Where the value of improvements has be
to a lessee with no notice of an assignment, a bill brought b
signee of the lease, more than a year after it has expired, to
the value of improvements, cannot be maintained.[489] It is a
of intention as to whether the lessee intends to transfer his con
rights to remove structures by an assignment of the leasehold

ond assignee of the lease and the original landlord.

[483] Lametti v. Anderson, 6 Cow. (N. Y.) 302; Spencer's Case, 5 Coke 16.

[484] Thompson v. Rose, 8 Cow. (N. Y.) 266.

[485] Tallman v. Coffin, 4 N. Y. 134; Hansen v. Meyer, 81 Ill. 321, 25 Am. R. 282; Watson v. Gardner, 119 Ill. 312, 10 N. E. 192, affirming 18 Ill. App. 386; Bream v. Di 2 Humph. (Tenn.) 126.

[486] Frederick v. Callahan, 311; Ecke v. Fetzer, 65 Wi N. W. 266.

[487] Bream v. Dickerson, 2 (Tenn.) 126.

[488] Estabrook v. Stevenson, 206, 66 N. W. 286.

[489] Cronin v. Watkins, 1 T 119.

the intention of the parties by the assignment is to transfer the own-ship of the buildings, an alternative contract by the lessor to pur-ase passes with it to the assignee.[490]

§ 378. Mechanics' liens for improvements.—A lessor who stipu-es in his lease for the erection by the lessee of a building upon the mised premises, which is to become the property of the lessor upon e termination of the lease by expiration or otherwise subjects his le to mechanics' liens arising from the erection of the building. is is true notwithstanding the lease provides, under penalty of for-ture, that the lessee shall permit no mechanics' liens to attach to the emises.[491] If the improvements were made and the material fur-shed under a contract authorized by the lessor, he must be held to ve subjected his title in the premises to the builder's lien, if the lien otherwise valid.[492] The improvements were to become the property the lessor at the termination of the lease. In this state of the facts may be truthfully said that the improvements on the lot and the ma-ials necessary to make them, were made and furnished by his con-nt and for his benefit. He not only consented to them, but con-cted with his lessees for them.[493] According to this view the lien aches to the whole of the property,—the owner's title. It is his con-ct, not that of the lessee's,—and he gets the full benefit of it. A ovision in a ninety-nine year lease at an annual rent that the lessor's erest in a building to be erected on the premises as a joint enterprise the parties shall be exempt from mechanics' liens is void, as being attempt to set aside the law of the land. The parties here were ing together in the construction of the building. Each was inter-ed in it and within the meaning of the mechanics' lien law they re, as to those who should furnish labor or material in the construc-n of the building, owners of the building.[494] Even under mechan-s lien statutes without a provision including those whom "such ner has knowingly permitted to improve," etc., the result would be

[490] California Ann. Conference v. Itz, 74 Cal. 287, 15 Pac. 839.

[491] Carey-Lombard Lumber Co. v. nes, 187 Ill. 203, 58 N. E. 347, re-rsing 87 Ill. App. 533.

[492] O'Leary v. Roe, 45 Mo. App. 7; Hall v. Parker, 94 Pa. St. 109; rclay v. Wainwright, 86 Pa. St. 1; Burkitt v. Harper, 79 N. Y. 3; Hill v. Gill, 40 Minn. 441, 42 N. W. 294; Henderson v. Connelly, 123 Ill. 98, 14 N. E. 1; Carey-Lombard Lumber Co. v. Jones, 187 Ill. 203, 58 N. E. 347, reversing 87 Ill. App. 533.

[493] Gruner Lumber Co. v. Nelson, 71 Mo. App. 110.

[494] Crandall v. Sorg, 198 Ill. 48, 64 N. E. 769, reversing 99 Ill. App. 22.

the same and the doctrine is fully sustained by numerous deci
The cases which hold that a lessee who is authorized to mak
or improvements on the premises cannot create a lien against
sor, stand on the ground that a lien is created on the estate of
see under the statute and the statute cannot be construed to
the same time, under such circumstances, a lien against the
reversion.[496] In one case the agreement for building took t
that the lessor agreed to pay to the lessee a gross sum toward
tion of a house on the demised premises. It was held that th
sionary interest of the lessor was bound by the mechanics' lien
the premises.[497]

Nevertheless, the estate of the lessor cannot be subjected to a
work done or material furnished under a contract with the le
less the agreement or consent of the lessor is shown, or unles
done some act to make his estate liable. A statute which c
lien upon the leasehold interest, must be construed with refe
the common-law rule, that the burden of repairs is cast upon
ant and that the landlord is under no implied obligation
them.[498]

A landlord who leases property with a condition that cer
provements are to be made in lieu of rent, is not bound for t
of his tenant contracted in making those improvements.[499]
quirement that a lessee shall "put cash in repairs" to a certain
does not confer a right of charging such repairs against the
or his property by means of a mechanic's lien.[500] Nor could t
lord be charged on such a lien by reason of allowing the tena
duct the cost of repairs from the rent.[501]

§ 379. Proceedings for appraisal.—In no case where a p
for the appraisal of permanent improvements is made is it
plated that evidence or the statement of the parties should b
but the appraisers are merely to examine the property and u

[496] Miller v. Mead, 127 N. Y. 544, 28 N. E. 387; Schmalz v. Mead, 125 N. Y. 188, 26 N. E. 251; Burkitt v. Harper, 79 N. Y. 273.

[497] McCue v. Whitwell, 156 Mass. 203, 30 N. E. 1134; Francis v. Sayles, 101 Mass. 435; Conant v. Brackett, 112 Mass. 18.

[498] Williams v. Vanderbilt, 145 Ill. 238, 34 N. E. 476; Leiby v. Wilson, 40 Pa. St. 63; Boteler v. E Pa. St. 313.

[499] 2 Jones on Liens, § 127 Lumber Co. v. Wilson, 56 A 19 S. W. 974.

[500] Jones v. O'Farrel, 1 Ne

[501] Schrage v. Miller, 44 N 62 N. W. 1091.

[501] Boone v. Chatfield, 118 916, 24 S. E. 745.

own judgment in determining value. There is no dispute to be settled or trial to be had, as is the case where there is an arbitration and award. Where a proceeding is an arbitration, it is necessary that a time and place should be fixed for a hearing,—that the parties should receive notice, in order that they might appear and introduce their evidence and make their statements before the arbitrators. But nothing of this kind is required in a case of this character. No evidence is to be heard. The appraisers ascertain such facts as may have a bearing on the value of the improvements, in their own way, and act upon their own judgment.[502]

In regard to the time at which the valuation of the improvements should be made, they must be valued as they were at the time the lease expired. The lease contemplates a settlement of this whole question at its expiration; then it is that the buildings are to be examined and a final adjustment made. Everything looks to that time.[503]

A mere agreement for appraisal, though binding on the parties, is not a submission to arbitration, and is not subject to the same rules.[504] The appraisers chosen by the parties to make such appraisal are not arbitrators within a statutory provision requiring arbitrators to be sworn.[505] The distinction between appraisal and arbitration is brought out in the rule laid down in regard to the necessity of notice to the parties of the meeting of the persons selected to make the decision. The approved rule is that "unless the submission expressly shows that the parties intended that the arbitrators should decide the questions in dispute without the aid or presence of the parties, or it is evident that such was the intention, *as where the matter is merely one of appraisal,* the arbitrators must give both parties notice of the time and place of meeting."[506] But in case the appraisers had to construe the contract, and determine its meaning before they could determine what value should be set upon the building it was held that notice of the meeting of the appraisers should be sent to the parties. The argument for this requirement is that the appraisers were not merely to determine the simple matter of the value of specific property, but, necessarily, to construe the contract and determine its legal effect. In such a case the parties had the same right to be heard before

[502] Pearson v. Sanderson, 128 Ill. 88, 21 N. E. 200, affirming, 28 Ill. App. 571.

[503] Berry v. Van Winkle, 2 N. J. Eq. 390.

[504] California Annual Conference v. Seitz, 74 Cal. 287, 15 Pac. 839.

[505] Pintard v. Irwin, 20 N. J. L. 497.

[506] Wood v. Helme, 14 R. I. 325.

[507] Janney v. Goehringer, 52 Minn. 428, 54 N. W. 481.

their cause was adjudged as they would have in any general ar
tion.[507] In one case in New York the distinction between an app
and arbitration was rejected in its entirety.[508]

In case the parties did not concur in the appointment of appr
but all the appraisers were appointed by one party, their finding
not be final, but the question of damages would be decided b
jury.[509] However, if the parties cannot agree upon an apprais
or upon the appointment of appraisers according to the prov
of the deed, it has been held that appraisers might be appointe
the purpose by the court.[510]

§ 380. Restraints upon building.—A covenant by a lessee th
will make no alteration or addition to the buildings or to the pr
themselves is broken by the erection of a wooden structure which
be removed as a trade fixture before the expiration of the term.
fact that it could be removed without leaving any permanent
that it had ever been on the premises would not affect the m
The same argument might be advanced of a building erected of
permanent materials. It was a building, and not a mere covere
If it had been placed there by the owner of the fee, it would ha
come a part of the realty, and, therefore, it was an addition.[511]

But a covenant in a lease "that no alteration or addition sh
made during the term of the lease in or to the premises witho
consent of the lessors," does not relieve the lessees from liabili
injuries resulting to a third person from want of repair of the p
ses. It was contended for the lessees that they had no legal right t
edy the defect, and, therefore, were not responsible for it because
lease provided that no alteration or additions should be made by
But the court held that the repairing of a defect was not an alte
or an addition within the meaning of the lease. In any case a cov

[508] Van Cortlandt v. Underhill, 17 Johns. (N. Y.) 405, Spencer, C. J., said: "Notwithstanding the ingenious distinctions made between an appraisement, under an agreement entered into many years before the appraisement takes place and an ordinary submission to arbitration, I confess that I do not feel the force of these distinctions. It makes no difference when the contract was made. It took its effect from the mutual agreement as to the persons to become the appraisers; a whatever name they are calle were substantially arbitrators plenary power to decide upo subject of difference betwee parties."

[509] Holliday v. Marshall, 7 J (N. Y.) 211.

[510] City of Providence v. St. J Lodge, 2 R. I. 46.

[511] Whitwell v. Harris, 106 532.

o continue a nuisance would not exonerate them from liability to hird persons.[512] In order to constitute a breach of such an agreement, the structure must be on the leased premises. In holding the erection of a building upon an adjacent lot was not a breach of a covenant not to make alterations without the landlord's written consent, t was said: "The tenant has made no alteration in the building leased o him by anything done directly to that building." The tenant alone s injured by the shutting off of light and air, if it be an injury, and he lone has a right to complain of it.[513]

A recital of the purpose for which leased premises are to be used has been held to restrict the kinds of buildings which may be erected upon hem; so that an injunction would be granted against the erection f buildings of a different character, for they indicated an intention o put the premises to a use forbidden by the terms of the lease.[514]

§ 381. Tenant's right to light and air against landlord.—The prevalent rule in the United States is that an easement in the unobstructed passage of light over an adjoining close cannot be acquired by prescription.[515] A grant of the right to the use of light and air will not be implied from the conveyance of a house with windows overlooking the land of the grantor.[516] The law of implied grants and implied reservations, based on necessity or use alone, is not to be applied o easements for light and air over the premises of another.[517] It follows, that a landlord will not be liable for obstructing his tenant's windows by building on an adjoining close, in the absence of any covenant or agreement in the lease forbidding him to do so.[518] But

[512] City of Boston v. Worthington, 10 Gray (Mass.) 496.

[513] Atkins v. Chilson, 9 Metc. (Mass.) 52.

[514] Kraft v. Welch, 112 Iowa 695, 84 N. W. 908.

[515] Keating v. Springer, 146 Ill. 481, 34 N. E. 805; Guest v. Reynolds, 68 Ill. 478, overruling Gerber v. Grabel, 16 Ill. 217; Keats v. Hugo, 115 Mass. 204; Mullen v. Stricker, 19 Ohio St. 135, 142; Pierre v. Fernald, 26 Me. 436; Napier v. Bulwinkle, 5 Rich. L. (S. Car.) 311; Cherry v. Stein, 11 Md. 1; Hubbard v. Town, 33 Vt. 295; Ward v. Neal, 37 Ala. 500, § 359.

[516] Keats v. Hugo, 115 Mass. 204; Keating v. Springer, 146 Ill. 481, 34 N. E. 805; Mullen v. Stricker, 19 Ohio St. 135; Morrison v. Marquardt, 24 Iowa 35; Palmer v. Wetmore, 2 Sandf. (N. Y.) 316; Myers v. Gemmel, 10 Barb. (N. Y.) 537. *Contra*, Janes v. Jenkins, 34 Md. 1; Lampman v. Milks, 21 N. Y. 505, 512 (*semble*).

[517] Mullen v. Stricker, 19 Ohio St. 135; Haverstick v. Sipe, 33 Pa. St. 368; Keiper v. Klein, 51 Ind. 316.

[518] Keating v. Springer, 146 Ill. 481, 35 N. E. 805; Myers v. Gemmel, 10 Barb. (N. Y.) 537; Palmer v. Wetmore, 2 Sandf. (N. Y.) 316; Keiper v. Klein, 51 Ind. 316.

the authorities all agree that the right to have the light and air enter the windows of a building over an adjoining lot may exist by express grant, or by virtue of an express covenant or agreement.[519] So a covenant by a lessor not to build on a close adjoining the demised premises is binding on him, and a breach of it constitutes a constructive eviction which justifies an abandonment of the premises by the tenant. But the tenant is still bound for the rent if he continues to occupy the premises.[520] Though the tenant will not be allowed to plead eviction as a bar to the recovery of rent, yet he is not for that reason without remedy. In those states where the doctrine of recoupment is recognized, he may recoup such damages as he may have sustained by reason of the acts of the landlord, against the rent sought to be recovered.[521] The injury grows out of the same transaction as the claim for rent, and recoupment is clearly applicable.

V. *Restricting Use of Premises.*

§ 382. **Validity of restrictions.**—A lessee has, by implication, the right to possess and enjoy the property during the term specified, and to put it to such use and employment as he pleases, not materially different from that in which it is usually employed, to which it is adapted, and for which it was constructed.[522] But the mode of use may be restricted by express agreement, a lessee having no right to devote the premises to a use other than that stipulated in the lease without the consent of the owner. In the absence of express prohibition, offices rented for real estate business could be used by a constable without a breach of the covenant.[523] A landlord may by contract lawfully restrict his tenant's use of the property, and, in case of such an agreement, if the latter use the demised premises for a purpose prohibited by the lease, it is a breach of the agreement for which the law affords relief.[524] A covenant in a lease that the lessee shall sell no

[519] Hilliard v. Gas Coal Co., 41 Ohio St. 662; Brooks v. Reynolds, 106 Mass. 31; Keating v. Springer, 146 Ill. 481, 34 N. E. 805; Keats v. Hugo, 115 Mass. 204; Morrison v. Marquardt, 24 Iowa 35.

[520] Skally v. Shute, 132 Mass. 367; Chicago &c. Co. v. Browne, 103 Ill. 317; Edgerton v. Page, 20 N. Y. 281, 284.

[521] Keating v. Springer, 146 Ill. 481, 34 N. E. 105; Lindley v. Miller, 67 Ill. 244; Lynch v. Baldwin, 69 Ill. 210; Pepper v. Rowley, 73 Ill. 262.

[522] Nave v. Berry, 22 Ala. 382; Bucklen v. Cushman, 145 Ind. 51, 44 N. E. 6; Reed v. Lewis, 74 Ind. 433, 39 Am. R. 88.

[523] White v. Kane, 53 Mo. App. 300.

[524] Haywood v. Ramge, 33 Neb.

beer upon the leased premises except that manufactured by a certain brewing company may be enforced by the company for whose benefit the contract is made, although the company is not a party thereto. A covenant by a lessee not to carry on a particular business, or not to carry on any business except a business named, on the leased premises, is binding and may be enforced.[525] It has been uniformly held that a provision in a deed that no intoxicating liquors shall be manufactured or sold on the premises conveyed is valid, however much the same may affect the value of the property conveyed.[526] "It will not be doubted," said Judge Cole, of the Wisconsin court, "that the landlord, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be neither contrary to law nor the principle of reason or public policy."[527]

A lessor may bind himself by a contemporaneous parol agreement, made in consideration of the execution of the lease, not to engage in a rival business in the same city; and in an action by the lessee for damages and for injunctive relief, parol evidence of the agreement is competent.[528] Such a promise not to engage in a rival business is not void, because not in writing.[529] A restrictive covenant in a lease of offices to a telegraph company, that during the term the lessor will not lease offices in the building to any other telegraph company for use as a telegraph office without the consent of the lessee, will not prevent another telegraph company, subsequently purchasing the fee subject to existing leases, from using the building for its own offices. The covenant does not place any restriction on the use of the building further than an inhibition against leasing for a telegraph office, and a court cannot interpolate into that contract something it does not contain and make it apply to the use of the building instead of the leasing to another.[530]

836, 51 N. W. 229; Steward v. Winters, 4 Sandf. Ch. (N. Y.) 587; Dodge v. Lambert, 2 Bosw. (N. Y.) 570; Brouwer v. Jones, 23 Barb. (N. Y.) 153; De Forest v. Byrne, 1 Hilt. (N. Y.) 43.

[525] Ferris v. American Brewing Co., 155 Ind. 539, 58 N. E. 701.

[526] Cowell v. Springs Co., 100 U. S. 55, 57, 25 L. Ed. 547; Collins Mfg. Co. v. Marcy, 25 Conn. 242; O'Brien v. Wetherell, 14 Kan. 616; Indian &c. Co. v. Sikes, 8 Gray (Mass.) 562; Watrous v. Allen, 57 Mich. 362, 24 N. W. 104; Smith v. Barrie, 56 Mich. 314, 22 N. W. 816; Sutton v. Head, 86 Ky. 156, 5 S. W. 410.

[527] Brugman v. Noyes, 6 Wis. 1.

[528] Welz v. Rhodius, 87 Ind. 1, 44 Am. R. 747.

[529] Doyle v. Dixon, 97 Mass. 208; Lyon v. King, 11 Metc. (Mass.) 411; Hill v. Hooper, 1 Gray (Mass.) 131; Wiggins v. Keizer, 6 Ind. 252; Hill v. Jamieson, 16 Ind. 125.

[530] Postal Tel. &c. Co. v. Western Union &c. Co., 155 Ill. 335, 40 N. E. 587, 51 Ill. App. 62. See also, Kemp v. Bird, L. R. 5 Ch. Div. 549.

A lessee's title to an adjoining estate cannot enable him to dispense with a stipulation regarding passageways made by him as lessee of the demised estate; *a fortiori* his title *under* the lease cannot enable him to close up a gangway which, for the benefit of the leased premises as well as of the adjoining estates, he agreed in the lease to keep open during his entire term. The lease looks through the term and, as between him and his landlord, restricts his rights as tenant in this very particular; and such title might as well be urged as enabling him to dispense with any other stipulation of the lease as the one under consideration."[581]

§ 383. What constitutes a covenant for restrictive use.—Whether a recital in a lease as to the purpose for which the premises are to be used, without an express prohibition against their use for other purposes, precludes their use for other purposes, is a matter about which courts have disagreed. On one side a recital that premises were to be occupied as a lumber yard was held to be an express covenant to occupy them as a lumber yard. To constitute an express covenant, no formal, technical, or precise terms are required, but whenever the intent of the parties can be collected out of the deed, for the doing or not doing a particular thing, that is sufficient to make an express covenant. The intention here was as plain as if the words of the lease were "I covenant and agree to occupy the premises as a lumber yard," and, therefore, occupying them for another purpose was a breach of the covenant.[582] According to this doctrine a stipulation against sub-letting except for certain purposes would restrict the use of the premises by sub-tenants to the specified purpose.[583] On the other hand, a mere statement in a lease of the purpose for which the premises are leased has been held not to be a covenant against their use for other purposes, relying on the rule that restrictions upon beneficial use are not to be raised by implication. In a case where this question arose, after the description of the premises in a lease, there followed the clause "to be used as cabinet ware-rooms." The court, in holding this did not restrict the lessees to such use, said: "Of course the intention of the parties must control in the case. . . . We do not feel authorized in saying that the sense and meaning of the words employed show that it was the intention of the parties to restrict the use of the building for cabinet

[581] Beckwith v. Howard, 6 R. I. 1, 11.

[582] De Forest v. Byrne, 1 Hilt. (N. Y.) 43; White v. Kane, 53 Mo. App. 300. By implication the same result is reached in Maddox v. White, 4 Md. 72; Freer v. Stotenbur. 2 Keyes (N. Y.) 467; Farwell v. Easton, 63 Mo. 446.

[583] Farwell v. Easton, 63 Mo. 446.

ware-rooms, and prohibit the use of them for any other purpose. We think such a construction is forced. . . . It is obviously inconsistent with the principles upon which courts of equity act, to raise by implication a covenant in restraint of a beneficial use of property."[534] Had the restrictive clause been followed by the words, *"and for no other kind of business,"* equity would then have enforced the restrictive covenant.[535] Thus the use of part of premises for a saloon or dramshop was not a proper use when a restriction provided they were "to be used for studio, salesroom, and dwelling purposes, and for no other purpose whatever."[536] Where a store was leased "to be occupied for a grocery store, and for no other purpose," it was held necessary actually to conduct a grocery store to comply with the covenant, while storing groceries there was a breach of the condition.[537]

A restriction in a lease of premises that they are "to be used as a first-class liquor saloon only" is a restriction upon the class of liquor saloon,—it must be first-class. It could not be the intention of the parties, in view of the contingencies affecting the procurement of the license, that the lessee should pay the rent during the term for premises which were to remain idle unless he could open a saloon there. It is not a letting for an unlawful purpose merely because a liquor license had not been obtained first.[538]

A covenant is to be construed according to its terms, and these may prohibit a different use without compelling a continued use for the purpose named. In such case the lessee does not covenant to continue the use, but merely covenants not to use the premises "for any other purpose." A covenant not to use the demised premises for any other purpose than a specified one is not broken by ceasing to use them for that purpose, provided it is not used for anything else.[539]

A stipulation in the lease of a quarry having openings on four sides that it shall be worked as the face now opens, is not violated by quarrying one of the faces to a greater extent than the others.[540]

[534] Brugman v. Noyes, 6 Wis. 1. See also, Shumway v. Collins, 6 Gray (Mass.) 227.

[535] Steward v. Winters, 4 Sandf. Ch. (N. Y.) 587.

[536] Bryden v. Northrup, 58 Ill. App. 233.

[537] White v. Naerup, 57 Ill. App. 114.

[538] Kerley v. Mayer, 31 N. Y. S. 818, 10 Misc. R. (N. Y.) 718.

[539] McCormick v. Stephany, 57 N. J. Eq. 257, 41 Atl. 840.

[540] Keeler v. Green, 21 N. J. Eq. 27. A lease provided that lessee should not mine the land south or east of a certain building, and it was held that this restriction covered the land southeast of the building. Oskaloosa College v. Western Union &c. Co., 90 Iowa 380, 54 N. W. 152, 57 N. W. 903.

§ 384. Equity will restrain an infraction of an agreement in a lease in regard to the use of the premises, although such lease does not contain a formal covenant or a forfeiture clause with a right of reëntry.[541] When the mode of occupation is fixed by the lease, or when the intention of the parties to confine the leased premises to a special use may be fairly implied from the words of the lease, then the tenant may be enjoined from converting the property to other purposes.[542] The danger of irreparable injury from the breach of covenant need not be shown to entitle the lessor to an injunction. An injunction to stay waste would issue on allegations that the complainant was the owner and entitled to the possession of premises and the tenant was insolvent and threatened to destroy improvements.[543] A right of reëntry reserved in a lease can rarely be said to be in law a fair equivalent for the performance of the lease. This is obviously true if the reëntry have the effect of terminating the lease. Even if the tenants' obligation to pay rent continues after forfeiture, the landlord would have to account for the value of the possession, or at least for such rents as he should make, or might with proper diligence make, by means of such possession. That could not be so beneficial to the landlord as performance of the lease by the tenant.[544] A court of equity will not, however, exercise its jurisdiction to enjoin a breach of a negative covenant, unless it is express or can be fairly implied from the stipulation of the parties, and injury will result from its breach. If a party has not seen fit to stipulate expressly against the objectionable act in his contract, a court of equity will not, by implication, insert it.[545] And even where the covenant expressly requires

[541] Spalding Hotel Co. v. Emerson, 69 Minn. 292, 72 N. W. 119; Bryden v. Northrup, 58 Ill. App. 233; Ferris v. American Brewing Co., 155 Ind. 539, 58 N. E. 701; De Forest v. Bryne, 1 Hilt. (N. Y.) 43; Dodge v. Lambert, 2 Bosw. (N. Y.) 570; Maddox v. White, 4 Md. 72; Frank v. Brunnemann, 8 W. Va. 462; Kirkpatrick v. Peshine, 24 N. J. Eq. 206; Gannett v. Albree, 103 Mass. 372; Kraft v. Welch, 112 Iowa 695, 84 N. W. 908.

[542] Reed v. Lewis, 74 Ind. 433; Steward v. Winters, 4 Sandf. Ch. (N. Y.) 587; Maddox v. White, 4 Md. 72.

[543] Frank v. Brunnemann, 8 W. Va. 462; High on Injunctions, § 714.

[544] Stees v. Kranz, 32 Minn. 313, 20 N. W. 241.

[545] Postal Tel. &c. Co. v. Western Union Tel. Co., 155 Ill. 335, 40 N. E. 587, affirming 51 Ill. App. 62; Sheets v. Selden, 7 Wall. (U. S.) 416; Des Moines R. Co. v. Wabash R. Co., 135 U. S. 576; Consolidated Coal Co. v. Schmisseur, 135 Ill. 371, 25 N. E. 795. In granting the relief prayed for in Spalding Hotel Co. v. Emerson, 69 Minn. 292, 72 N. W. 119, the court said: "While, as before stated, there was no express or formal covenant as to the

that the premises be used for a specified purpose, equity will not enforce affirmative compliance with it, for that would be requiring a person to carry on a business.[546]

A lessor who, seeing a lessee spend money in preparing property for a use forbidden by the lease on the faith that no objection will be made, stands by and makes no objection, cannot have the covenant enforced in equity. If the lessor acquiesces in the doing of acts which are inconsistent with the covenant, he cannot come to a court of equity to have the covenant or contract enforced.[547] But for all injury caused by a prohibited use of leased premises the lessee is liable to the lessor in damages in an action at law.[548]

§ 385. A covenant for exclusive personal occupation on the part of the lessee cannot be classed as one of the usual covenants in a lease. If there is no promise by the lessee that he will personally occupy, the "ordinary covenants" which a conveyancer is instructed to insert in an instrument of lease will not embrace a covenant for exclusive personal occupation upon the part of the lessee, or that he will not conduct the leased farm by agents or employes.[549] Such a stipulation is, however, valid and binding if inserted in a lease, and a covenant that the lessee, his executors and administrators shall constantly reside upon the demised premises during the demise has been held to run with the land and to be binding upon the assignee of the lessee, though he be not named. Such a covenant is *quodam modo* annexed and appertinant to the thing demised, according to the first and sixth resolutions in Spencer's case, and, therefore, the assignee would be bound though he were not expressly named.[550]

The right of a landlord to interfere with and control the domestic relations of his tenant has received no recognition in the United States.

use to which the premises should be put in the lease, there was certain language used therein and some stipulations, which, fairly construed, amounted to an agreement that the building was to be occupied by the tenant for hotel purposes only. It was recited that the premises leased were an hotel building, and were demised and leased for hotel purposes and to be operated as such. [There was] language and stipulations which in this form of action ought to be construed as equivalent to an express covenant in respect to the use of the premises, with a formal forfeiture and right of reëntry clause. No effect can be given to this portion of the lease unless it be held that there was a positive and enforceable agreement of the nature above mentioned."

[546] Hooper v. Broderick, 11 Sim. 47.

[547] Malley v. Thalheimer, 44 Conn. 41.

[548] Taylor v. Koshetz, 88 Ill. 479.

[549] Clark v. Clark, 49 Cal. 586.

[550] Tatem v. Chaplin, 2 H. Bl. 133.

The relation of landlord and tenant rests upon contract, and in the absence of a stipulation to the contrary, a landlord cannot exclude from the domicile of the tenant the wife of the latter. The previous bad character of the tenant's wife did not constitute a breach of any legal or moral duty due from the tenant to the landlord, and the tenant could not be excluded from the enjoyment of the premises because he occupied them with his wife.[551]

§ 386. An agreement by a lessee not to "make or suffer" an unlawful use of the premises should be interpreted as a stipulation that there shall be no unlawful use by the original lessee, or by any person who is occupying under him. The reason for this interpretation is that it is easy for the lessee to control the use of the property, and to protect the interests of the lessor and of himself in this particular. With this interpretation effect is given to the word "suffer." It may not be reasonable to hold that the covenant makes the lessee liable for an unlawful use of the property by trespassers; but he may well be held to "suffer" an unlawful use of the property if he does not take effectual measures to prevent such a use by those who occupy by his authority.[552]

A covenant on the part of the lessee to keep the premises clean, and not to occupy them for a saloon or meat market was held to be broken by the use of them for a morgue. The word "clean" was used in an absolute and not in a comparative sense. The terms of the lease did not authorize the lessees to occupy the premises for any business, however foul in itself, by excepting that of a meat market and a saloon. On the contrary, the agreement to keep the premises clean would prevent their use for any purpose which would necessarily make them foul and unclean. The condition expressed was not merely to keep the premises clean, provided the nature of the use to which the lessees should subject the property would render that possible, or as clean as the nature of the business which the lessee might elect to carry on there would allow, but to keep them *"clean."*[553]

Though a lease of rooms restrict their use to a particular purpose, the lessor does not thereby retain any control over them which renders it his duty to prevent their use for illegal gaming. It should be left to

[551] Miles v. Lauraine, 99 Ga. 402, 27 S. E. 739.

[552] Miller v. Prescott, 163 Mass. 12, 39 N. E. 409; Wheeler v. Earle, 5 Cush. (Mass.) 31.

[553] Clemenston v. Gleason, 36 Minn. 102, 30 N. W. 400.

the jury whether or not the lease was a sham and the lessor was in actual control.[554]

VI. *As to Sale of Premises.*

§ 387. An option in a lease giving the lessee a privilege of purchasing the premises for a certain stipulated price is valid and enforceable as it is a part of the lease and supported by the consideration thereof. It is not a separate and distinct offer which could be withdrawn at any time before acceptance.[555] The general rule is that where a contract consists of several distinct and separate stipulations on one side, and a legal consideration is stated on the other, it must be considered that the entire contract was in the contemplation of the parties in each particular stipulation, and formed one of the inducements therefor, and no one stipulation can be supposed to result from or compensate for the consideration or any portion of it exclusive of other stipulations, unless the parties have expressly so declared.[556] The privilege conceded to the lessee to purchase within the period of the lease is as much a term of the lease, and binding upon the lessor, as any other term of the instrument. The lessee, it is true, is not bound to purchase; but upon a good consideration the lessor bound himself to sell upon certain terms if the lessee wished to buy.[557] Still Lord Chancellor Redesdale thought that a contract ought to be mutual to be binding in equity, and that if one party could not enforce it the other ought not to be permitted to do so.[558] But there is no reason why such an option should not be enforced. The contract was fair

[554] Robinson v. The State, 24 Tex. 152.

[555] De Rutte v. Muldrow, 16 Cal. 505, 513; Hall v. Center, 40 Cal. 63, 67; Perkins v. Hadsell, 50 Ill. 216; Souffrain v. McDonald, 27 Ind. 269; Rogers v. Saunders, 16 Me. 92, 97; Hawralty v. Warren, 18 N. J. Eq. 124; Clason v. Bailey, 14 Johns. (N. Y.) 484, 488; Parkhurst v. Van Cortland, 14 Johns. (N. Y.) 15; Kerr v. Day, 14 Pa. St. 112; Corson v. Mulvany, 49 Pa. St. 88; Schroeder v. Gemeinder, 10 Nev. 355.

[556] Stansbury v. Fringer, 11 Gill & J. (Md.) 149.

[557] De Rutte v. Muldrow, 16 Cal. 505, 513.

[558] Lawrenson v. Butler, 1 Sch. & Lef. 13. Chancellor Kent was of the same opinion. In Clason v. Bailey, 14 Johns. (N. Y.) 488, he said: "I have thought and have often intimated that the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that one party ought not to be at liberty to enforce, at his pleasure, an agreement which the other was not entitled to claim. . . . But notwithstanding this objection it appears from the review of the cases that the point is too well settled to be now questioned."

and just in all its parts, and was not a hard or unconscionable bargain. The mere option to purchase may be sold. It is as valid to agree to sell property upon the condition that another will consent to buy as upon any other condition. If the lessee has fairly bought and paid for the option, there is no principle or policy of law violated in its purchase.[559]

A covenant to convey to the lessee at any time during the term is a continuing obligation running with the land and binding the lessor's interest, with the option in the tenant to accept the same or not within that time.[560] Under a stipulation giving to lessees the right and privilege to purchase the leased premises at any time before the expiration of the lease, for a sum to be paid down in cash upon the demand of a deed prior to the expiration of the lease, the payment of the stipulated sum or tender of it, within the time limited, is an essential condition to the consummation of any binding contract of sale. Equity cannot vary the terms of such a stipulation by an extension of the privilege. The time limited for acceptance is part of the contract, and equity cannot interfere except in case of fraud or mistake. It differs from the case of penalties which are annexed to contracts to secure their performance.[561]

In a case where the covenant was that if the lessee "should *at any time* thereafter pay to the lessor" a specified sum, the lessor should execute a deed of the leased premises, the court said: "If the covenant had been to convey, upon the payment of the purchase-money during the life of the lease, putting an end to the lease would have destroyed the covenant. But the covenant is to convey whenever the purchase-money should be paid. In such cases the conveyance may be demanded at any time, and the existence, or non-existence, of the lease when the demand is made, is immaterial to the rights of the parties."[562] The answer to an objection that money was not tendered within the time

[559] Hall v. Center, 40 Cal. 63, 67.

[560] Maughlin v. Perry, 35 Md. 352; Schroeder v. Gemeinder, 10 Nev. 355. Where a lease contained an option to the lessee to purchase, and before he exercised his option the premises burned down, it was held that the lessee could not elect to purchase, bring specific performance of the contract against the lessor and claim the insurance on the burned buildings. At the time of the fire the parties stood in relation of landlord and tenant, and the insurance went to the landlord as owner. Gilbert v. Port, 28 Ohio St. 276. Citing Townley v. Bedwell, 14 Ves. 591, where rents, under option to purchase lease, were held to belong to heir of lessor till option was exercised when executor became entitled to purchase money.

[561] Steele v. Bond, 32 Minn. 14, 18 N. W. 830.

[562] Prout v. Roby, 15 Wall. 471, 476.

limited in the lease is that mere default in the payment of money at a stipulated time admits, in general, of compensation, and hence time of payment is seldom treated as of the essence of real contracts. So it has been held that a covenant for title was implied in a renewal of a lease from year to year.[563] But without carrying the doctrine to such an extent, an option to purchase may be regarded as continuing open during the period covered by a privilege of renewal in a lease, the time not being limited to the years mentioned in the lease, nor restricted to the time of the existence of the lease under the privilege of renewal. The language is general,—at any time they wish to do so. Construing it liberally, in favor of the lessor, it certainly gives to the lessee the privilege of purchasing the property at any time during the existence of the lease.[564]

§ 388. A clause in a lease reserving to the lessor the right to sell and providing that any of the premises sold during the term should cease to be a part of the demised premises, is valid and enforceable. It is clear from such a lease that the contract is not that the lessee is, at all events, to hold for the term the land conveyed, but that his right in so much as should be sold during the term should cease upon such sale. Such bargains are common, and clauses inserted to express them have often been given effect.[565] Such a provision is not void as being repugnant to the habendum of the lease. Any provision stipulating that during the term a lessor may enter or may terminate the lease is, in a sense, repugnant to words demising land for a fixed term; but such stipulations are found in most leases, and are not held void because repugnant to the words of the demise. If it is clear that the contract was that the lessee should take his estate subject to a defeasance by a sale of the demised property by the lessor, to hold the clause defining the reserved right of the lessor void because repugnant to the demise would be unwarrantably to defeat an intention which the parties have clearly expressed.[566] The sale of a life estate in the land would terminate a lease for years under such a provision, and the life tenant is the proper person to give the thirty days' notice required by the lease.[567] The objection that such an agreement is not mutual by

[563] D'Arras v. Keyser, 26 Pa. St. 249, 254.

[564] Schroeder v. Gemeinder, 10 Nev. 355.

[565] Munigle v. Boston, 8 Allen (Mass.) 230; O'Connor v. Daily, 109 Mass. 235; Pynchon v. Stearns, 11 Metc. (Mass.) 304; Shaw v. Appleton, 161 Mass. 313, 37 N. E. 372; Aydlett v. Pendleton, 114 N. Car. 1, 18 S. E. 971.

[566] Shaw v. Appleton, 161 Mass. 313, 37 N. E. 372; Hunnewell v. Bangs, 161 Mass. 132, 36 N. E. 751.

[567] Aydlett v. Pendleton, 114 N. Car. 1, 18 S. E. 971.

its terms is not valid. The lessor reserves the right to sell and the lessee agrees to surrender possession at once upon sale. The lessee could not be compelled by a new owner to hold the premises, and if the occupation continued after the sale it would be by virtue of a new agreement between the parties, and not by virtue of the lease. The parties mean that a sale is to terminate the lease, *ipso facto*, and the lessee's covenant signifies his assent to this.[568] If a lessee is to vacate the premises before the expiration of his term, only upon the contingency that the lessors should desire to sell them, and upon notice of such desire being given, no other purpose than that of selling would authorize the giving of the notice, and if the lessee is entitled to notice by express agreement, a notice stating no desire to sell can have no effect.[569] Where a lease is conditioned on circumstances that land be not sold, a *bona fide* sale is intended, and if a colorable sale is made, the lessee may sue for damages. If the sale is a fraudulent one, made for the purpose of defrauding the lessee out of his rights under the lease, it is not such a sale as will defeat the contract; for where a contract makes a sale a condition, it means a sale in good faith, and not a fraudulent one. Parties who contract respecting a sale have in contemplation a sale in good faith, and not one founded in fraud. It would be strange if a lessor could, by a fraudulent sale made for the purpose of defeating his lessee, avoid the lease and thus avail himself of his own wrong.[570] If the powers of a court of equity are invoked by a bill for equitable relief against an alleged fraudulent sale, a decree that the sale should be treated as in all respects subject to the lease would meet all the lessee's equities. Conceding the sale to be fraudulent, that would furnish adequate relief.[571] Or a lessee might yield to a notice to quit, according to a covenant in the lease, in case the lessor wished to put the land to a different use, and recover damages as for an eviction if the landlord did not in fact discontinue the former use.[572] Such a provision contemplates a sale which transfers a present right of possession. Thus, where a contract for sale was made prior to the expiration of a term, but did not take effect till after the lease had expired, the lessee did not become entitled under a provision allowing him the value of improvements in case of a sale

[568] Rhode Island Hospital &c. Co. v. Baxter, 20 R. I. 553, 40 Atl. 1135.

[569] Sloan v. Cantrell, 5 Cold. (Tenn.) 571.

[570] Trout v. Perciful, 105 Ind. 532, 5 N. E. 558; Davis v. Schweikert, 130 Cal. 143, 62 Pac. 411.

[571] Allenspach v. Wagner, 9 Colo. 127, 10 Pac. 802.

[572] Salzgeber v. Mickel, 37 Ore. 216, 60 Pac. 1009.

during the term.[573] But a sale subject to the lease was modified by a provision that the purchaser could end the term by thirty days' notice, and if the purchaser exercised that privilege the lessee could recover the sum allowed by the lease on such a contingency.[574]

VII. *For Insurance.*

§ 389. So common is the practice of fastening on the lessee the burden of insuring that it has been held that, if an agreement be made for a lease, with the usual covenants, the lessee is not entitled to have the insurance covenant omitted.[575] A general covenant on the part of a lessee to insure puts him under obligation to take out insurance against fire if the demised premises consist of a building. A general undertaking to insure is sufficiently definite without specifying the kind of insurance to be effected. It would be hypercritical to give a construction to general language which would exclude an insurance against loss by fire, or declare it too uncertain to be enforced for any purpose.[576] The mode of insuring may be put within the control of either party. Thus a lessee, covenanting to insure for a certain sum during the term in companies approved by the lessor, fulfilled his covenant when he took out a policy for the benefit of both lessor and lessee according to their respective interests; and he was not bound to renew a policy previously taken out by the lessor in his own interest merely.[577] On the other hand, the control over the details of effecting the insurance may be left with the lessor, and in such case he is responsible for the solvency of the companies in which he insures. So a lessee who has once complied with a convenant to pay extra insurance cannot be compelled to pay over again when the insurance companies selected by the lessor become insolvent.[578] A requirement in a lease that the premises should be kept insured and the insurance assigned to the lessor is sufficiently complied with to prevent a breach of condition by the taking out of insurance alone without any assignment, when the lessor makes no objection to such an arrangement.[579] But the fact that a lessee was told by two or three insurance agents, to whom he applied for insurance on the property, that such property

[573] Stewart v. Pier, 58 Iowa 15, 11 N. W. 711.

[574] Hazen v. Hoyt (Iowa), 75 N. W. 647.

[575] Bodman v. Murphy, 35 Md. 154; citing Bunyon on Fire Ins., p. 132, 133.

[576] Rhone v. Gale, 12 Minn. 54.

[577] Sherwood v. Harral, 39 Conn. 333.

[578] Quincy v. Carpenter, 135 Mass. 102.

[579] Eberts v. Fisher, 54 Mich. 294, 20 N. W. 80.

was not insurable, does not show such impossibility of performance of the contract to insure as to excuse its non-performance.[580]

Although it was formerly a matter of some dispute as to whether a covenant to insure might run with the land, it is now settled that such a covenant runs with the land and binds assignees.[581] A covenant, to run with the land, must have for its subject-matter something which sustains the estate or the enjoyment of it, and is, therefore, beneficial to both lessor and lessee. A covenant to insure, which had for its object the benefit of the lessor only, as where the money paid in the event of a loss would go to him, has been regarded as collateral; but if the money is to be applied to repair or rebuild, then it is in its character like a covenant to repair, which may run with the land. When such a covenant to insure has for its object a building to be erected after the date of the lease but which, when erected, is to be used by the lessee and is an essential ingredient in the agreement of the parties for the creation of the estate, it is not indispensable to make such a covenant run with the land, that assignees should be expressly named; but the covenant being one which may be annexed to the estate and run with the land, equivalent words, or a clear intent shown by the whole instrument, may suffice.[582]

§ 390. **Measure of damages for failure to insure.**—Where a tenant obligated himself, by a valid contract, to keep the leased premises insured in a certain sum during the term of the lease, and without sufficient excuse failed to do so, and if the building was worth the sum mentioned and was wholly destroyed by fire, the extent of the tenant's liability would be the amount of the lessor's damages, that is the amount for which insurance was to be taken out. It was argued that the tenant received no consideration for agreeing to insure the property; that it contracted to pay the costs of insurance as part of the rental, and the cost of the premium of insurance was the proper measure of recovery. The court refused to accept the proposition that the lessor's damages arising out of the breach of the covenant were to be measured by what it would have cost the lessee to secure the stipulated insurance; and pointed out that the consideration for the lessee's promise to insure was the obligation of the lessor to rebuild and repair in case of fire and the suspension of rent as long as the premises re-

[580] Jacksonville &c. R. Co. v. Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515.

[581] Vernon v. Smith, 5 B. & Ald. 1; Merchants' Ins. Co. v. Mazange, 22 Ala. 168.

[582] Masury v. Southworth, 9 Ohio St. 340.

mained uninhabitable.[583] The prevailing rule as to the measure of damages for the breach by a tenant of a contract to insure is the loss sustained by the landlord, not exceeding the amount of the policy which the tenant covenanted to obtain.[584] The same doctrine as to damages is applied in the case of an agent or factor who fails to insure goods of his principal,[585] and in other cases where a person is responsible for a loss of insurance.[586] In New York a different rule of damages is adopted as between landlord and tenant, and the landlord can only recover the amount which would have paid the premiums for the required insurance. The result of this practice is that the lessor must place insurance himself in case the lessee fails to fulfil his covenant to do so. According to this view damages resulting from the burning of the building would not be the direct and natural consequence of the breach of the contract to insure. The natural consequence of the failure would be that the lessor would procure another policy.[587] It seems clear that the lessor may, if he choose, proceed to insure the premises on the default and recover the amount paid in

[583] Jacksonville U. P. R. & N. Co. v. Hooper, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515.

[584] Douglass v. Murphy, 16 U. C. Q. B. 113.

[585] Ela v. French, 11 N. H. 356; Miner v. Tagert, 3 Bin. (Pa.) 204; Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 645; Morris v. Summerl, 2 Wash. C. C. 203; De Taslet v. Crousellat, 1 Wash. C. C. 504; Smith v. Price, 2 F. & F. 748. See also, Bateman, Ex parte, 8 De Gex M. & G. 263.

[586] Gray v. Murray, 3 Johns. Ch. (N. Y.) 167; Soule v. Union Bank, 45 Barb. (N. Y.) 111, 30 How. Pr. 105; Ainsworth v. Backus, 5 Hun (N. Y.) 414; Hawkins v. Coulthurst, 5 B. & S. 343.

[587] National &c. Bank v. Hand, 80 Hun (N. Y.) 584, 30 N. Y. S. 508, 89 Hun (N. Y.) 329, 35 N. Y. S. 449. The New York court went on the authority of Dodd v. Jones, 137 Mass. 322, where a contract for the sale of a house and lot contained a promise that a grantor would assign a policy of insurance. The policy was not assigned, the premises burned; but the grantor was only held liable for the amount of the premiums. The court said: "The agreement was not a contract of insurance, but of sale; and the measure of damages for the breach of it was the value of the thing sold. A sum that would procure a similar policy, and thus place the plaintiff in the position she would have been in had there been no breach of the contract, would indemnify her, and she cannot elect to go without insurance, and hold the defendant as insurer. Damages resulting from the burning of the building are not the direct and natural consequence of the breach of the defendant's contract, and could not have been contemplated by the parties as included in it. The natural consequence of the failure of the defendant to perform his contract would be that the plaintiff would procure another policy of insurance, and she can not charge the defendant with the consequences of her neglect to do that."

premiums from the lessee or from his surety. But when the parties agreed that the lessor should attend to the taking out of the insurance for the lessee, that would be more like a voluntary loan from the lessor of the amount of the premiums, and the surety would not be liable to repay such amount.[588] If the lessee collects the insurance after a loss and fails to covenant to rebuild with the proceeds, the lessor has been allowed to recover the amount of the policy from him.[589]

VIII. *For Repairs.*

§ 391. A covenant by a lessee to repair has been regarded as one of the usual covenants in a lease, so that under an agreement to execute a lease with the usual covenants it has been held proper to insert a covenant on the part of the lessee to repair.[590] Where an agreement for a lease expressly provides for a covenant by the lessee to repair, he was held not to be entitled to have excepted from the covenant "damage by fire or tempest."[591] Although the lease which contains a covenant to repair is for some cause invalid as a lease and cannot be given in evidence, yet if the lessee enters and a year to year tenancy is created, he will be bound by the agreement in this respect. It cannot be taken as a proposition of law that a mere verbal covenant or agreement to return the premises in the same condition as taken, is not sufficient to fix the liability. This would assume that such a contract must, in all cases, be in writing. Agreements to repair or rebuild are agreements for work, labor, and materials and are not required to be in writing. At common law a tenant for years was entitled to necessary timber for repairing houses, fences, etc., if there were no stipulation to the contrary, but so far as the parties have themselves stipulated in the lease for repairs, the court must look to their express contract; an unqualified stipulation to repair binding the tenant not only to make the repairs, but to find the materials.[594] However, the landlord may contract expressly to furnish materials, but, in such case, his failure to perform such contract would not relieve the tenant from his express covenant to make the repairs. He is under obligation to proceed with the repairs, but may charge the cost of materials up against the landlord and deduct it from the rent.[595]

[588] Woodbridge v. Richardson, 2 Thomp. & C. (N. Y.) 418.

[589] Hayes v. Ferguson, 15 Lea (Tenn.) 1.

[590] Kendall v. Hill, 6 Jur. N. S. 968.

[591] Sharp v. Milligan, 23 Beav. 419.

[594] Harris v. Goslin, 3 Harr. (Del.) 340.

[595] Wood v. Sharpless, 174 Pa. St. 588, 34 Atl. 319, 321.

A provision in a will which requires a tenant to keep a property in good repair, and contains no exception relieving him from the duty to make repairs occasioned by wear and tear or the elements, or other named reason, obliges the tenant to maintain the property in good repair, without regard to the cause of dilapidation.[596] So, under a general covenant to repair, the lessee's liability is not confined to cases of ordinary and gradual decay, but extends to accidental injuries.[597] A covenant by a sub-tenant to repair is not a mere covenant of indemnity, but renders him liable to his lessor whether the latter has paid the original landlord or not.[598]

§ 392. It is the established rule of the common law that an express covenant to repair binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident, or the act of a stranger.[599] The foundation of the rule is the doctrine that a person who has bound himself unconditionally cannot be relieved, and that a covenant to repair is equivalent to a covenant to rebuild.[600] Although a man may be ex-

[596] Ashby v. Ashby, (N. J.) 46 Atl. 522.

[597] Kling v. Dress, 28 N. Y. Super. Ct. 521, 525; Cohn v. Hill, 9 Misc. (N. Y.) 326.

[598] Smith v. Coe, 1 Sweeny (N. Y.) 332.

[599] California: Polack v. Pioche, 35 Cal. 416. Illinois: Barnhart v. Boyce, 102 Ill. App. 172; Reno v. Mendenhall, 58 Ill. App. 87. Iowa: David v. Ryan, 47 Iowa 642. Kentucky: Bohannons v. Lewis, 3 T. B. Mon. (Ky.) 376, 380; Proctor v. Keith, 12 B. Mon. (Ky.) 252. Massachusetts: Leavitt v. Fletcher, 10 Allen (Mass.) 119. Mississippi: Fowler v. Payne, 49 Miss. 32. Missouri: O'Neil v. Flanagan, 64 Mo. App. 87. Ohio: Linn v. Ross, 10 Ohio 412. Pennsylvania: Hoy v. Holt, 91 Pa. St. 88, 36 Am. St. 659; Lincoln Trust Co. v. Nathan, 175 Mo. 32, 74 S. W. 1007. New York: Beach v. Crain, 2 N. Y. 86. United States: Dermott v. Jones, 2 Wall. (U. S.) 1, 7. South Carolina: Mitchell v. Nelson, 13 S. Car. 105. English: Paradine v. Jane, Aleyn 26; Walton v. Waterhouse, 3 Saund. 422a, *n.*; Bullock v. Dommitt, 6 Term. R. 650; Green v. Eales, 2 A. & E. (N. S.) 225, 42 E. C. L. 648; Brecknock Co. v. Pritchard, 6 Term R. 750.

[600] Fowler v. Payne, 49 Miss. 32; Leavitt v. Fletcher, 10 Allen (Mass.) 119; Allen v. Culver, 3 Denio (N. Y.) 284; Bigelow v. Collamore, 5 Cush. (Mass.) 226; Phillips v. Stevens, 16 Mass. 238; Walton v. Waterhouse, 2 Saund. 422a, *n.*; Abby v. Billups, 35 Miss. 618; Bullock v. Dommitt, 6 Term R. 650; Meyers v. Myrrell, 57 Ga. 516. In Wattles v. South Omaha &c. Co., 50 Neb. 251, this doctrine of construction was severely criticized and with the aid of a statute repudiated. The reasoning of the court appears in the following extract from the opinion: "No one can find fault with the principle that a man should be compelled to perform what he has

cused from a duty imposed on him by law, if he is disabled from performing it without any fault of his own; yet when, by his own contract, he creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity.[601] If it be urged that this is a hardship upon the lessee, the answer is that it was his own folly to not stipulate against such inevitable consequences.[602] So the covenant of a lessee or lessor to repair is not discharged by the destruction of the premises by lightning, fire, or wind.[603] However, a nice distinction between repairing and rebuilding was made in a case where a tenant had covenanted to make all needful repairs at his own expense "except the putting on of a new roof, new doors and new floors." As long as the old roof could be repaired and no new roof was needed or called for, the expense of repairs could not be charged against the landlord, but must be paid by the lessee under his covenant.[604]

The statement of the rule is sometimes put in the form that under an express covenant to keep and leave the premises in repair, the lessee is bound to make good any injury from any cause not resulting from the act or neglect of the landlord.[605] Yet, where a lessee cove-

promised; but, with all due respect to the supreme court of Massachusetts, it seems to us that the court ignored the entire issue. The question there was not whether the lessee was obliged to perform a covenant he had made, but the question was what covenant he had made; that is, whether his covenant to repair and keep in repair the demised premises included within it a covenant on his part to rebuild the buildings on the leased premises if they should be destroyed. But in that case, as in the other cases cited, and in every case that we have been able to find which supports the contention of the appellee here, it was taken for granted that the rule of common law was that a covenant by a lessee to repair was equivalent to and involved a covenant to rebuild. Assuming, however, that such was and is the rule of construction at common law, are we bound by that rule? . . . What did the parties to this contract understand and intend by the terms 'repair' and 'keep in repair?' These words 'repair' and 'keep in repair' are not technical words, nor should they be given a technical or strained interpretation. They should receive their ordinary interpretation. To repair, as it is ordinarily used, means to amend, not to make a new thing, but to refit, to make good or restore an existing thing. When we speak of repairing a thing, the very expression presupposes something in existence to be repaired."

[601] Walton v. Waterhouse, 2 Saund. 442a, *n*.

[602] Bohannons v. Lewis, 3 T. B. Mon. (Ky.) 376, 380.

[603] Flynn v. Trask, 11 Allen (Mass.) 550; Chit. Contr. (10 Am. Ed.) 803.

[604] Powers v. Cope, 93 Ga. 248, 18 S. E. 815.

[605] Eisenhart v. Ordean, 3 Colo.

nanted to deliver up the premises in good order and condition, he was held not responsible for a freshet which washed away a road along a river so that it could not be repaired.[606] In this case the lessee could neither prevent the damage by previous precautions nor repair it by subsequent efforts. A covenant in a lease that the lessee will maintain buildings in as good condition and repair as the same are now in and return the same to the lessor at the expiration of the lease in as good condition as the same now are, reasonable wear and tear from ordinary use alone excepted, imposes the duty on the lessee to rebuild in case of the destruction of the buildings by accidental fire.[607] Where a tenant covenants to build and leave in repair and does build and the houses are destroyed by fire, this does not discharge him. He must rebuild or pay the value of the building.[608]

However, any positive act of prevention by the covenantee, which prevents the covenantor from performing, will release the latter from liability. A lessor might discharge his lessee from his duty of rebuilding a part of the premises by undertaking to do it himself. If the lessor had occasioned the breach, that would be an answer to a complaint founded on that breach on the ground that it was the act of the lessor and not, as charged, the act of the lessee.[609]

§ 393. **Responsibility for rebuilding rests on contract.**—"The lessee is not responsible to the lessor for the accidental, casual destruction by fire of the property demised unless by his covenant he has made himself so.[610] In construing covenants, the cardinal rule is the intention of the parties; . . . if there is not an express stipulation to rebuild or restore edifices and structures destroyed by casualty or some covenant which is equivalent thereto, such as a covenant to 'uphold and repair' or 'to repair,' then the loss must fall upon the reversioner and not upon the lessee. And, lastly, the covenant to redeliver or restore to the lessor in the same plight and condition, usual wear and tear excepted (or other words of like import), does not bind the

App. 162, 32 Pac. 495; Allen v. Howe, 105 Mass. 241; Hallett v. Wylie, 3 Johns. (N. Y.) 44; Weigall v. Waters, 6 Term R. 488.

[606] Waite v. O'Neil, 76 Fed. 408.

[607] Ely v. Ely, 80 Ill. 532; Armstrong v. Maybee, 17 Wash. 24, 48 Pac. 737; Reno v. Mendenhall, 58 Ill. App. 87; Phillips v. Stevens, 16 Mass. 238; Abby v. Billups, 35 Miss. 618; Cline v. Black, 4 McCord (S. Car.) 431; Walton v. Waterhouse, 2 Saund. 422a, *n*.

[608] Pasteur v. Jones, Conf. Rep. (N. Car.) 194.

[609] McHenry v. Marr, 39 Md. 510; West v. Blakeway, 2 M. & G. 729, 40 E. C. L. 828.

[610] Wainscott v. Silvers, 13 Ind. 497.

covenantor to rebuild in case of casual destruction by fire or impose the burden of loss upon him."[611] Where a tenant agrees to redeliver the premises in a prescribed condition of good order, it is a question of intention whether he intended to become bound to rebuild in case of casual destruction by fire. An attendant circumstance should be examined and the probable intention of the parties discovered.[612] On the face of the contract there is the express obligation on the part of the lessees to deliver up "the house with the lots and appurtenances thereunto attached" at the expiration of the term. There is no obligation to repair, but simply "to deliver up," meaning to surrender back to the lessor. The decisions on this subject make a distinction between an obligation "to repair and deliver up" and one simply "to deliver up." Whilst the former binds the obligor to rebuild in case of loss by fire during the term, the latter is construed simply as an obligation against holding over; and the lessee is not bound to rebuild in case the buildings are destroyed.[613] An agreement merely to leave buildings erected on the premises does not bind lessee to rebuild them when they are destroyd by fire or give lessor any claim to insurance taken out by lessee for his own benefit.[614] But an express agreement to deliver up the premises at the end of the term, *in as good order* and *condition,* reasonable use and unavoidable casualties excepted, as when they were received from the lessor, binds the lessee to make repairs. Whatever repairs might be necessary to keep the premises in good repair must be made by the lessee under such an agreement;[615] and so, if an exception is not made in case of destruction by fire, a lessee would be bound by such a provision to rebuild structures destroyed by fire. But such was not the result reached by the Texas court, where a covenant to deliver up in good order at the end of the term without an undertaking to repair, was held not to make the tenant liable to rebuild in case of destruction by fire.[616] However, a covenant in a lease that the tenant shall keep the premises in good order, and deliver the same in good

[611] Levey v. Dyess, 51 Miss. 501; Seevers v. Gabel, 94 Iowa 75, 62 N. W. 669; Wainscott v. Silvers, 13 Ind. 497; Maggort v. Hansbarger, 8 Leigh (Va.) 532; Fowler v. Bott, 6 Mass. 63; Ellis v. Welch, 6 Mass. 246; Hallett v. Wylie, 3 Johns. (N. Y.) 44; Warner v. Hitchins, 5 Barb. (N. Y.) 666.

[612] Halbut v. Forrest City, 34 Ark. 246.

[613] Nave v. Berry, 22 Ala. 382; Phillips v. Stevens, 16 Mass. 238; Maggort v. Hansbarger, 8 Leigh (Va.) 532; Warner v. Hitchins, 5 Barb. (N. Y.) 666.

[614] Clemson v. Trammell, 34 Ill. App. 414.

[615] Jaques v. Gould, 4 Cush. (Mass.) 384.

[616] Howeth v. Anderson, 25 Tex. 557; Miller v. Morris, 55 Tex. 412.

order as "they are now," on the expiration of the lease, binds the tenant to rebuild in case the premises should be destroyed by fire.[617]

The Mississippi Code provides that in the absence of an express covenant to restore buildings destroyed by fire without fault on his part a tenant is not bound to do so; and the covenant to leave building in good repair is not equivalent to an express covenant. Where the premises leased were a farm, and a valuable gin-house thereon was destroyed by fire, it was held that by force of this statute rent would be abated in proportion as the value of the premises was lessened.[618]

Some covenants in a lease do not put a hard and fast duty on the covenantor. Thus, in a five-year lease of farming lands a lessee covenanted to grow a good and substantial hedge fence by the close of the term. This only imposed a duty on him to plant and faithfully to cultivate it during the term. He did not guarantee a good fence.[619]

But, on the other hand, it has been held that a covenant in the lease of a farm to keep fences in repair is equivalent to one to leave them so, and binds lessee to repair after destruction by an unprecedented flood.[620] Moreover, a covenant to deliver a certain number of cattle and sheep at end of term takes effect as an absolute obligation. It is not sufficient to show that by reasonable care the lessee could not acquire so many during the term.[621]

§ 394. The phrase "unavoidable casualty" is in common use in leases in this country and has a well-settled and understood meaning. It does not signify a mere want of repair, neither does it include any injuries which may happen by reason of the common and ordinary use of the estate leased or of adjoining premises. The term has a much more restricted meaning. By a strict definition, as applied to the subject-matter, it signifies events or accidents which human prudence, foresight and sagacity cannot prevent.[622] The bursting of boilers at low pressure steam was held to be an "unavoidable casualty." It was proper to interpret the words, not according to their strict and philosophical signification, which might defeat the intention of the parties, but rather in conformity with their popular, everyday acceptation, and, in accordance with such an interpretation, there

[617] Schmidt v. Pettit, 8 D. C. 179.

[618] Taylor v. Hart, 73 Miss. 22, 18 So. 546.

[619] Gilchrist v. Gilchrist, 76 Ill. 281.

[620] Spafford v. Meagley, 8 W. L. J. (Ohio) 323; Proctor v. Keith, 12 B. Mon. (Ky.) 252.

[621] More, Estate of, 121 Cal. 609, 54 Pac. 97.

[622] Welles v. Castles, 3 Gray (Mass.) 323; Tays v. Ecker, 6 Tex. Civ. App. 188, 24 S. W. 1030.

was in a rupture of the boilers a degree of unexpectedness, as of something unforeseen and not contemplated in the making of the contract, which makes it proper to regard it as an unavoidable casualty.[623] If the negligence of the tenant was a proximate cause of the injury he would not be protected by a clause exempting him from liability for damage to the premises "by fire or other unavoidable accident not happening through the neglect of the lessee." The question whether it was negligence to leave an awning down during a wind storm was properly left to the jury. The contention that it should have been decided by the court in favor of the plaintiff as a matter of law was without foundation.[624] So it was held in another case that a cellar window broken by a stone accidentally kicked by a passing team is not broken by inevitable accident. The kicking of the stone, so far as the lessee was concerned, may have been inevitable, but not the breaking of the window, which might have been protected by a blind or wire netting. The burden of proving that the window was broken by inevitable accident was on the lessee.[625]

Another expression used in this connection with a similar meaning is "fortuitous event," which has been defined to be something which happens by a cause that cannot be resisted. It was held that the inability of lessees to operate a plantation for the third year of their lease, on account of their financial failure and the fact that their creditors took possession of their movable property, must be deemed to be the result of their own improvidence and could not properly be called a fortuitous event.[626]

§ 395. "Damages by the elements" which are ordinarily excepted from a lessee's covenant to keep in repair, cover destruction by fire occurring without fault or negligence in the lessee. Where lessee covenants to return the premises in like condition as when taken "damages by the elements excepted," it was held that this expression was sufficiently broad to release lessee from liability when the premises were destroyed by fire which originated without negligence on his part. The court adopted a popular meaning for this expression.[627] The terms "the elements" and "damage by the elements" are somewhat uncertain and indefinite expressions, and very little aid will be de-

[623] Phillips v. Sun Dyeing &c. Co., 10 R. I. 458.

[624] Miles v. Stanke, 114 Wis. 94, 89 N. W. 833.

[625] Peck v. Scoville Mfg. Co., 43 Ill. App. 360.

[626] Taylor v. Syme, 162 N. Y. 513, 57 N. E. 83.

[627] Van Wormer v. Crane, 51 Mich. 363.

rived from resorting to any technical or scientific discussion of the meaning of the word "elements." Such language refers only to some sudden, unusual, or unexpected action of the elements, such as floods, tornadoes or the like,—extraordinary disasters, not anticipated by either party, the efficient cause of which originated after the term began.[628]

The clause "damage by fire, wind or water excepted," was held to include extraordinary damage only where the lease also contained a specific covenant for the lessee to make at his own expense all necessary repairs. Extraordinary damage from fire, wind, or water would be unusual, partial, or total destruction. "Necessary repairs" were held to mean necessary to keep that property, situated as it was, in as good condition as it was then—the condition in which the lessee agreed to return it.[629]

§ 396. The external parts of premises are those which form the inclosure of them, and beyond which no part of them extends; and it is immaterial whether those parts are exposed to the atmosphere, or rest upon and adjoin some other building which forms no part of the premises let. The expression "outside of a building" in a covenant by a lessor to repair includes the whole outer shell of the building, or external inclosure of roof and sides. The necessary repairs on the outside are those which will make the building outwardly complete.[630]

An undertaking by a lessee to bear one-third of expense of "outside" repairs of a church and belfry, was construed to mean that the entire belfry was a part of the outside of the church.[631]

In New York it is provided that where any building is so injured as to become untenantable, a tenant may in the absence of an express covenanf to the contrary surrender it and avoid further liability for rent. A covenant to make "all inside and outside repairs" is not an express agreement against the right conferred by this statute. These words import simply a general covenant. Under this clause the lessee was bound to make all ordinary repairs, but was not called upon to make those which were extraordinary. To give these words the force and meaning contended for would make the lessee liable to rebuild in case of complete destruction of the premises. Under such a construction there could be no other limitation upon the liability of

[628] Harris v. Corlies, 40 Minn. 106, 41 N. W. 940.

[629] Waddell v. De Jet, 76 Miss. 104, 23 So. 437.

[630] Leavitt v. Fletcher, 10 Allen (Mass.) 119; Green v. Eales, 2 A. & E. (N. S.) 225, 42 E. C. L. 648.

[631] First Cong. &c. Soc. v. Rochester, 66 Vt. 501, 29 Atl. 810.

the lessee. Such an interpretation is neither reasonable nor necessary.[632]

§ 397. A general covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate.[633] "Good tenantable repair" has been defined to be "such repair as having regard to the age, character, and locality of the house would make it reasonably fit for the occupation of a reasonable-minded tenant of the class who would be likely to take it."[634] A covenant to keep leased premises in repair only imposes upon the tenant the obligation to keep the premises in as good repair as when the agreement was made. Covenants to keep "in repair" and to keep "in as good repair as they now are," are held to amount to the same thing.[635] So, where an old house is rented with the usual covenants to keep the same in repair, the covenantor will not be bound to put it in an improved state, nor to avert the consequences of the elements, but only to keep it in a state in which it was at the time of the demise by timely expenditure of money and care."[636] But any direct injury to the freehold by an act of the tenant would be a breach of a contract to deliver up the premises in like condition as when received.[637]

In one case a tenant covenanted to bear all the expenses of repairing or improving the premises during the term. The building demised was condemned by the city authority, who ordered the walls to be rebuilt. It was held that the expense of rebuilding the walls must be borne by the lessee under this covenant. The court say that, in the absence of express contract, it would not have been the duty of lessee to make other repairs than such as were necessary to preserve the property in the condition it was when he rented, less such deterioration as time and ordinary use would cause; here his obligation does not rest alone on the duty to repair which the law imposes on every tenant, but upon his express contract made with a knowledge of the condition of the house at the time he rented. The word means to restore to a sound or good state after decay, injury, dilapidation, or

[632] May v. Gillis, 169 N. Y. 330, 62 N. E. 385.

[633] Walker v. Hatton, 10 M. & W. 249, 258.

[634] Proudfoot v. Hart, 25 Q. B. D. 42, per Lopes, L. J.

[635] St. Joseph &c. R. Co. v. St. Louis &c. R. Co., 135 Mo. 173, 36 S. W. 602; Stultz v. Locke, 47 Md. 562; Middlekauff v. Smith, 1 Md. 329.

[636] Gutteridge v. Munyard, 7 C. & P. 129; Stultz v. Locke, 47 Md. 562; Harris v. Goslin, 3 Harr. (Del.) 338.

[637] Murray v. Moross, 27 Mich. 203.

partial destruction.[638] Even though a covenant stipulates that premises shall be put in perfectly good repair, this does not oblige the covenantor to reconstruct out of a different kind of materials.[639]

A covenant to keep in "good repair" is much the same as a covenant to keep in "tenantable repair." So there is a case deciding that in order to satisfy the tenant's obligation under such a contract it was not enough for him to deliver up the premises in the same condition of repair as when he took them; he must deliver them up in good repair, even if they were not in good repair when the tenancy began. Parke, B., said in the course of his judgment: "This is a contract to keep the premises in good repair *as old premises,* but that cannot justify the keeping them in bad repair because they happened to be in that state when the defendant took them."[640] Where the covenant of the lessee required him to "preserve the property from deterioration" he was thereby bound to do something with respect to the property to off-set the natural wear and damage by the elements.[641] And a covenant to deliver the premises at the expiration of the term, "in good tenantable repair in every respect," binds the covenantor to restore the premises in such tenantable condition, without any reference to the condition in which he received them.[642] Leaving ashes and rubbish has been held to be no breach of an agreement peaceably to yield possession of the premises in good tenantable repair.[643]

"Habitable" means "in such a condition as to be reasonably fit for tenants to use for such purposes as the premises were reasonably and naturally adapted and for such uses as they might be reasonably put."[644]

A covenant to repair only puts the lessee under obligation to make such repairs as were necessary for his own use of the premises, and does not render him liable to put them in first-class condition.[645] So, the principle has been laid down that, if a tenant takes a house which is of such a kind that by its own inherent nature it will in course

[638] Martinez v. Thompson, 80 Tex. 568, 16 S. W. 334.

[639] Ardesco Oil Co. v. Richardson, 63 Pa. St. 162.

[640] Payne v. Haine, 16 M. & W. 541. So in Heintze v. Erlacher, 1 City Court (N. Y.) 465, a covenant to keep in repair was held to oblige the covenanter to put the premises in repair if they were in such a state that they needed it.

[641] Scott v. Haverstraw &c. Co., 135 N. Y. 141, 31 N. E. 1102.

[642] Brashear v. Chandler, 6 T. B. Mon. (Ky.) 150.

[643] Thorndike v. Burrage, 111 Mass. 531.

[644] Goss &c. Co. v. Oviatt, 60 Mo. App. 565.

[645] White v. Albany Ry., 17 Hun (N. Y.) 98.

of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing.[646] Moreover, if in the course of making repairs, changes in the original construction are made which improve the premises, the tenant is not bound to bear the cost of that part of the work.[647] A covenant by a tenant to keep the premises in repair for a certain purpose will not be extended by construction to bind him to repair for an entirely different purpose.[648] A covenant to restore premises to their original condition in a series of leases binds lessee to restore to the condition in which the premises were at the beginning of the first lease.[649]

Where premises which were out of repair were let and the tenant covenanted to make "necessary repairs," the expression was held to mean necessary to keep the property, situated as it was, in as good condition as it then was,—the condition in which the lessee agreed to return it; and, in case the lessee is insolvent, he must make such repairs or submit to a cancellation of the lease.[650]

§ 398. **A lessee who has been compelled to rebuild has no claim on insurance taken out by the lessor for his own benefit** or claim for contribution from the lessor. The erection of the new building, by the lessee, was not done at the instance or by the procurement of the lessor. It was the voluntary act of the lessee, done in performance of his own covenants in the lease. He was not entitled to the contribution, by the lessor, of any money toward the rebuilding. The insurance money belonged to the assured, the owner of the building. The title to it was purchased with his money, not that of the lessee. He as well as the lessee had an insurable interest in the premises. Either might have insured his interest. Although it may seem a hardship for the lessee that he should sustain the whole cost of rebuilding, while the owner of the premises will enjoy the ultimate benefit thereof should the building remain, a court of equity cannot for such reason impose upon the owner payment of part of such cost.[651] The fire-policy of a landlord, made in his own behalf at his

[646] Lister v. Lane, L. R. (1893), 2 Q. B. 212.

[647] Gutteridge v. Munyard, 7 C. & P. 129.

[648] Meyers v. Myrrell, 57 Ga. 576.

[649] Hooker v. Banner, 76 Cal. 116, 18 Pac. 136.

[650] Waddell v. De Jet, 76 Miss. 104, 23 So. 437.

[651] Ely v. Ely, 80 Ill. 532.

cost, does not attach to the building insured but is personal to him. It is not a covenant running with the land, for these are always referable to tenure, and requires privity of estate and must affect it in quantity, or quality, value, or enjoyment; and a fire policy does none of these things, and therefore does not inure to the benefit of a grantee of the insured. The lessee is a grantee, a lease for rent being legally a sale of the premises for the term.[652]

§ 399. City ordinance forbidding wooden buildings.—Where a lessee of a frame building had bound himself to replace it in case of destruction by fire, it was held that he was bound to build a brick or stone building after a city ordinance had been passed forbidding the erection of wooden buildings. The court argue that the parties must have known that the city could pass such an ordinance at the time they entered into the contract. If they intended that the passage of such an ordinance should exonerate the lessee from his covenant they should have so stipulated. The ordinance does not render the performance of the covenant impossible. It simply makes it more burdensome and expensive, and that has never been an excuse for nonperformance.[653] The opposite result was reached in regard to a similar covenant by a lessor on the ground that the lessor had undertaken to do something which by a change in the law had become illegal; and his covenant had thereby been discharged. The court emphasized the view that the lessor only undertook to replace the destroyed building with a similar structure and that would be inconvenient if not impossible. Had the exact contingency which had since happened been in the minds of the parties at the time, it is scarcely conceivable that the lessor would have consented to put up a brick building and rent it for the same price.[654].

§ 400. A duty to maintain machinery in a leased mill will be created by a covenant of the kind under discussion. So on the demise of a cotton press, a covenant to keep the premises in good repair and to leave them in good repair made it the duty of the lessee to put the press in good order and if he failed to do so, the owner of the press had a right to charge the lessee with the expenses of such repairs.[655] Under a covenant in a lease, to keep a mill in necessary repairs, the covenantor is not bound to add improvemnets or make additions, but

[652] Lovett v. United States, 9 Ct. Cl. 479; Carpenter v. Providence &c. Ins. Co., 16 Pet. (U. S.) 495.

[653] David v. Ryan, 47 Iowa 642.

[654] Cordes v. Miller, 39 Mich. 581.

[655] Simkins v. Cordele Compress Co., 113 Ga. 1050, 39 S. E. 407.

he is required to renew existing machinery when too old and worn to answer its purpose in the mill. If, for example, a strap gave way and the material was too rotten and decayed to be mended, a new one to take its place became necessary as a repair.[656]

§ 401. Painting, papering and decorating.—In the case of *Proudfoot* v. *Hart*;[657] arising before the court of Queen's Bench, the court below were of opinion that painting for decorative purposes could not be required under a covenant to repair, and that repapering could only be required in case it were necessary to preserve the walls and to keep the plastering from falling down. On appeal the court above agreed that the tenant was not bound to repaper simply because the old paper was worn out, but under certain circumstances they thought the tenant would be under obligation to repaper. The mere fact of its being in worse condition does not impose on the tenant any obligation to repaper under the covenant, if it is in such a condition that a reasonably-minded tenant of the class who would occupy such a house would not think the house unfit for his occupation. The same reasoning makes it necessary that he paint it in such a way as would satisfy a reasonable tenant taking such a house. Although decorations are out of repair, the tenant is not bound by his covenant to repair or replace them if the house would be acceptable to a reasonable tenant of the class accustomed to occupy it without any such decorations at all. These views are in conformity with an early case to the effect that under a covenant to repair, uphold, and maintain a house a tenant was bound to keep up the inside painting.[658] But even if there is an express covenant to repair and paint, this does not necessarily involve the entire repainting of the premises.[659] It has been held also that a covenant by a landlord to repair did not contemplate that he should restore wall decorations placed there by a previous tenant.[660]

§ 402. The point of time at which the then condition of the premises furnishes the standard of repair which a lessee is bound to maintain is the time when the leasehold estate commences. After the date of a lease and before the beginning of the term, certain repairs were made on the leased premises by the lessee in consideration of his being allowed to occupy them during that period. They were in effect re-

[656] Cooke v. England, 27 Md. 14.

[657] Proudfoot v. Hart, 25 Q. B. D. 42, 47.

[658] Monk v. Noyes, 1 C. & P. 265.

[659] Moxon v. Townshend, 2 Times L. R. 717, affirmed 3 Times L. R. 392.

[660] Goss &c. Co. v. Oviatt, 60 Mo. App. 565.

paired by the lessees in behalf of the lessor, and stood as if they had been put in repair by the lessor before the execution of the lease. So that a covenant by the lessee to deliver up the premises "in as good order and repair as the same now are" bound him to keep up these repairs.[661] The obvious meaning of a future lease is that the lessees are to receive the premises at the beginning of the term in the condition they were in when the lease was executed and were to keep it in as good repair as it was on the latter day till the end of the term. When, therefore, a shed on the premises fell before the term of lease began and before the lessees took possession, it was incumbent upon the lessor to rebuild it. This was essential in order to put the lessees in a position to perform their undertaking and carry out the evident intention of the parties to the contract.[662]

§ 403. When right of action accrues.—For injury to personal property leased, any action for damages would be premature until the expiration of the lease term. If the lessee under his contract agreed to return the personal property "in as good condition as the same now is," no cause of action for a breach of that covenant could arise until the time came for a return of the property. The mere fact that it was injured and damaged at some time during the life of the lease would not show that it could not be returned subsequently in substantially the same condition. It would not show but that repairs would place it in the same condition as when leased.[663] Where a lease contained a covenant on the part of the lessee to deliver up the premises at the end of the term in as good condition as he received them, this was held not to be a continuing covenant to repair and keep in repair at all times but that the tenant has the whole time until the end to put the premises in repair. So when the premises were surrendered before the end of the term the lessee was under no obligation to repair by reason of his covenant. The repairs were to be made *on the expiration of said lease.*[664]

However, there is authority for allowing the lessor to bring an action on the case against the lessee during the term; such action would not be prevented by the covenant of the lessee to leave the premises in good repair. At common law a tenant was liable for waste from accidental causes only where there was an agreement to repair. In all

[661] Holbrook v. Chamberlin, 116 Mass. 155.

[662] Lightfoot v. West, 98 Ga. 546, 25 S. E. 587.

[663] Fratt v. Hunt, 108 Cal. 288, 41 Pac. 12.

[664] Reed v. Snowhill, 51 N. J. L. 162, 16 Atl. 679, reversing 49 N. J. L. 292.

such cases the only remedy is by suit on the covenant; but where the tenant is guilty of voluntary waste, and by his voluntary act injury is done to the reversioner, then the lessor may bring his action during the lease, even though the tenant may have it in his power to restore the premises to their original state before its expiration.[665] In a leading English case on this subject, Lord Ellenborough, with whom the other judges concurred, said that "the act of the tenant was an injury to the title of the reversioners, and a present damage to them."[666]

§ 404. **The obligation of a landlord in any case to repair and rebuild leased premises rests solely on express contract,** and without an express contract to that effect the landlord is neither bound to repair leased premises himself nor to pay for repairs made by the tenant. It is not in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them authorizing him to do this. The tenant takes the premises for better and for worse and cannot involve his landlord in expense for repairs, without his consent.[667] A covenant by a lessee to repair a part of the prem-

[665] Moses v. Old Dominion &c. Co., 75 Va. 95. On page 102 the court argues as follows: "If the landlord is compelled to wait the expiration of the term before he can sue, he must of course run all the risks of the tenant's continued solvency, and of the loss of evidence by the death or absence of witnesses. And all this loss and inconvenience are to be borne, because perchance the tenant may conclude to repair the property during the term, in the face of his declaration that he will not repair, and of his express denial of all liability for injury to the estate. If the tenant refuses to repair the premises, he can not complain that the landlord does so. He is thereby restored to his former occupation, whereas he might have been compelled to pay the rent without the use and occupation. If by his negligence, or misfeasance, the property has been materially injured he ought at once to make good the loss by repairing it, or by indemnifying the landlord for the expense he has necessarily incurred in making such repairs."

[666] Provost v. Hallett, 14 East 489.

[667] Turner v. Townsend, 42 Neb. 376, 60 N. W. 587; Witty v. Matthews, 52 N. Y. 512; Libbey v. Tolford, 48 Me. 316; Vai v. Weld, 17 Mo. 232; Brewster v. De Fremery, 33 Cal. 341; Estep v. Estep, 23 Ind. 114; Kahn v. Love, 3 Ore. 206; Moore v. Weber, 71 Pa. St. 429; Arden v. Pullen, 10 M. & W. 321; Dutton v. Gerrish, 9 Cush. (Mass.) 89; Rogan v. Dockery, 23 Mo. App. 313; Hughes v. Vanstone, 24 Mo. App. 637; Kaufman v. Clark, 7 D. C. 1; Medary v. Cathers, 161 Pa. St. 87, 28 Atl. 1012; Hess v. Weingartner, 12 Montg. Co. L. R. (Pa.) 105, 5 Pa. Dist. R. 451; Long v. Fitzimmons, 1 W. & S. (Pa.) 530; Weinsteine v. Harrison, 66 Tex. 546, 1 S. W. 626.

ises was held to raise a fair implication that the balance was to be repaired by the lessor and in that case the landlord cannot recover rent after the building has become untenantable.[668] The lessee must suffer necessary repairs to be made, however, and is not justified in abandoning the premises because of the lack of repair.[669]

As long ago as the time of Lord Mansfield it was laid down as an established principle of law, that the consequence of the house being burned down was, that the landlord was not obliged to rebuild, but the tenant was obliged to pay the rent during the whole of the term.[670] If there has been no agreement or obligation on the part of the lessor to repair the premises, the fact that they were out of repair would not be a defense to an action to recover the amount of rent agreed to be paid.[671] Under a power to a tenant for life to lease for years reserving the usual covenants, a lease made by him containing a proviso, that, in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, is void. Such a covenant is not a usual covenant in a lease.[672] From a provision in a written lease that the lessee shall keep the premises in repair except as to unavoidable accidents and natural wear and tear, the law will not imply a covenant on the part of the lessor to repair damage caused by unavoidable accidents.[673] The only possible effect of the exception of natural wear and tear would be to qualify or restrict the liability of the lessee to the lessor to restore the premises in good condition.[674] But where a part only of a building was leased and the lessee covenanted to repair the part leased it was held that by implication the lessor undertook to repair the rest of the building.[675] A mere naked promise of a landlord to repair the demised premises based on no sufficient consideration cannot be enforced in favor of the tenant,[676] but such an agreement might be supported by the lessee's obligation to

[668] Bissell v. Lloyd, 100 Ill. 214.

[669] Murrell v. Jackson, 33 La. Ann. 1341.

[670] Belfour v. Weston, 1 Term R. 310; Fowler v. Bott, 6 Mass. 63; Smith v. Kerr, 108 N. Y. 31, 15 N. E. 70, § 675.

[671] Moffat v. Smith, 4 N. Y. 126; Burnes v. Fuchs, 28 Mo. App. 279; Hill v. Woodman, 14 Me. 38.

[672] Doe v. Sandham, 1 Term R. 705.

[673] Clifton v. Montague, 40 W. Va. 207, 21 S. E. 858; Kline v. McLain. 33 W. Va. 32; Weigall v. Waters, 6 Term R. 488.

[674] Hartford &c. Co. v. Mayor &c., 78 N. Y. 1.

[675] Mumford v. Brown, 6 Cow. (N. Y.) 475.

[676] Libbey v. Tolford, 48 Me. 316, 77 Am. Dec. 229; Hall v. Beston, 16 Misc. R. (N. Y.) 528, 38 N. Y. S. 979; Purcell v. English, 86 Ind. 34, 44 Am. R. 255; Proctor v. Keith, 12 B. Mon. (Ky.) 252; Eblin v. Miller, 78 Ky. 371; Gottsberger v. Radway, 2 Hilt. (N. Y.) 342.

comply with the recitals in a deed-poll which he had accepted.[677] Furthermore voluntary repairs by a landlord raise no presumption of a contract to repair.[678] The tendency of modern decisions is not to imply covenants which might and ought to have been expressed if intended. A covenant is never implied that a lessor will make any repairs.[679] In one case the supposed implied covenant on the part of the lessor was not for repairs to the property demised but related to other property belonging to the lessor which, it was claimed, he bound himself by implication to keep in good order and repair. But there was no covenant, either express or implied, that the lessor would build or keep the premises in good order. Such was doubtless his intention as expressed in the recital, but that was intended only for his own benefit, and, whether he would continue to do so or not, was left to depend entirely on his own will.[680] A tenant refused to pay rent unless repairs were made and was notified to quit. It was held that a subsequent promise of the landlord to make repairs, if the tenant would stay at the same rental, was based upon a sufficient consideration, and could be enforced by action.[681]

Upon familiar principles of law, an authority given by a landlord to a tenant to make repairs at his expense would terminate upon the death of the landlord.[682]

§ 405. A tenant has no equity to compel his landlord to expend money received from an insurance company, on the demised premises being burned down, in rebuilding the premises; nor can the tenant restrain the landlord from suing for the rent until the premises are rebuilt.[683] But if the lessor has covenanted to rebuild structures destroyed by fire, compliance with that covenant is a condition precedent to his right to collect rent and the lessor's breach releases the lessee from further liability.[684] In the absence of a covenant by the lessor to rebuild, however, a lessee's covenant to pay rent is not affected by an injury to the premises, nor limited by the exception of unavoidable casualty in his subsequent covenant to repair, and the liability for rent would also be independent of the lessor's covenant to make

[677] Vass v. Wales, 129 Mass. 38.

[678] Moore v. Weber, 71 Pa. St. 429, 10 Am. R. 708.

[679] Witty v. Matthews, 52 N. Y. 512; Sheets v. Selden, 7 Wall. (U. S.) 416; Pomfret v. Ricroft, 1 Saunders 321, 322, n. 1; Post v. Vetter, 2 E. D. Smith (N. Y.) 248.

[680] Moyer v. Mitchell, 53 Md. 171.

[681] Conkling v. Tuttle, 52 Mich. 630, 18 N. W. 391.

[682] Wilson v. Edmonds, 24 N. H. 517, 547.

[683] Leeds v. Cheetham, 1 Sim. 146.

[684] Lincoln Trust Co. v. Nathan, 175 Mo. 32, 74 S. W. 1007.

outside repairs.[685] It is well settled that the exception of a lessee's liability on his covenant to repair in case of damage by fire does not raise an equity in his favor for an injunction against an action under the contract for payment of rent after the destruction of the house by fire.[686] On the destruction of a leased building, the tenant has the right to build on the premises and occupy such building for the remainder of the term if he chooses to do so under the conditions of the original lease. In the absence of a covenant to rebuild, the landlord has no right to enter upon the demised premises and take possession to the exclusion of the tenant for the purpose of erecting a new structure, but if the tenant makes no objection to such a proceeding, it would be deemed a license from him to the landlord to enter for the purpose of rebuilding.[687]

§ 406. **In California** the lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation and repair all subsequent dilapidations thereof, which render it untenantable,[688] except that the hirer of a thing must repair all deteriorations or injuries thereto occasioned by his ordinary negligence.[689] If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, and deduct the expenses from the rent, or he may vacate the premises and be discharged from further payment of rent.[690] These sections of the code do not by operation of law insert in a lease of a residence a covenant on the part of the landlord to repair but merely make it the duty of the landlord to repair upon notice, and upon his failure to do so, allow the tenant the option to repair to the extent of one month's rent, or to vacate the premises discharged from further liability for rent.[691]

§ 407. **By statute in Dakota,**[692] which has been reënacted in both North[693] and South Dakota,[694] the lessor of a building intended for

[685] Belfour v. Weston, 1 Term R. 310; Hare v. Groves, 3 Anstr. 687; Kramer v. Cook, 7 Gray (Mass.) 550; Leavitt v. Fletcher, 10 Allen (Mass.) 119, § 675.

[686] Holtzapffel v. Baker, 18 Ves. 115.

[687] Smith v. Kerr, 108 N. Y. 31, 15 N. E. 70.

[688] Civ. Code, § 1941.

[689] Civ. Code, § 1929.

[690] Civ. Code, § 1942.

[691] Green v. Redding, 92 Cal. 548, 28 Pac. 599.

[692] Civ. Code, §§ 1114, 1115.

[693] Civ. Code 1895, §§ 4080, 4081.

[694] Civ. Code 1901, §§ 4926, 4927.

human habitation must repair all subsequent dilapidations except those caused by the ordinary negligence of the lessee. After lessor's failure to repair on notice, the lessee may repair and deduct the cost from the rent or he may vacate and be relieved from further liability on the lease. These statutes have been construed to apply to dwelling houses only, so that a building used and occupied as a retail grocery store would not come within the terms of the act.[695]

§ 408. A covenant by a lessor to make all necessary repairs on the outside of a building is not a covenant that the outside shall not give way but one that, if it does, he will repair it. So he cannot be held liable for damages occasioned by the fall of the building. The necessary repairs on the outside are those which will make the building outwardly complete. When those are made, then, and not before, the lessee will be bound by his covenant to make all necessary repairs on the inside. The fact that rebuilding the outside will so far replace the whole building as to leave very little to be done on the inside and thus make the performance of the lessee's covenant very easy, does not in any degree excuse the lessor from first performing his covenant.[696] Where a lessee agreed to make all improvements he should deem necessary in a house at his own expense, but all outside and permanent improvements were to be done at the expense of the lessor, the expense of putting in a heating furnace could not be charged up to the lessor. The furnace not being outside the house the cost of it could not be charged to the lessor and parol evidence varying or explaining the meaning of the lease was properly excluded.[697]

In case a lessor lets a building for a particular purpose and covenants to repair it, it is his duty to put it in such a state of repair as the business requires. This duty exists whether the defects existed at the time of the lease, or arose from defects in construction or general dilapidation.[698] So by force of an agreement to "keep" in repair, if to keep in repair it is necessary that the premises should first be put in repair, the lessor is bound to perform that duty.[699] Such a covenant by a lessor usually contains no clause as to the then condition of the premises and no exception of natural wear and natural

[695] Edmison v. Aslesen, 4 Dak. 145, 27 N. W. 82.

[696] Leavitt v. Fletcher, 10 Allen (Mass.) 119.

[697] Smith v. Hess, 83 Iowa 238, 48 N. W. 1030.

[698] Piper v. Fletcher, 115 Iowa 263, 88 N. W. 380; Myers v. Burns, 35 N. Y. 269; Bass v. Rollins, 63 Minn. 226, 65 N. W. 348; Miller v. McCardell, 19 R. I. 304, 33 Atl. 445.

[699] Myers v. Burns, 35 N. Y. 269; Payne v. Haine, 16 M. & W. 541.

decay. Good repair and good condition, at all times, is the fair intent of the agreement. But after a landlord has performed a covenant such as to put fences in repair, the lessee must make any objections to the work at once; if he accepts possession without complaint, he is estopped subsequently to claim the repairs were defective and caused damage.[700]

Ordinarily a lessor's covenant to repair and to have premises suitable for occupation for a certain purpose would apply only to the state of physical repair of the premises. But an agreement that premises should be in good condition for comfortable occupation as a courtroom was held to be a covenant against disturbance by noise from other tenants in the building.[701]

§ 409. Requirement of notice to landlord.—The established rule of law in regard to notice which the courts now apply is that "where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice unless he stipulates for it; but when he is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him."[702] Thus, where the thing to be repaired is a fence and the lessor has not stipulated for notice he is not entitled to any. Even if this were not decisive, a further clause reserving to the lessor the right to enter on the premises to view and make improvements would be.[703] But where the tenant has secured to himself the right to make the necessary repairs, and to deduct the expense thereof from the rent, he cannot claim any extra compensation by way of damages, especially if he does not allege in his answer that he gave notice to the lessor that the premises wanted repairs after the commencement of the term.[704] In case the lack of repair is on the inside of the house to which the tenant only had access, the landlord cannot be deemed to have broken his engagement, or to be in default unless it appear that he neglected to do the thing promised, after notice and lapse of a time sufficient to allow him to repair.[705] The same rule was applied in a case where a lessor covenanted to repair the outside of a building, the main timbers and

[700] Williamson v. Miller, 55 Iowa 86, 7 N. W. 416.

[701] Riley v. Pettis County, 96 Mo. 318, 9 S. W. 906.

[702] Vyse v. Wakefield, 6 M. & W. 442, 453, per Lord Abinger.

[703] Hayden v. Bradley, 6 Gray (Mass.) 425.

[704] Wolcott v. Sullivan, 6 Paige (N. Y.) 117.

[705] Ploen v. Staff, 9 Mo. App. 309; Walker v. Gilbert, 2 Robt. (N. Y.) 214, 221.

the roof. As to part of these the lessor could have acquired knowledge of the necessity for repairs by observation, but as to the rest he could not; so there should be imported into the covenant the condition that the lessor shall have notice of the lack of repair before he can be called on under the covenant to make it good.[706]

§ 410. Where a landlord fails to keep his covenant to make exterior repairs, a tenant has several remedies. (1) He may abandon premises if they become untenantable by reason of want of repair. (2) He may make the repairs and deduct the cost from the rent. (3) He may occupy the premises without repair and recoup his damages in an action for the rent. (4) He may sue for damages for breach of the covenant to repair.[707] Where a lessor fails to perform his covenants to repair, the lessee may hold him to the ordinary responsibility of a person failing to keep his contract. A lessee need not make the repairs himself but can recover as damages the difference between the value of the premises in repair and out of repair.[708] It is well settled that a tenant is not bound to make permanent and important repairs which the landlord has contracted to make, but may recover his damages for the landlord's failure to make them.[709] Or if a lessor after notice refuses to perform a covenant to make improvements and repairs, the lessee may make them in accordance with the covenant and charge their reasonable value against the rent.[710] It has also

[706] Makin v. Watkinson, L. R., 6 Exch. 25. In this case Bramwell, B., says: "I think that we are irresistibly driven to say that the parties can not have intended so preposterous a covenant as that the defendant should keep in repair that of which he had no means of ascertaining the condition. The lessee is in possession; he can say to the lessor, 'You shall not come on the premises without lawful cause;' and to come for the purpose of looking into the state of the premises would not be lawful cause. If the lessor comes to repair when no repair is needed he will be a trespasser; if he does not come, he will, according to the plaintiff's contention, be liable to an action on the covenant, if repair is needed, and will be liable not only to the cost of repair but to consequential damage for injury to chattels caused by reason of the repairs he had no opportunity of effecting." The principal case was approved in Manchester &c. Co. v. Carr, L. R., 5 C. P. Div. 507.

[707] McCardell v. Williams, 19 R. I. 701, 36 Atl. 719.

[708] Bostwick v. Losey, 67 Mich. 554, 35 N. W. 246; Buck v. Rodgers, 39 Ind. 222; McCoy v. Oldham, 1 Ind. App. 372; Ross v. Stockwell, 19 Ind. App. 86, 49 N. E. 50; Green v. Bell, 3 Mo. App. 291; McFarlane v. Pierson, 21 Ill. App. 566; Hexter v. Knox, 63 N. Y. 561. But see, Cook v. Soule, 56 N. Y. 420.

[709] Thomson-Houston &c. Co. v. Durant &c. Co., 144 N. Y. 34, 39 N. E. 7.

[710] Buck v. Rodgers, 39 Ind. 222; Wright v. Lattin, 38 Ill. 293; Ross

been held that a breach of a covenant to repair will justify the tenant in abandoning the premises and discharge him from further liability for rent. Although the covenant to pay rent and the covenant to repair are independent, so that the failure of a landlord to repair does not work a forfeiture of the rent,[711] yet if the landlord fails to repair and in consequence the premises become untenantable, the tenant may abandon them and escape liability for rent.[712] To warrant an abandonment, however, it must be shown that the premises became untenantable by reason of the landlord's failure to comply with his agreement.[713]

The general rule for the measure of damages for failure to make repairs is the difference in the rental value of the premises with the repairs and the rental value without them.[714] In an action by lessee for breach of covenant to repair resulting in damages to furniture and rendering the premises unfit for use as a boarding house, the proper measure of damages is such as will compensate for damage to furniture, and the difference between the rental value of the building as it actually was and what it would have been worth if the contemplated repairs had been made.[715] Consequential damages may sometimes be recovered but such recovery is confined to the proximate and unavoidable consequences of the breach of the covenant to repair. The lessee, it is true, cannot wait till the demised premises fall to pieces about his head, and then abandon the premises and sue on his covenant to repair.[716] But he is not deprived of his right to recover any actual

v. Stockwell, 19 Ind. App. 86, 49 N. E. 50; Hexter v. Knox, 63 N. Y. 561; Cook v. Soule, 56 N. Y. 420; Beardsley v. Morrison, 18 Utah 478, 56 Pac. 303; Cheuvront v. Bee, 44 W. Va. 103, 28 S. E. 751; Orton v. Noonan, 30 Wis. 611; McFarlane v. Pierson, 21 Ill. App. 566.

[711] Young v. Burhans, 80 Wis. 438, 50 N. W. 343.

[712] Pierce v. Joldersma, 91 Mich. 463, 51 N. W. 1116; Bissell v. Lloyd, 100 Ill. 214; Lewis v. Chisholm, 68 Ga. 40; Piper v. Fletcher, 115 Iowa 263, 88 N. W. 380; Bostwick v. Losey, 67 Mich. 554, 35 N. W. 343.

[713] Prescott v. Otterstatter, 85 Pa. St. 534; Moore v. Gardiner, 161 Pa. St. 175, 28 Atl. 1018; Blake v. Dick, 15 Mont. 236, 38 Pac. 1072; Piper v. Fletcher, 115 Iowa 263, 88 N. W. 380.

[714] Thomson-Houston &c. Co. v. Durant &c. Co., 144 N. Y. 34, 39 N. E. 7; Taylor v. Lehman, 17 Ind. App. 585, 46 N. E. 84, 47 N. E. 230. In Vivian v. Champion, 2 Ld. Raym. 1125, it was said that the proper measure of damages in a breach of such covenants was what it would cost to put the premises in repair. This rule appears to have been modified in some modern cases on covenants for repairs. Fisher v. Goebel, 40 Mo. 475.

[715] Kohne v. White, 12 Wash. 199, 40 Pac. 794.

[716] Thompson v. Shattuck, 2 Metc. (Mass.) 615; Fisher v. Goebel, 40 Mo. 475.

damage he may have sustained by the dilapidation of the leased building merely because he did not himself repair as soon as the decay or dilapidation became dangerous. The damages must not be remote or speculative.[717] Hence it has been held that indirect and consequential damages flowing from some failure to repair, such as the destruction of crops by the trespasses of cattle, cannot be recovered from the lessor.[718] The correct rule in most cases would be that if a lessee took possession with a fence down, it was his right and duty to rebuild the fence and that the full extent of his damages could not exceed the necessary cost of rebuilding. Yet this would not apply where the lessor refused to rebuild a fence or to allow the lessee to rebuild it. A man cannot forbid the doing of a thing and then insist that his rights are to be predicated upon the result of a disregard of his instruction.[719] So a tenant cannot recover damages for loss of trade resulting from a breach of lessor's covenant to repair.[720]

In assessing damages, certainty, as far as the nature of the case will admit of, is to be aimed at and ascertained; mere speculative injuries, depending on uncertain future contingencies, afford no ground for damages.[721] But in an action during the term by a tenant against his landlord for breach of a covenant to repair, the tenant may recover damages for the whole leasehold estate.[722] So where an action brought during the term was tried after the lease expired, it was held that the jury could consider all the consequences of the refusal to repair, those subsequent as well as those prior to the institution of the suit, thus settling all questions of damages arising from the breach of the covenant assigned in the declaration.[723]

IX. *To Pay Taxes.*

§ 411. A covenant to pay taxes, like one to pay rent, is an undertaking to do something in respect to the land itself and therefore runs with the land and binds an assignee of the leasehold estate.[724]

[717] Green v. Bell, 3 Mo. App. 291; Loker v. Damon, 17 Pick. (Mass.) 284, 288.

[718] Varner v. Rice, 39 Ark. 344.

[719] Park v. Ensign, 10 Kan. App. 173, 63 Pac. 280.

[720] Middlekauff v. Smith, 1 Md. 329.

[721] Cooke v. England, 27 Md. 14.

[722] Cohen v. Habenicht, 14 Rich. Eq. (S. Car.) 31.

[723] Cooke v. England, 27 Md. 14.

[724] Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3; Mason v. Smith, 131 Mass. 510; Wills v. Summers, 45 Minn. 90, 47 N. W. 463; Post v. Kearney, 2 N. Y. 394, 51 Am. Dec. 303; West Virginia &c. R. Co. v. McIntire, 44

Furthermore such a covenant is divisible in case of an assignment of a part of the lease. And the assignee of a portion would be liable to pay taxes in proportion to the extent of the premises assigned to him.[725] That a lessee can recover from his assignee, and also from a second assignee, the taxes accruing during their terms respectively, and which the lessee has been obliged through their default to pay to the lessor is well settled.[726] But after a second assignment, the original lessee cannot recover from the first assignee those taxes which he has been obliged to pay the lessor.[727] In order that the covenant shall run with the land it is only necessary that the payments which it covers shall be made in respect to the land and it is not essential that it shall be to pay yearly taxes. So a covenant by the lessee, in a lease under seal, to pay all costs, charges and expenses, except the yearly taxes, is a covenant running with the land, and binding on an assignee.[728]

On an assignment of the reversion by warranty deed, the assignee can enforce the lessee's covenant to pay taxes. Although the conveyance expressly excepts the grantor from liability for taxes, such exception will not prevent a transfer of the right to the grantee to compel the lessee to pay the taxes according to his covenant. The exception is no more than a refusal by the grantor to covenant that the lessee would perform his covenant.[729] But a stranger to the lease cannot take advantage of a covenant by the lessee to pay taxes. Thus it was held that an assessment for the construction of a sewer could not be personally enforced against the lessee by a municipality, though the lessee covenanted in his lease to pay all assessments upon the property demised.[730]

In general the obligation of the lessee to pay taxes does not make them a part of the rent reserved. Rent has a fixed legal meaning, and to consider all payments which, by the terms of a lease, a tenant is bound to make, as coming within its definition, would lead to a confusion of ideas without necessity or advantage. It may be said that the payment of taxes is part of the return made by a tenant to

W. Va. 210, 28 S. E. 696; Huddell, in re, 16 Fed. 373; Hendrix v. Dickson, 69 Mo. App. 197; Washington Gas Co. v. Johnson, 123 Pa. St. 576, 16 Atl. 799, 10 Am. St. 563, § 328.

[725] Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3.

[726] Patten v. Deshon, 1 Gray (Mass.) 325; Burnett v. Lynch, 5 B. & C. 589; Moule v. Garrett, L. R., 5 Exch. 132.

[727] Mason v. Smith, 131 Mass. 510.

[728] Torrey v. Wallis, 3 Cush. (Mass.) 442.

[729] Hendrix v. Dickson, 69 Mo. App. 197.

[730] Davis v. Cincinnati, 36 Ohio St. 24.

his landlord for the use of the property and, therefore, properly comes under the definition of rent. But in one sense the performance of every covenant on the part of the lessee is a return made by the tenant for the use of the land. Yet it would hardly be contended that money stipulated to be expended in repairs or for insurance, or in the way of improvements was any portion of the rent. Taxes, being payable annually, approach, it is true, to the idea and character of rent which is a certain yearly return reserved to the landlord in money, or kind, or service for the enjoyment of the freehold; but they are distinguishable from rent in this, that they are uncertain both as to amount and time of payment, and are payable, not to the landlord, but to the government, and are imposed for the benefit of the public, and the landlord may, by the terms of his agreement with the tenant, be relieved from their payment; taxes are not, on that account, any more rent than the expenditure of money for insurance, under a covenant to that effect on the part of the lessee.[731] The expressions sometimes used by a court in determining what taxes are included in the lessee's covenant, that taxes are payable as part of the *rent,* mean only that they are paid as part of the consideration for the use of the land, and not that they are technically rent.[732] However it has been held that a lessee's general undertaking to pay taxes made them payable as part of the rent so that the lessor was entitled to a lien to that extent, giving him priority over other creditors of the lessee.[733]

§ 412. **The general rule in regard to leases for years is that where the lease is silent on the subject, the landlord is bound to pay all state and municipal taxes** and assessments on the property during the term.[734] However in the case of a lease for ninety-nine years with a

[731] Garner v. Hannah, 6 Duer (N. Y.) 262, 266, in the words of Sloson, J.

[732] Elliot v. Gantt, 64 Mo. App. 248; McManus v. Fair Shoe &c. Co., 60 Mo. App. 216.

[733] Gedge v. Shoenberger, 83 Ky. 91.

[734] Bettison v. Budd, 17 Ark. 546, 65 Am. Dec. 442; Sargent v. Pray, 117 Mass. 267; Weichselbaum v. Curlett, 20 Kan. 709, 27 Am. R. 204; Western &c. R. Co. v. State, 54 Ga. 428; Kitchen v. Smith, 101 Pa. St. 452; Turley &c. Inst. v. City of Memphis, 8 Heisk. (Tenn.) 845; Connell v. Female &c. Asylum, 18 La. Ann. 513; Moffat v. Henderson, 50 N. Y. Super. Ct. 211; Sheldon v. Hamilton, 22 R. I. 230, 47 Atl. 316; Philadelphia &c. R. Co. v. Appeal Tax Court, 50 Md. 397; Leach v. Goode, 19 Mo. 501; People v. Barker, 153 N. Y. 98, 47 N. E. 31, affirming, 15 App. Div. 628; Anderson v. Harwood, 47 Mo. App. 660; Graham v. Wade, 16 East 29; Townshend v. Stangroom, 6 Ves. 333; Greaves v. Ashlin, 3 Campb. 426; Dove v. Dove, 18 U. C. C. P. 424.

covenant for perpetual renewal, it was held that the lessee was bound to pay taxes. The arguments of counsel which were evidently adopted by the court were that the lessee had covenanted absolutely to pay rent without deduction of any kind and that a covenant was to be construed most strongly against the covenantor. Furthermore as the lessor had expressly covenanted for quiet enjoyment, no further covenants could be raised by implication against him. The consequent hardships on the landlord was also used as an argument for imposing the liability on the tenant.[735]

If a tenant erects buildings which by the terms of the lease remain his property, the landlord is not bound to pay taxes on such improvements but the tenant must pay them.[736] A provision in a lease giving the lessee the right to remove buildings erected by him on the leased premises, makes such buildings personal property taxable to the lessee.[737] If the right to remove buildings is reserved to the lessee in a lease, then, in such case, he will be regarded as an owner of the property for the purpose of taxation. But some sort of agreement is necessary to prevent the operation of the rule that structures become a part of the realty upon which they are erected.[738] A provision that buildings erected on the premises shall become the property of the lessor at the end of the term does not make the lessee the owner during the term but merely negatives the possibility of a power of removal in the lessee.[739] The test is who really owns the structures. A shed, erected by a lessee on a pier leased from a city, was by the provisions of the lease to become the property of the city on the expiration of the lease. As the shed was affixed to the realty, it became the property of the city immediately and could not be assessed for taxation against the lessee.[740] Yet a tenant would be liable to pay taxes on a house standing on the demised premises which was owned by him even though the lessor's interests were exempt from taxation.[741] However, a covenant by a lessee to pay taxes does not bind him to pay those from which the landlord would be exempt.[742]

[735] Hughes v. Young, 5 Gill & J. (Md.) 67.

[736] Leach v. Goode, 19 Mo. 501; Luttrell v. Knox County, 89 Tenn. 253, 14 S. W. 802.

[737] East Tennessee &c. R. Co. v. Mayor &c. (Tenn.), 35 S. W. 771.

[738] People v. Commissioners &c., 80 N. Y. 573.

[739] So in an English case where there was a building lease it was held that the lessee was bound to pay taxes on the improvements, and the lessor was only liable for the taxes levied at the original valuation. Smith v. Humble, 15 C. B. 321, 80 E. C. L. 321.

[740] People v. Barker, 153 N. Y. 98, 47 N. E. 31.

[741] Parker v. Redfield, 10 Conn. 490.

[742] Philadelphia &c. R. Co. v. Appeal Tax Court, 50 Md. 397.

§ 413. In many jurisdictions it has by statute been made the duty of the tenant holding any leasehold estate to pay the taxes levied on the demised premises. But the tenant so paying has been given his right of action to recover such money of the landlord, as money paid for his use or the right to deduct the same from the rent reserved, unless otherwise agreed. This provision was intended as a means of facilitating the collection of taxes, there being many cases where the landlord might not be known or might be absent.[743] Ordinarily, one who voluntarily pays the debt of another cannot recover the sum paid, but taxes paid by the tenant are not a voluntary payment.[477] The land itself is, in fact, the debtor to the public, and *prima facie* it is the tenant's tax, because all the remedies are against him.[745] If the tenant pays the taxes without any compulsion in pursuance of a previous invalid undertaking on his part, it will be regarded as a voluntary payment and cannot be recovered back from the landlord.[746] If there be a special contract that the lessee shall deduct from the rental all taxes levied, or to be levied upon the leased property, such a contract would unquestionably be good and in case the lessee were granisheed, he would be entitled to his discharge, even though at the time of the trial the liability was still undetermined and contingent.[747] A special agreement of this nature, entitling the lessee to deduct from the rent amounts paid as taxes was not invalidated by the

[743] Philadelphia &c. R. Co. v. Appeal Tax Court, 50 Md. 397; Caldwell v. Moore, 11 Pa. St. 58; Kitchen v. Smith, 101 Pa. St. 452. In the last citation the doctrine was applied in the case of an oil lease. In England a local act provided that a drainage tax should be paid by tenants, who might deduct and retain the same out of the rents, and it was also provided that the tax might be levied by distress on the goods and chattels on the premises. The meaning of this act was to make the tax payable by the tenant in whose time it became due. If such tenant was not called upon to pay it till after the rent had been paid, he had the right to require the landlord to reimburse him. Dawson v. Linton, 5 B. & Ald. 521, 7 E. C. L. 285. The right to reduce rent by the amounts paid by the tenant as taxes had previously been recognized in Stubbs v. Parsons, 3 B. & Ald. 516. But in Saunderson v. Hanson, 3 C. & P. 314, it was said that back taxes could not be recovered by the tenant if he had gone on paying the full amount of rent with no deduction.

[744] Carter v. Carter, 5 Bing. 406.

[745] Walker v. Harrison, 75 Miss. 665, 23 So. 392.

[746] McAnany v. Tickell, 23 U. C. Q. B. 499.

[747] McPherson v. Atlantic &c. R. Co., 66 Mo. 103; St. Louis v. Regenfuss, 28 Wis. 144; Thompson v. Fischesser, 45 Ga. 369; Wheelock v. Tuttle, 10 Cush. (Mass.) 123; Shearer v. Handy, 22 Pick. (Mass.) 417.

English statutory provision[748] forbidding any agreement which would throw the burden of taxation on the tenant. Such an agreement does not come within the mischief to be guarded against. There is nothing in the statute to invalidate an agreement by the landlord to repay the amount if the tenant will refrain from insisting on the deduction from the rent.[749] Furthermore the lessee might be enabled to recover back from the lessor sums paid as taxes, even though the taxes could not be assessed as a personal obligation or liability of the lessee. If to save the leased premises from sale and to prevent his consequent eviction therefrom, the lessee should pay the taxes, it cannot be doubted but that, without any express agreement in the lease, he could withhold it from the rent or maintain assumpsit to recover it from the lessor.[750]

When the lease is for life, however, the general equitable principle which apportions the charges upon real estate ratably places the burden on the tenant to keep down the taxes and to keep the premises in repair. This obligation on the life tenant does not rest in covenant, express or implied, but in equity, and exists as an incident of the estate. When one contracts for a life estate he must be presumed to contract with reference to the incidents thereto attached. The reservation of rent does not change the nature of the estate nor create an equity in favor of the tenant for life.[751] This obligation resting on a tenant for life would pass to an assignee upon an assignment of the term and it is the duty of such assignee to pay all taxes assessed during his tenancy. If he neglects it and suffers the land to be sold for the taxes, he can acquire no right to the estate against the owner of the fee by buying in the tax title.[752]

§ 414. The price charged for water by a city is not a tax or assessment chargeable upon the premises which the tenant being compelled to pay may recover from the landlord; but is a commodity which the tenant may take or decline at his option. The price charged for it is not a tax any more than the price charged for gas, electricity, steam,

[748] 5 & 6 Vict., c. 35, § 103.

[749] Lamb v. Brewster, 4 Q. B. D. 220.

[750] McPherson v. Atlantic &c. R. Co., 66 Mo. 103; Wells v. Porter, 7 Wend. (N. Y.) 120; Hammon v. Sexton, 69 Ind. 37.

[751] Carter v. Youngs, 42 N. Y. Super. Ct. 418.

[752] Prettyman v. Walston, 34 Ill. 175, 190; Varney v. Stevens, 22 Me. 331; Hughes v. Young, 5 Gill & J. (Md.) 67; Cairns v. Chabert, 3 Edw. Ch. (N. Y.) 312; Burhans v. Van Zandt, 3 Seld. (N. Y.) 523; Trustees of Elmira v. Dunn, 22 Barb. (N. Y.) 402.

or coal, some of which are as necessary commodities as water. Nor does the fact that the city supplies water and a private corporation supplies gas make one a tax rather than the other.[753] The city has no lien on the premises for the payment of water bills, and so the charge is not an incumbrance which the tenant is presumed to pay on account of the landlord.[754] In the absence of agreement, a landlord is not bound to pay tax rates for city water used by the tenant though the house is piped therefor. The landlord is under no greater obligation than he would be to pay for gas, because the house demised is piped for gas.[755] The lessee cannot recover amounts paid on this account without showing in some way that the lessor was liable for the water rates. No agreement to pay them could be implied because the water was essential to the premises for the purpose for which they were leased. It can hardly be said that the landlord impliedly agrees to pay for whatever is essential to the use of the premises which he leases.[756] But it does not necessarily follow in every instance that a lessor who has paid water rates can recover them back from the lessee. It may have been the understanding that the lessor should furnish the water gratuitously or that it should be supplied to the lessee as an appurtenance of the leased premises. Such seems to have been the case where the water was furnished at the request of the lessor, and he had in prior years paid for it.[757]

However the rule seems to be different when the water rent is made a lien on the premises. In a case holding the lessor was liable to pay water rates, the court enumerated the points of similarity to a tax as follows: "It will thus be seen that these rents possess many of the essential elements of a tax; they are general and annual, and imposed for a public purpose, and from the time of their imposition they become both 'ordinary and yearly' burdens; they constitute a lien on the property and are collectible in the same manner as ordinary taxes." The conclusion of the court is that such water rents may fairly be considered as within the term "taxes" so as to be included in the tenant's covenant to pay all taxes.[758] It is obviously possible for a municipal corporation which goes into the business of supplying its mem-

[753] Sheldon v. Hamilton, 22 R. I. 230, 47 Atl. 316; Badcock v. Hunt, 22 Q. B. D. 145.

[754] Turner v. Revere Water Co., 171 Mass. 329, 50 N. E. 634; Leighton v. Ricker, 173 Mass. 564, 54 N. E. 254; Sheldon v. Hamilton, 22 R. I. 230, 47 Atl. 316.

[755] McCarty v. Humphrey, 105 Iowa 535, 75 N. W. 314.

[756] Leighton v. Ricker, 173 Mass. 564, 54 N. E. 254.

[757] Jamesin v. Thomen, 24 Cinn. L. B. (Ohio) 334.

[758] Garner v. Hannah, 6 Duer (N. Y.) 262.

bers with water, to defray the expense of such undertaking by a tax levied according to valuation of real estate, street frontage or in some other manner. Where this mode is adopted, the charge for water would be a tax and in the absence of agreement would fall upon the lessor.[759] But even where the expense of maintaining a waterworks system is in part defrayed by the levy of a special tax, there is no reason why in some instances the water should not be measured off by a meter and sold as a commodity. The landlord might be liable for the usual and ordinary water rates which were assessed according to the frontage of the building, and yet be under no implied obligation to pay for the extraordinary use of water in large quantities. It cannot be contended that there is any implied obligation on the part of the landlord to pay for extra water used for the exclusive benefit of the tenant.[760] Where a lessee had covenanted to pay the regular water rates, there would seem to be even greater reason for making him pay for extra water, measured off by a meter and used in relation to his business. But the court held the contrary, on the ground that there was nothing in the statutes making the actual consumer of the extra water personally liable for the meter-rates.[761]

All doubt as to the responsibility for water bills may be settled by a covenant in the lease that the lessee undertakes to pay them. Such a covenant is not to be regarded as a mere declaration as to who is to pay for the gas and water furnished on the premises. There is no ambiguity as to whom the water rates are to be paid to. They are payable to the company furnishing the water. So when a tenant covenants to pay water rates or gas bills, it is as much a condition of his holding as any other covenant in the lease.[762]

[759] Williams v. Kent, 67 Md. 350, 10 Atl. 228; Darcey v. Steger, 23 Misc. (N. Y.) 145; Moffat v. Henderson, 50 N. Y. Super. Ct. 211.

[760] Williams v. Kent, 67 Md. 350, 10 Atl. 228.

[761] Moffat v. Henderson, 50 N. Y. Super. Ct. 211.

[762] Hand v. Suravitz, 148 Pa. St. 202, 23 Atl. 1117. In Badcock v. Hunt, 22 Q. B. D. 145, the lessor covenanted to pay "all rates, taxes and impositions whatsoever, whether parliamentary, parochial or imposed by the corporation of the city of London, or otherwise howsoever." Lord Esher said: "The question appears to me to be whether this water rate can be said to be a rate or imposition 'imposed' within the meaning of those words. I do not think that it can. I do not think that a charge can be said to be imposed upon him within the meaning of this covenant. If a man buys things in a shop, the liability to pay the price may be said in one sense to be imposed on him by law, but that is not, in my opinion, the sense in which the terms imposed and imposition are used in this covenant. Furthermore, I think the words 'imposed otherwise howsoever' must be construed agreeably

§ 415. The intention of the parties, as shown by the language of the instrument, determines what taxes, burdens and assessments are to be borne by the lessee. In the early English cases the distinction was made between an entirely new kind of tax and the fresh levy of a tax which had been previously imposed. A lessee's covenant would not oblige him to pay a new tax; it must be understood of such taxes as were then in use.[763] Still the language of the covenant might be such as to provide for the payment of a tax of an entirely new kind.[764] Moreover a covenant in the ordinary form was held to bind the lessee to pay all land taxes whatsoever, although there was no land tax at the time and it was ordered long after the making of the covenant. And the reason was because the land tax was known and understood, and was to be levied as occasion required.[765] The rule recognized and adopted in these cases is, that if the tax or assessment be made under a law existing at the time of the covenant, it is within such covenant; or if there be no law existing at the time authorizing or requiring it, but it is afterward enacted, still if the assessment or tax be of the same kind with taxes or assessments made under former acts, it is presumed to have been in the contemplation of the parties as a tax *in viris* though not *in esse*. But if such tax or assessment be different in kind from such as have been heretofore *in esse*, it is not to be presumed that the parties contemplated any unusual exercise of power in the legislature, such as it had never before exercised. These principles were applied by the Supreme Court of Rhode Island in 1859 to a betterment assessment for laying, widening and altering highways. The court say: "In looking back to past legislation, we look in vain for any taxes or assessments made upon any principle for any similar purpose. . . . In no case either for highway or other public improvements, have lands been taxed for the value added thereto by the public improvement. This is certainly a departure from any known mode or purpose of assessments. So novel and extraordinary did the provisions of this act appear when it went into effect, that it was seriously and earnestly denied to be within the constitutional power of the legislature to enact it. . . . We are of

to the rule of construction applicable when general words follow specific words, and that therefore they can only include rates or impositions imposed in a similar manner to parliamentary and parochial rates, viz., imposed compulsorily upon the person charged."

[763] Davenant v. Bishop of Sarum. 2 Lev. 68; Brewster v. Kidgill, 12 Mod. 166; Hopwood v. Barefoot, 11 Mod. 238.

[764] Hopwood v. Barefoot, 11 Mod. 238.

[765] Giles v. Hooper, Carthew 135; Bradbury v. Wright, 2 Doug. 624.

opinion that this assessment was not within the defendant's covenant."[766]

However true and forcible these arguments were at the time they were made, the levying of special assessments to pay for betterments has since then become so familiar a practice that they would have no application at the present day. So a lessee's general covenant to pay taxes, duties, etc., may bind him to pay special assessments levied on the property for betterments.[767] The question then becomes one as to intention; whether the language used indicates an intent that he shall be bound to pay this kind of burden.

While in a general sense the word "taxes" includes special assessments, yet there is a clear distinction between the two; special assessments are a peculiar class of taxes which are laid upon the property benefited according to some equitable rule, while taxes, as generally understood, mean the burdens imposed by the government to defray its expenses. A promise to pay taxes does not apply to a special assessment for the construction of a sewer.[768] A covenant to pay "all taxes or duties levied, or to be levied," does not include a special tax for paving a sidewalk.[769] A private assessment for paving a street is not a tax or public due of any kind within the meaning of the covenants in a lease.[770] And conversely, in conformity with a statutory distinction as to terms, it has been held that a condition in a lease that the lessee shall "pay all *assessments* whatsoever levied on said premises," does not bind him to pay state, city or county taxes for general purposes.[771] But a general covenant to pay taxes and assessments of any kind bound a lessee with a twenty-year term to pay a betterment assessment for altering a street.[772] A covenant by a lessee to pay special taxes *prima facie* includes an assessment for street improvements.[773] And an agreement to pay all taxes, charges and impositions was held to bind a lessee to pay a special assessment.[774] So a lessee was held liable to pay a special assessment for a betterment where he cove-

[766] Love v. Howard, 6 R. I. 116, 125, per Brayton, J.

[767] Blake v. Baker, 115 Mass. 188; Curtis v. Pierce, 115 Mass. 186; Simonds v. Turner, 120 Mass. 328.

[768] Ittner v. Robinson, 35 Neb. 133, 52 N. W. 846; De Clercq v. Barber &c. Co., 167 Ill. 215, 47 N. E. 367, affirming 66 Ill. App. 596; Mayor &c., Matter of, 11 Johns. (N. Y.) 77; Bleecker v. Ballou, 3 Wend. (N. Y.) 263.

[769] Twycross v. Fitchburg R. Co., 10 Gray (Mass.) 293.

[770] Bolling v. Stokes, 2 Leigh (Va.) 178.

[771] Stephani v. Catholic Bishop, 2 Ill. App. 249.

[772] Codman v. Johnson, 104 Mass. 491.

[773] Lucas v. McCann, 50 Mo. App. 638.

[774] Bleecker v. Ballou, 3 Wend. (N. Y.) 263.

nanted to pay "all taxes, assessments, impositions and payments, payable out of and for the demised premises."[775] The same result was reached where the agreement included "all and singular the taxes, rates, charges and assessments which shall or may from time to time and at any time be levied, assessed or made on the demised premises, or in respect of the same, for or on account of any matter or cause whatever."[776]

Where a lease contained covenants that the lessee should pay all assessments for paving, flagging or repairing the streets but that improvements of a public character or for permanent improvements should be paid by the lessor, it was held that the substitution of granite blocks for cobble stones was a permanent improvement and the cost of it must be borne by the lessor.[777]

A general covenant by a lessee to pay all taxes does not bind him to pay a license fee which is charged against the lessor in respect to its corporate franchise. To hold that the act imposed a tax on franchises would be to declare it in contravention to the constitution of the state and would destroy the act itself.[778]

§ 416. If a lessee of a part of a building covenants with the lessor that he will pay the taxes which may be payable or assessed in respect to the premises, the landlord may prove a usage to apportion taxes among different tenants according to the amount of rent paid by each.[779] The Massachusetts Court said on this question: "Though an estate is leased to several independent tenants, taxes are uniformly assessed against the whole estate. The covenant of each tenant to pay taxes cannot be construed to mean the taxes upon the whole estate. From the nature of the case some mode of apportioning the whole tax must be contemplated by the parties. The usage to apportion it in proportion to the rents paid by the tenants is a convenient and reasonable usage, and in the absence of any express stipulation upon the subject, the parties must be deemed to have contracted in reference to it." In reply to the argument that separate assessments should be made, the same court said in another case: "The precise sum could not be fixed in the lease, because it would necessarily be

[775] Mayor &c. v. Cashman, 10 Johns. (N. Y.) 96; Davenant v. Bishop of Sarum, 2 Lev. 68, 1 Vent. 223; Brewster v. Kitchin, 1 Ld. Raym. 317, 1 Salk. 198.

[776] Walker v. Whittemore, 112 Mass. 187.

[777] Ten Eyck v. Rector &c., 20 N. Y. S. 157, 65 Hun 194.

[778] Jersey City &c. Co. v. United Gas. Imp. Co., 46 Fed. 264.

[779] Amory v. Melvin, 112 Mass. 83; Codman v. Hall, 9 Allen (Mass.) 335.

uncertain and might vary from year to year. Nor could the mode of apportionment be well made to depend on the act of the assessors of the city. They were not obliged to regard the special agreements of individuals as to the mode of assessing or apportioning taxes on their property. The plaintiffs had no power to compel a separate assessment of different parts of the same estate belonging to them."[780]

However there is an Illinois case holding that in the absence of such usage a clause in a lease that the tenant shall pay all water rents taxed, levied or charged on the demised premises during the term does not apply to one of several tenants of a building or block where the water tax assessment is in bulk against the entire block.[781]

§ 417. Levy distinguished from assessment.—The word "levy" is synonymous with "collect" or "raise by collection" and is entirely distinct from "assess." "Levy" and "assess" are not convertible terms as applied to taxation; to assess a tax is to declare it payable; to levy it is to collect it.[782] So the words of the covenant are to be looked to in determining whether a lessee is bound for taxes assessed during the term or only for those actually levied during that time. A general covenant on the part of a lessee to pay taxes during his lease binds him to pay those which were assessed during the term but which did not become payable till after it terminated.[783] The promise contained in such a covenant is not to pay the taxes and assessments which shall or may be payable during the term, but those which may be payable for or in respect of the premises during the term, at whatever period of time they shall become or be payable. It is plain that the parties did not contemplate or intend the assumption, on the part of the lessee, of any liability to pay those taxes which had been assessed and made chargeable upon the estate anterior to the commencement of the

[780] Wall v. Hinds, 4 Gray (Mass.) 256, 267, per Bigelow, J.

[781] Kingsbury v. Powers, 131 Ill. 182, 22 N. E. 479.

[782] Valle v. Fargo, 1 Mo. App. 344. In Elliot v. Gantt, 64 Mo. App. 248, Biggs, J., says: "The word levy as used in the revenue law has been construed by this court to be synonymous with the word collect, and it has been held that a tax can not be said to be levied until the books are placed in the hands of the collector. Valle v. Fargo, 1 Mo. App. 344." The principal case also defines the word "laid" when used in regard to the imposing of a tax, and holds that it is equivalent to assess.

[783] Blythe v. Gately, 51 Cal. 236; Salisbury v. Shirley, 53 Cal. 461; Henry v. Chrisinger, 76 Iowa 126, 40 N. W. 121; Wilkinson v. Libbey, 1 Allen (Mass.) 375; Craig v. Summers, 47 Minn. 189, 49 N. W. 742; Elliot v. Gantt, 64 Mo. App. 248.

term, and which should become and be due and payable during its continuance.[784] A general covenant by a tenant to pay all taxes levied on the premises during the term does not extend to general taxes which are payable during the term, but were assessed before the term began and were therefore a lien on the property when the term began, and were levied for a period wholly anterior to it.[785] However, in a case where the certificate issued and the amount of the tax was inserted in the assessment roll during the term, a lessee was held on his covenant to pay taxes, even though the tax was to raise money for paving done before the term began. The lien accrued and the assessment was made during the term; and the language of the covenant was that the defendants were "to pay all taxes and assessments levied or assessed thereon during said term."[786]

A covenant to pay all taxes assessed during a term renders the lessee under obligation to pay taxes assessed at the beginning of a fiscal year, although the lease terminates in the middle of the year. A clause in the lease at the end of the covenant "including the taxes for the previous fiscal year," does not limit the covenant.[787] On the same principle where a lease for ten years and six months contained a covenant to pay taxes, it was held that the lessee must pay the taxes which were assessed during the last six months for an entire year.[788] An agreement in a lease to pay all taxes "that may be assessed, levied upon or charged against" the leased property during a certain period binds the lessee to pay taxes which were assessed prior to the termination of the lease, though not levied until afterwards.[789]

In law taxes are regarded as assessed on the regular date for assessment whether the assessment is actually made or not. If it be contended for a lessee that his lease expired before the board of assessors fixed the rate of taxation and assessed the tax, the answer is that it is immaterial when the valuation of estates is completed or when the tax is payable. The assessment, when completed, relates back to the first of May, and the tax is in law regarded as assessed on that day.[790]

The term taxable year in a certain calendar year was held to mean the fiscal year beginning on the previous calendar year.[791]

[784] Wilkinson v. Libbey, 1 Allen (Mass.) 375; Craig v. Summers, 47 Minn. 189, 49 N. W. 742.

[785] McManus v. Fair Shoe &c. Co., 60 Mo. App. 216.

[786] Shepardson v. Elmore, 19 Wis. 424.

[787] Blythe v. Gately, 51 Cal. 236.

[788] Salisbury v. Shirley, 53 Cal. 461.

[789] Waterman v. Harkness, 2 Mo. App. 494.

[790] Amory v. Melvin, 112 Mass. 83; Elliot v. Gantt, 64 Mo. App. 248.

[791] De Giverville v. Legg, 48 Mo. App. 573. A lease under which tenant covenanted to pay all taxes and

§ 418. Invalid taxes.—Where lessee of premises agrees to pay all assessments that may be levied thereon, he in fact agrees to pay such assessments only as are valid or such as can be legally enforced against the lessor or against the property.[792] A claim that a lessee, having stipulated in a lease to pay the taxes on the property, is thereby estopped from urging their invalidity is fallacious. The lessee, by the provision in the lease, did not preclude himself from urging the invalidity of any taxes that should be assessed against the property. His obligation was to pay the legal taxes such as a special assessment that might be levied by the city in this case.[793] No estoppel can be raised against a lessee to assert the invalidity of a tax, as long as he has no special knowledge of the validity or invalidity and has done nothing to mislead or influence the lessor. It is only necessary to protect the lessee that he did not know or pretend to know anything concerning the validity of the tax.[794]

§ 419. The destruction of the leased premises does not, as a general rule release the tenant from his covenant to pay taxes.[795] This is true, although the building is destroyed soon after the tax is assessed and the lease comes to an end by force of one of its own provisions. A further agreement by a grantee from the lessor to pay one-half the tax would not relieve the lessee. The payment of half the tax was merely a part of the price of the estate. Whatever price was obtained or however it was computed, it could have no effect upon the covenant of the lessee to pay the tax.[796] Under a lease in which lessee covenants to pay all taxes assessed during the term upon a portion of the premises, the lessee is not entitled to a proportionate return of the sums paid by him when the building is destroyed by fire and the lease is terminated.[797] An agreement to apportion taxes between lessor and lessee under certain circumstances is valid and enforceable but is limited in its operation to its express language. Thus a special provision for the apportionment of taxes in the first and last years of

assessments was surrendered on October 1, after taxes had been assessed, which would not become due till January. Held, a release in general terms relieved tenant from all obligation to pay these taxes. Henry v. Chrisinger, 76 Iowa 126, 40 N. W. 121.

[792] Clark v. Coolidge, 8 Kan. 189; Scott v. Society &c., 59 Neb. 571, 81 N. W. 624.

[793] Scott v. Society &c., 59 Neb. 571, 81 N. W. 624.

[794] Clark v. Coolidge, 8 Kan. 189.

[795] Paul v. Chickering, 117 Mass. 265; Sargent v. Pray, 117 Mass. 267; Carnes v. Hersey, 117 Mass. 269.

[796] Paul v. Chickering, 117 Mass. 265.

[797] Wood v. Bogle, 115 Mass. 30.

the lease leave the general covenant, to pay all taxes payable for or in respect of the premises during the term, unqualified during the intermediate time. It strengthens the inference that there was no intention to apportion taxes in case of a destruction of the premises.[798]

§ 420. What constitutes a breach.—In the absence of specific language in a covenant to pay taxes it is difficult to determine the exact time when the obligation of the lessee to pay accrues. In one case it was assumed that the tenant was entitled to delay the payment thereof until they became "delinquent" under the statute. However this was no reason why the lessor should not pay them sooner and recover them back from the lessee in case of his ultimate default. Still there could be no breach of the covenant to pay till the lessee's obligation to pay accrued.[799] An obligation in a lease requiring lessee to pay taxes or forfeit his right to remove improvements simply requires him to pay them in the ordinary course of collection, and not necessarily before the termination of the lease.[800] Actual payment of the delinquent taxes by the lessor is not essential to his right to maintain an action to recover the amount of them. On lessee's failure to pay assessments, the lessor may bring suit and recover the full amount of the assessments, though he has not paid any part of them. The covenant in such a case, it was held, was not one simply of indemnity, but a positive agreement to pay the assessments and was broken when the lessee neglected to pay. Upon the lessee's neglect to pay, a cause of action at once accrues to the lessor, and he may either pay the tax and sue the lessee for the amount or may sue without first so paying it himself. It may be stated as the general rule that, when the defendant contracts to pay a debt and fails to do so, the measure of damage is the amount of the debt; but when the contract is one of indemnity only, damages must be sustained before a recovery can be had.[801] However, there is a case holding that the lessor's right of action does not accrue till he has paid the overdue taxes himself.[802]

[798] Carnes v. Hersey, 117 Mass. 269.

[799] Wills v. Summers, 45 Minn. 90, 47 N. W. 463.

[800] Allen v. Dent, 4 Lea (Tenn.) 676.

[801] Rector &c. v. Higgins, 48 N. Y. 532; Fontaine v. Schulenburg &c. Co., 109 Mo. 55, 18 S. W. 1147; Ham v. Hill, 29 Mo. 275; Rowsey v. Lynch, 61 Mo. 560.

[802] Board &c. v. Streeter, 2 Kan. App. 498. The court say: "Suppose these taxes had never been paid; what cause of action would Mrs. S. have against the county? The law creates an implied contract that the county will reimburse her, not, however, upon the written contract, but upon the fact of payment, and this implied contract creates the cause of action, and it accrues as soon as the payments are made. It is the

In an action for a breach of covenant to pay taxes, a general allegation in the complaint, showing that the premises were assessed for state and county purposes, and the amount of the taxes due thereon, is sufficient. Such a complaint will stand the test of a general demurrer.[803] Where the due payment of taxes is one of the covenants of a lease and the taxes are allowed to become delinquent by the lessee or his assigns, no demand for their payment by lessor is necessary before declaring a forfeiture.[804] It would be impossible for the landlord to tell when, where, and what to demand.[805] A covenant in a lease for the payment of taxes does not require demand for such payment before a forfeiture may be had, since such taxes are not rent to require demand but are wholly matters between the tenant and the proper officer.[806] But where the landlord is given his option to pay assessments and collect them as part of the rent, the tenant could not be expected to know when the assessments were due and could not be put in default till he was notified of the levy or be held for a breach of covenant.[807] A statutory provision by which a landowner is given an option to extend a time for payment of assessments by waiving all claims of their illegality cannot be exercised by a tenant who is bound by a covenant in his lease to pay taxes and assessments.[808]

Actual payment of the taxes out of property or money of the lessee is all that the lessor can insist upon, and it seems that the leasehold estate is property belonging to the lessee which may be applied to this purpose. So in a case where a tenant neglected to pay taxes and his leasehold estate was sold to pay them, this was held not to cause a forfeiture. Since only the lessee's title had been taken, it was just

wrongs done (the delicts) that create the cause of action, and these are not complete until the other party has suffered damage, and this could not occur in this case till she paid. When did the delicts occur? Take the earliest possible moment of time when the county could be said to be in default, or have committed a wrong. Certainly not until the taxes became due. But can she complain at this time? We think not, for she has not been harmed. But when she has made the payment she is damaged to the amount paid. * *"

[803] Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3.

[804] Byrane v. Rogers, 8 Minn. 281; Bacon v. Park, 19 Utah 246, 57 Pac. 28; Davis v. Burrell, 10 C. B. 821, 70 E. C. L. 821; Garner v. Hannah, 6 Duer (N. Y.) 262, overruling Jackson v. Harrison, 17 Johns. (N. Y.) 66. *Contra*, Meni v. Rathbone, 21 Ind. 454.

[805] Byrane v. Rogers, 8 Minn. 281.

[806] Metropolitan Land Co. v. Manning, 98 Mo. App. 248, 71 S. W. 696; Davis v. Burrell, 10 C. B. 821, 70 E. C. L. 821.

[807] Dockrill v. Schenk, 37 Ill. App. 44.

[808] Vorse v. Des Moines Marble &c. Co., 104 Iowa 541, 73 N. W. 1064.

the same as if the tenant had taken money from his own pocket and paid the taxes.[809]

The amount of damages which a lessor can recover from his lessee for breach of a covenant to pay taxes is the amount paid by the lessor as taxes, with interest from the date of the payment, not including costs. The costs incurred by reason of any delay in the payment to the city must be considered as the result of the lessor's own fault or negligence and are not to be included in the amount he may recover.[810]

[809] Goode v. Ruehle, 23 Mich. 30. [810] Sargent v. Pray, 117 Mass. 267.

CHAPTER VI.

ASSIGNMENT OF LEASES.

1. By Lessor, §§ 421–430.
2. By Lessee, §§ 431–446.
3. Rights and Liabilities of Parties, §§ 447–463.
4. Conditions against Assignment and Subletting, §§ 464–473.

I. *By Lessor.*

§ 421. According to the modern rule the power of a lessor is ample to transfer either the entire reversion or his interest under the lease, and such transfer is effective to vest in the transferee the right to all rent reserved in the lease, without any further action on the part of the tenant. "At common law, reversions and remainders, lying in grant and not being capable of being perfected by livery, as in the case of the grant of the freehold, or by entry, in case of the grant of a leasehold interest, required for many purposes an attornment of the tenant of the particular preceding estate; but where such attornment was obtained, the reversion or remainder, or the estate carved out of it, vested so as to give the grantee the right to the rents and services attached to the reversion, and, since statute 32 Hen. VIII, chap. 34, to sue on any covenant running with the reversion. The statute of 4 Anne, chap. 16, § 9, now makes all grants of manors or rents, or of the reversion or remainder of any messuages or lands, effectual to all intents and purposes, without any attornment of the tenants of the manors, or of the lands out of which the rent shall be issuing, or of the particular tenants upon whose estates any such reversions or remainders shall and may be expected or depending, as if their attornment had been had and made."[1]

The rule introduced into the English law by the statutes of 32 Hen. VIII, chap. 34, and of 4 Anne, chap. 16, § 9, by which grants of reversions are made effectual without attornment, so that an assignee can maintain an action for rent, must be regarded as adopted in many states of this country; it follows that the ancient common law require-

[1] Doe v. Brown, 2 E. & B. 331, 347, 75 E. C. L. 331, per Lord Campbell, C. J.

ment of attornment, being unsuited to our conditions, has never been a part of the law of this country.[2] After a lessor has sold his reversion, the purchaser can recover the rent reserved although the tenant has not attorned. The conclusion in any particular jurisdiction that attornment is not necessary may rest upon one of three grounds. First, that the early English acts dispensing with the necessity may have been expressly reënacted; second, it may be held that those early statutes became a part of the great body of English common law which was adopted in this country upon the settlement of the English colonists; third, it has been held that the common law rule requiring attornment was inapplicable to conditions existing in this country and never became a part of our law. In support of the third view it has been said that the "doctrine of attornment grew out of the peculiar relations existing between the landlord and his tenant under the feudal law. The landlord could not alienate the estate without the consent of his tenant. This consent was called an attornment. It was founded upon a state of society which certainly never had any existence in Michigan. The peculiar reasons and relations out of which the doctrine sprung never having had any existence here, why should the rule itself? Where the reasons from whence a rule arose cease to exist, the rule should cease also. The doctrine of attornment is inconsistent with our laws, customs and institutions."[3]

Where a lease is made at common law, the tenancy is not complete until the lessee has entered upon the land demised. The lease itself is regarded, not as a conveyance, but merely as a contract for the possession of the land, and, therefore, before entry, the lessee has no interest or estate in the land, but only a right to have the

[2] American &c. Co. v. Turner, 95 Ala. 272, 11 So. 211; Otis v. McMillan, 70 Ala. 46, 52; English v. Key, 39 Ala. 113, 116; King v. Housatonic R. Co., 45 Conn. 226; Baldwin v. Walker, 21 Conn. 168; Funk v. Kincaid, 5 Md. 404; Lindley v. Dakin, 13 Ind. 388; Kellum v. Berkshire L. Ins. Co., 101 Ind. 455; McCardell v. Williams, 19 R. I. 701, 36 Atl. 719; Hendrickson v. Beeson, 21 Neb. 61; Jones v. Rigby, 41 Minn. 530, 43 N. W. 390; Tilford v. Fleming, 64 Pa. St. 300; Pelton v. Place, 71 Vt. 430, 46 Atl. 63; Farley v. Thompson, 15 Mass. 18, 26; Burden v. Thayer, 3 Metc. (Mass.) 76; Cavis v. McClary, 5 N. H. 529; Pendergast v. Young, 21 N. H. 234. In the latter case it is said: ". . . the whole doctrine of attornment grew out of the peculiar policy of the feudal law and never could have been consistent in the spirit of our government and political institutions." Per Perley, J., p. 236.

[3] Perrin v. Lepper, 34 Mich. 292, per Marston, J.

land for the term of the lease, called in law an *interesse termini*.[4] It follows that if at the making of the lease the land demised be in the possession of a tenant under a prior letting, so that no entry upon it can lawfully be made by the lessee, the lessee can acquire no estate in the land during the continuance of the prior tenancy, unless he can prevail upon the prior tenant to attorn to him, so that the possession of the prior tenant becomes his also; and, accordingly, the rule in such case is, that without attornment no interest in the reversion passes under the lease, but it is good against the tenant only as a future *interesse termini*, to take effect in possession on the determination of the prior tenancy.[5] So the lessor and not the lessee would be the proper one to give the statutory notice to quit to a tenant in possession.[6]

In Tennessee it seems that attornment is still necessary to entitle an assignee of a reversion to sue for rents in his own name. In the case where this doctrine was laid down, the lessee had knowledge of the sale and had been directed by the lessor to pay rent to the grantee. The court held that the grantee could have maintained an action in the name of the lessor for his own use, but before such an action could be maintained in the grantee's own name on the obligation, the lessee must make an express promise to pay rent to him.[7] Nevertheless, in that state, a lessor may alienate his estate in the land, and his right in reversion to the possession, so that his grantee would have the same right to the possession after the expiration of the term that his grantor had.[8]

§ 422. In regard to the effect of a transfer of the reversion on the rents, it is a well-settled principle of the common law that the grant of the reversion of an estate expectant on the determination of a lease for years, passes to the grantee the rents reserved in the lease as incident to the reversion.[9] No apportionment would be made, but

[4] Miller v. Green, 8 Bing. 92, 104; 1 Instit. 46b; Bacon's Abridg. Tit. Leases and Terms for Years (M.).

[5] Edwards v. Wickwar, L. R., 1 Eq. 403, 404; Doe v. Brown, 2 E. & B. 331, 348, 75 E. C. L. 331; Rawlyns' Case, 4 Coke 52d, 53b; Bacon's Abridg. Tit. Leases and Terms for Years (N.).

[6] Comstock v. Cavanagh, 17 R. I. 233, 21 Atl. 498.

[7] Marney v. Byrd, 11 Humph. (Tenn.) 95.

[8] Marley v. Rodgers, 5 Yerg. (Tenn.) 217.

[9] King v. Housatonic R. Co., 45 Conn. 226; Foote v. Overman, 22 Ill. App. 181; Peck v. Northrop, 17 Conn. 217; Chandler v. Pittsburgh &c. Co., 20 Ind. App. 165; Perrin v. Lepper, 34 Mich. 292; Hansen v. Prince, 45 Mich. 519, 8 N. W. 584; Kornegay

the monthly, quarterly, or annual rent would follow the land and belong to the owner at the time it accrues.[10] And the rule is the same where the assignment of the reversion is by mortgage, instead of being by an absolute conveyance.[11] So the purchaser on a foreclosure sale under a mortgage junior to a lease would prevail over a transferee of the lease from the lessor. As against the rights of the lessor, who is also the mortgagor, the right of the mortgagee is complete at the time of the execution of the mortgage, and such mortgage being executed prior to the assignment of the lease, it is apparent that no subsequent assignment of the lease can take away any rights from the mortgagee.[12]

A transfer of a reversion is entirely unlike an assignment of a chose in action, where to perfect the transfer notice must be given to the debtor. The land is assigned and the rent passes only as an incident; and notice of the transfer of the land is given the lessees and everybody else by recording the deed. Moreover, no one but the lessees can complain of the want of notice, though the lessees right to notice is universally recognized. If the deed is not recorded at the time of its delivery, and the lessees afterwards pay the rent to the lessor, without notice of the assignment, they may well complain, if sued for it by the assignee.[13] If the assignee lies by and permits the tenant to pay rent to the lessor as it falls due, he cannot force the lessee to pay it a second time. Such was the rule under the old common law where an attornment was necessary.[14] The equities between the parties are adjusted, however, by holding that the grantor

v. Collier, 65 N. Car. 69; Bullard v. Johnson, 65 N. Car. 436; Holly v. Holly, 94 N. Car. 670; Hecht v. Dettman, 56 Iowa 679, 7 N. W. 495, 10 N. W. 241; Abrams v. Sheehan, 40 Md. 446; Keay v. Goodwin, 16 Mass. 1; Beal v. Boston &c. Co., 125 Mass. 157, 28 Am. R. 216; Burden v. Thayer, 3 Metc. (Mass.) 76; Culverhouse v. Worts, 32 Mo. App. 419; Vaughn v. Locke, 27 Mo. 290; Kimball v. Pike, 18 N. H. 419; York v. Jones, 2 N. H. 454; Johnston v. Smith, 3 Pen. & W. (Pa.) 496; Scott v. Lunt, 7 Peb. (U. S.) 596; Co. Litt. 151, 152; 2 Bl. Comm. 176; 4 Kent 354, § 667.

[10] Vaughn v. Locke, 27 Mo. 290; Page v. Culver, 55 Mo. App. 606, § 667.

[11] Kimball v. Pike, 18 N. H. 419; Fitchburg &c. Corp. v. Melven, 15 Mass. 268; Burden v. Thayer, 3 Metc. (Mass.) 76; Babcock v. Kennedy, 1 Vt. 457; Moss v. Gallimore, 1 Doug. 279; Birch v. Wright, 1 Term R. 378, 383; King v. Housatonic R. Co., 45 Conn. 226; American &c. Co. v. Turner, 95 Ala. 272, 11 So. 211; Clarke v. Cobb, 121 Cal. 595, 54 Pac. 74; Scheidt v. Belz, 4 Ill. App. 431.

[12] Kimball v. Pike, 18 N. H. 419.

[13] Peck v. Northrop, 17 Conn. 217; Kornegay v. Collier, 65 N. Car. 69.

[14] Pelton v. Place, 71 Vt. 430, 46 Atl. 63.

is liable to the grantee for rents received by him becoming due after the conveyance.[15]

It follows from the doctrine that rent is incident to the reversion, that after a grant of the reversion, the rent cannot be reached by creditors of the lessor to be applied upon his debts.[16] Furthermore, an agreement that an assignor shall receive a certain proportion of a subsequently accruing rent payment gives him no title to enforce such payment by any action founded on the lease itself; and therefore the lessee could not be garnisheed by a creditor of the lessor.[17] After a lessor conveys without reservation of rent, he cannot recover rent subsequently accruing, unless it has been assigned to him by the grantee.[18]

The general rule that rent follows the reversion is applicable where a person grants a lease of lands and on his death conveys the land by will. In such case it is settled that rents coming due after the death of the testator, follow the reversion to the devisee.[19] A sale of a reversionary interest in land under execution carries with it all the rent falling due after the transfer.[20] For, in this respect, such a forced sale has the same effect in transferring the reversionary interest that a voluntary deed of the premises by the lessor would have.[21] Rent follows the reversion after a sale by an administrator authorized by statute after the death of the lessor,[22] as it has been ruled that a sale by an administrator under a statute is equivalent to a sale by the heir, the administrator being made by statute, in substance, the attorney in fact of the heir to make such sale.[23] But this rule has its limitations, and the tenant of an heir is not tenant to the purchaser of the property at a sale ordered by the surrogate for the purpose of realizing assets to pay off the ancestor's debts;[24] and for heirs to assent to the collection of rent by the administrator of the former lessor does not make the administrator landlord to the tenant in possession.[25] Where an owner of gas land executes a gas

[15] Van Wagner v. Van Nostrand, 19 Iowa 422.

[16] Kornegay v. Collier, 65 N. Car. 69.

[17] Hansen v. Prince, 45 Mich. 519, 8 N. W. 584.

[18] West Shore Mills Co. v. Edwards, 24 Ore. 475, 33 Pac. 987.

[19] Rogers v. McKenzie, 65 N. Car. 218; Mixon v. Coffield, 2 Ired. (N. Car.) 301; Holly v. Holly, 94 N. Car. 670.

[20] Johnson v. Doss, 1 Tex. App. Civ. Cas., § 1076.

[21] Lancashire v. Mason, 75 N. Car. 455.

[22] Page v. Culver, 55 Mo. App. 606.

[23] Selb v. Montague, 102 Ill. 446; Foote v. Overman, 22 Ill. App. 181.

[24] Jackson v. Robinson, 4 Wend. (N. Y.) 436.

[25] Stewart v. Smiley, 46 Ark. 373.

lease and afterwards conveys the land, the grantees are entitled to rents maturing after the transfer, a gas lease being more like a lease for tillage than like a mining lease.[26]

§ 423. **In Illinois the statute of Anne dispensing with attornment was not regarded as in force in 1871,** and hence, it was decided in that year that an attornment by a tenant was necessary to entitle an assignee of rent to sue in his own name.[27] But the rule of this case has since been abrogated by statute, which dispensed with the necessity for attornment.[28] However, in a case where the Court of Appeals held that an assignment of rent would prevail over a garnishment of the lessee by a creditor of the lessor, the court said that the right of the assignee was merely an equitable right.[29] And this has been subsequently cited as an authority for the proposition that an assignee of all the lessor's right, title, and interest in a lease gives the assignee no right of action at law.[30] The correct rule was declared in a later case, decided by the same court, that an assignment by a lessor of all his title and interest in a lease, with directions that all rents thereunder be paid to the assignee, authorizes the assignee to sue for the rents to accrue and no attornment by the tenant is necessary.[31]

§ 424. **A reversion, not being an estate in possession, would lie in grant and the ordinary mode of transfer would be by deed, signed, sealed and delivered.** Where the lessor's interest was evidenced by a bond for title which was delivered with the indorsement "For value received, I hereby assign . . . all my right, title, and interest to the real estate described in the within bond, and held by me by virtue of said bond," an accompanying delivery of the lease was held to constitute a valid transfer and to invest the transferee with the right to recover rent. Such assignment was more than a mere transfer of the writing or bond. It invested the transferree with all the right

[26] Chandler v. Pittsburgh Glass Co., 20 Ind. App. 165, 50 N. E. 400.

[27] Fisher v. Deering, 60 Ill. 114.

[28] Howland v. White, 48 Ill. App. 236; R. S., ch. 80, § 14.

[29] Buxbaum v. Dunham, 51 Ill. App. 240. Even under the early doctrine in this state, where the tenant attorned to an assignee of the reversion by paying rent to him, the assignee could sue at law to recover subsequently accruing rent. Fisher v. Deering, 60 Ill. 114, overruling Chapman v. McGrew, 20 Ill. 101, on this point.

[30] Hefling v. Van Zandt, 60 Ill. App. 662.

[31] Barnes v. Northern Trust Co., 66 Ill. App. 282.

or interest of the obligee by virtue of such bond.[32] A lease for a year in writing, the rent under which was secured by rent notes, was delivered by the lessor to another and the rent notes were assigned to him, with the intention of assigning the lease, but no written assignment was executed. The absence of a written assignment was not fatal, for it was held to be well settled that such a lease could be assigned by parol. The intention of the parties to assign was clear, so there was not simply an assignment of the rent but an assignment of the lease as well.[33] Where an assignment is only of the term, the rights of the assignee of the lessor do not extend beyond the term and, if the reversion is not assigned, the assignee of the lessor has no right to a return of the premises. The right of action for breach of the covenant to return in good condition would in that case remain in the lessor, the owner of the reversion.[34] A covenant to surrender up premises in good repair is not broken until the term ends, and therefore no one but the owner of the reversion can prosecute for a breach of that covenant.[35] Where a building, two rooms of which were leased for a long term, was leased entire to another for a short term, this did not take effect as an assignment of the existing lease but was merely a transfer of the right to collect rents. An assignment of rents is neither, in law or equity, an assignment of the lease which secures the rents.[36] So the second lessee could not bring an action for breach of a covenant of restrictive use contained in the first lease. Nothing is more clear than that one man cannot complain of an injury affecting the property of another person.[37]

The interest of the landlord may also pass by descent; if the landlord die before the expiration of the term for which the land is leased, the tenant thereupon becomes the tenant of the heir to whom the land descends; and the relation between the tenant and the heir, in such case, will be in all respects the same as previously existed between the tenant and the ancestor. The contract of lease will be no less obligatory, as between the tenant and the heir, than between the original parties; and the tenant can no more controvert the title of the heir than he could that of the ancestor.[38]

[32] Van Driel v. Rosierz, 26 Iowa 575.

[33] Oswald v. Mollet, 29 Ill. App. 449.

[34] Bordereaux v. Walker, 85 Ill. App. 86.

[35] Demarest v. Willard, 8 Cow. (N. Y.) 206.

[36] White v. Kane, 53 Mo. App. 300.

[37] Allen v. Wooley, 1 Blackf. (Ind.) 148; Attorney-General v. United Kingdom &c., 30 Beav. 287.

[38] Blantre v. Whitaker, 11 Humph. (Tenn.) 313.

A lease for a term of years, conditioned on the payment of an annual rent, with a perpetual right of renewal, does not divest the lessor of his fee in the premises, so that a conveyance of the leased premises by the lessor makes the grantee the landlord of the lessee, with the right of possession upon a forfeiture for breach of the condition of the lease.[39]

Where a lease has been accepted from two owners as joint owners, one of them cannot assign the entire lease, even though they be husband and wife, for the tenant could not inquire into their individual interests.[40]

§ 425. Rent may be excepted in a grant of a reversion by a lessor, for rent is not necessarily an incident of the reversion so that it cannot by the acts or agreements of the parties be separated from it. It is true that in a general grant of a reversion, the rent will pass as incident to it. But the reversion may be granted and the rent reserved, or the rent may be assigned, reserving the reversion, if such is the intention of the parties as expressed by the words they use. Lord Coke says that fealty is an incident inseparably annexed to the reversion, and the donor or lessor cannot grant the reversion and save to himself the fealty; but the rent he may except, because the rent, though it be an incident, yet is not inseparably incident.[41] Thus a lessor could grant his reversion, or surrender it to the lessee, and reserve the rent accruing on under-leases, which had in turn been assigned to him. In such a case the lessor's relations to the sub-lessees is not changed by the grant or surrender of the reversion, and he can recover rent of them on the covenants of their leases. If it be expressly agreed that the surrender shall not invalidate the assignment of the sub-leases, the two transactions might be made simultaneously.[42]

§ 426. Attornment has been defined to be the acknowledgment by a tenant of a new landlord on the alienation of land, and an agreement to become tenant to the purchaser.[43] One of the commonest ways in which an attornment is effected is by the payment of rent to the grantee of the reversion. Thus, where the tenant of a de-

[39] Page v. Esty, 54 Me. 319.

[40] Hecht v. Ferris, 45 Mich. 376, 8 N. W. 82.

[41] Co. Lit. 143a, 151b; 3 Cruise Dig. 337; Demarest v. Willard, 8 Cow. (N. Y.) 206.

[42] Beal v. Boston &c. Co., 125 Mass. 157, 28 Am. R. 216.

[43] Whart. Law Dic. 66; 1 Bouv. Law Dic. 151; Lindley v. Dakin, 13 Ind. 388.

ceased lessor paid the *pro rata* share of rent to one of his heirs, the relation of landlord and tenant was established between the parties.[44] A payment of rent made on a threat of suit by an assignee of the reversion must be regarded as an attornment to him, though the payment was expressed to be merely for the use and occupation of the premises, and was accompanied by a protest, and denial of the assignee's right to receive the money, and also a declaration that the tenant did not recognize the relation of landlord and tenant as existing between him and the assignee. In spite of all objections the payment of rent was held to effect an attornment, according to the general rule in such cases.[45] Paying rent to the grantor as agent for the grantee, after notice of the transfer and the capacity in which the grantor acts, has also been held to constitute an attornment to the grantee, although he was not dealt with in person. The ordinary rules of principal and agent would apply.[46]

The endeavor of a lessee to persuade an assignee of the lease to accept a grain rent, coupled with the remark that they were all right, amounts to an attornment, as any act by which a party recognizes a change in the person to whom rent is due is an attornment.[47] Attornment is not the creation or initiation of a new lease, commencing on the day of attornment, but is merely the assent of the tenant to his landlord's alienation and the acceptance of the alienee as the new landlord.[48]

§ 427. Covenants in assignment to deliver possession.—Occupancy by a tenant of property sold, where that fact and the title of the tenant are known at the time to a purchaser, is not a breach of the covenant of right of possession; and if no special contract is made, the occupant becomes tenant to the purchaser. The possession of the tenant is the possession of the landlord.[49] At the common law, after attornment, the occupancy of a tenant could not be deemed a breach of any covenant in the deed. The reason is obvious. The tenant was thereafter the tenant of the purchaser. In contemplation of law the tenant received his possession from such purchaser and at the expiration of his term was bound to surrender it to him. The statute doing away with attornment now accomplishes the same

[44] Leitch v. Boyington, 84 Ill. 179.

[45] McCardell v. Williams, 19 R. I. 701.

[46] Knorr v. Raymond, 73 Ga. 749.

[47] Oswald v. Mollet, 29 Ill. App. 449; Hayes v. Lawver, 83 Ill. 182.

[48] Tilford v. Fleming, 64 Pa. St. 300.

[49] Kellum v. Berkshire L. Ins. Co., 101 Ind. 455; Lindley v. Dakin, 13 Ind. 388; Page v. Lashley, 15 Ind. 152.

purpose; it transfers the possession. It enables the purchaser to collect the rent, to enforce all other obligations of the tenant and compels him, at the expiration of the term, to yield the possession to the purchaser. It establishes the relation of landlord and tenant between the parties and entitles the purchaser to all the remedies applicable to such relation. This being so, it must follow that the mere occupancy of the vendor's tenants cannot operate as a breach of the covenants in the deed.[50]

Where a reversionary interest is assigned, it is not necessary that possession by symbol, as by delivery of keys, or possession by actual occupancy should exist in all cases. Where vendee is entitled to possession and is accepted as landlord by the tenant of a vendor, and the vendor assents, that is sufficient to constitute a transfer of possession to the grantee.[51] "A sale by a lessor of real estate, during an unexpired leasehold term, under which a tenant is holding, does not of itself abrogate the lease, determine the leasehold estate, or authorize the landlord or tenant to treat the lease as at an end. Its only effect is to substitute the vendee of the reversion to all the rights of the original lessor. . . . The vendee then becomes the landlord by operation of law; . . . and the tenant becomes the tenant of the vendee of the reversion."[52] Ordinarily a grantee accepts a tenant in possession as his own, and is in possession through such tenant, but this is not so where the grantor agrees to give the grantee immediate possession by means of an agreement with the tenant.[53] A tenant cannot attorn to a person other than his landlord. This doctrine is unquestionably applicable where the rights of the landlord would be injuriously affected; but when he contracts to sell rented premises to another and by express agreement between himself and his vendee, which is assented to by the tenant, the vendee is to have immediate possession of the premises and the tenant is thereafter to hold under him as landlord, there is an end to the contract of rental between the vendor and his tenant, and it certainly would not do to hold that these three persons were not all bound by the express terms of their agreement, or that their privies were not concluded thereby.[54] Even though a lessor's violation of an agreement to give the lessee a preference in case of sale gave the lessee a right to abandon the premises, as long as he did continue in the possession

[50] Kellum v. Berkshire L. Ins. Co., 101 Ind. 455.

[51] McLean v. Spratt, 19 Fla. 97.

[52] Otis v. McMillan, 70 Ala. 46, 53, per Stone, J.

[53] Williams v. Frybarger, 9 Ind. App. 558, 37 N. E. 302.

[54] Collins v. Moore, 115 Ga. 327, 41 S. E. 609.

of the land, he continued as the tenant to the grantees.[55] However, the sale of leased lands passes only the right to the land subject to the lease, if the grantee has notice of it,[56] and actual possession by the tenant at the time of the sale charges the purchaser with notice of his rights.[57]

§ 428. A conveyance of the reversion in fee to a lessee or his assignee holding an outstanding lease causes the lease to merge in the freehold estate.[58] A right of redemption in the lessor, as where the reversion passes to the lessee as purchaser under a power of sale in a mortgage junior to the lease, would not preclude the operation of this rule; but the lease would be merged in the larger estate, and in case the mortgagor exercised his right to redeem, he would obtain an immediate right to possession.[59] In case the lessor mortgages the demised estate to his lessee, the mortgage will be supposed to have been first executed, and will be no bar to the recovery of rent under the lease. But after the parties fail to demand or pay rent, or interest, and the lessee is suffered to enter for the purpose of foreclosing his mortgage, there is sufficient evidence of the lessee's election to hold under the mortgage and of the lessor's assent that he should so hold. During the suspension of the lease, the lessee will be accountable for the profits as mortgagee.[60] Nevertheless, a lessee taking a mortgage of the same lands from his lessor will, in the first instance, be considered as holding under the lease, until he has made

[55] Davidson v. Wallingford, 88 Tex. 619, 32 S. W. 1030; Heflin v. Burns, 70 Tex. 347, 8 S. W. 48; Hearne v. Lewis, 78 Tex. 276, 14 S. W. 572; Breeding v. Taylor, 13 B. Mon. (Ky.) 477.

[56] O'Neil v. Davis, 1 Tex. App. Civ. Cas., § 416.

[57] Friedlander v. Ryder, 30 Neb. 783, 74 N. W. 83; O'Neil v. Davis, 1 Tex. App. Civ. Cas., § 416.

[58] Liebeschutz v. Moore, 70 Ind. 142, 36 Am. R. 182; McMahan v. Jacoway, 105 Ala. 585, 18 So. 48; Otis v. McMillan, 70 Ala. 46; Carroll v. Ballance, 26 Ill. 9, 19; Wahl v. Barroll, 8 Gill (Md.) 288; Gunn v. Sinclair, 52 Mo. 327; Zeysing v. Welbourn, 42 Mo. App. 352; Beckwith v. Howard, 6 R. I. 1; Webb v. Russell, 3 Term R. 393; Hughes v. Robotham, 1 Cro. Eliz. 302; 1 Cruise Dig. 239, 3 Prest. Conv. 201. "Where a term for years and the immediate reversion meet in one and the same person, in his own right, either by his own act or by act of the law, so that he has full power of alienation of both estates, they will merge." Wash. Real Prop. (6th ed.), § 740, citing Burton Real Prop., §§ 897, 899; 1 Cruise Dig. 239; 3 Prest. Conv. 201.

[59] Otis v. McMillan, 70 Ala. 46.

[60] Newall v. Wright, 3 Mass. 138, 3 Am. Dec. 98.

his election to hold under his subsequent mortgage, or done some act equivalent and given notice of such election to the lessor.[61]

In order for a merger to take place, however, legal title, as distinguished from a mere equitable interest, must be conveyed to the tenant. A bond given by a lessor, in which he engaged to give a deed of the premises to the lessee, and "stop charging him rent," does not change the nature or incidents of the previous tenancy under an oral demise.[62]

If the deed to the lessee is expressly made subject to the lease, the lessee must hold under the lease and pay rent as long as it continues, and he cannot take under the deed till the end of the term. Such a deed, by its terms, postpones the rights thereunder to the lease already taken. The right under the deed is subject to the lease, and if the lease is to continue in force for three years the grantee can get nothing by the deed until then. He can take under a deed, only in accordance with its terms.[63] If a tenant purchases from his landlord, or at a sheriff's sale, the tenancy is thereby extinguished.[64] Such a sale entitles the purchaser to the rent accruing from the day of the sale to the expiration of the tenancy.[65] But it is competent to have an understanding or agreement that rent for the current year shall be paid to the representatives of the lessor, and it would be binding and enforceable when bids at the execution sale were guided by this understanding.[66]

It has been held that for a lessee or his assignee to become the owner in fee of an undivided half of the estate of which the leased premises constituted a part does not extinguish the lease. There is no union of the greater and the less estate, in the same person, and in the same right, which is necessary to create a merger.[67] The case relied upon as authority for this decision was one where there was a joint lease to two for their joint lives and to the survivor for his life and the entire reversion was conveyed to one of the life tenants. There was no merger because of the intervening estate in sur-

[61] Newall v. Wright, 3 Mass. 138, 3 Am. Dec. 98; Wood v. Felton, 9 Pick. (Mass.) 171.

[62] Rooney v. Gillespie, 6 Allen (Mass.) 74; Benedict v. Morse, 10 Metc. (Mass.) 223; Howard v. Merriam, 5 Cush. (Mass.) 563; Furlong v. Leary, 8 Cush. (Mass.) 409.

[63] Wilbur v. Nichols, 61 Vt. 432, 18 Atl. 154.

[64] Higgins v. Turner, 61 Mo. 249; Gunn v. Sinclair, 52 Mo. 327.

[65] Stevenson v. Hancock, 72 Mo. 612; Winfrey v. Work, 75 Mo. 55.

[66] Aull Sav. Bank v. Aull, 80 Mo. 199; Zeysing v. Welbourn, 42 Mo. App. 352.

[67] Martin v. Tobin, 123 Mass. 85, citing Johnson v. Johnson, 7 Allen (Mass.) 196.

vivorship in the other tenant.[68] This is essentially different from a case where a single lessee receives a conveyance of an undivided interest in the reversion, and on the latter state of facts there would be a merger, *pro tanto,* of the term, and the covenants to pay rent, taxes, and assessments are thereby extinguished as to the part purchased by the lessee.[69] In case of a sale on partition, the purchaser would have the same right to occupy and enjoy the premises, in proportion to his interest in the present estate, as the lessee himself. If partition is awarded and the premises are to be sold, of course they must be sold as an entirety subject to the lease. If after the sale the lessee assumed the exclusive possession, he would be bound to account to the purchaser for the value of the portion of the premises not covered by the lease.[70]

A covenant to convey to a lessee, though contained in the instrument of demise, does not depend for its validity on the continued existence of an outstanding term. The conveyance may be demanded at any time and the existence or non-existence of the lease at the time when the demand is made is immaterial to the right of the parties.[71] Where a lease contained a clause authorizing the lessor to terminate the lease by a sale of the premises, and providing for payment of a bonus to the lessee in that event, a sale to the lessee himself would not entitle him to recover the bonus, as that was not within the fair intent of the parties.[72]

§ 429. **Effect of sub-tenancy on merger.**—A sub-tenant who accepts an assignment of the original lease becomes the owner of the reversionary title to the sub-leased premises and therefore by operation of law the sub-lease and all the covenants therein contained are merged and extinguished and the sub-leased lot is held in the same manner and upon the same terms and conditions as if no sub-lease had ever been made.[73] By the sub-tenant's purchase of the entire leasehold interest, the relation of landlord and tenant under a rental contract for one year is merged into that of vendor and vendee. Consequently

[68] Johnson v. Johnson, 7 Allen (Mass.) 196.

[69] Lansing v. Pine, 4 Paige (N. Y.) 639; Hill v. Reno, 112 Ill. 154; Shillito v. Pullan, 2 Disney (Ohio) 588.

[70] Hill v. Reno, 112 Ill. 154.

[71] Prout v. Roby, 15 Wall. (U. S.) 471, 21 L. ed. 58.

[72] Seaman v. Civill, 45 Barb. (N. Y.) 267, 31 How. Pr. 52.

[73] Wahl v. Barroll, 8 Gill (Md.) 288; Webb v. Russell, 3 Term R. 393; Hughes v. Robotham, 1 Cro. Eliz. 302.

a covenant to repair in the rental contract would not be binding on the assignor after the assignment.[74]

A surrender by a lessee to his lessor of the outstanding term will not operate to destroy the interests of undertenants. The interests and terms of the subtenants continue as if no surrender were made. The owners of the fee to whom the surrender has been made become the landlords of the subtenants with only such rights as the surrenderor would have had to the possession of the premises. The original lessee could not sell, give up or surrender anything that did not belong to him; and he could not terminate the leases to the subtenants or destroy their rights.[75]

The merger of the term of the original lessee in the estate of his lessor would not render the latter liable on the covenants of the under lease. There is no privity of estate or contract between an original lessor and a subtenant, and such privity would not be created merely by the surrender of the original tenant—a matter between him and his lessor. A tenant may surrender his estate to his landlord, but if he have, since its commencement, created some minor interest out of it, or have made an underlease, he cannot, by surrendering, destroy the charge or affect the estate of the underlessee. Although the tenant cannot prejudice the interest of the underlessee, yet he will lose the rent he has reserved upon the underlease, for the rent is incident to the reversion; nor can the surrenderee have it, for, although the reversion, to which it was incident has been conveyed to him, yet, as soon as it was so conveyed, it merged in the greater reversion. Hence the consequence is that, neither the surrenderor nor the surrenderee being entitled to the rent, the underlessee holds without the payment of any rent at all, excepting where the contrary has been expressly provided by statute. In England it is now provided by statute[76] that when the reversion expectant on a lease of any tenements or hereditaments is surrendered, or merges, the estate which for the time being confers, as against the tenant under the lease, the next vested right to the premises, is to be deemed the reversion expectant on the lease; to the extent and for the purpose of preserving such incidents to and obligations on the reversion as, but for the surrender and merger, would have existed. However, there will be no

[74] McMahan v. Jacoway, 105 Ala. 585, 18 So. 48.

[75] Krider v. Ramsay, 79 N. Car. 354; Eten v. Luyster, 60 N. Y. 252; Bailey v. Richardson, 66 Cal. 416; Adams v. Goddard, 48 Me. 212; Davenport's Case, 8 Coke 287; Webb v. Russell, 3 Term R. 393; Doe v. Pyke, 5 M. & S. 146; Burton Real Prop., § 898; Crabb Real Prop., § 2447, b.

[76] 8 & 9 Vict., c. 106, § 9.

merger when the person in whom the two reversionary interests vests elects to keep the estate separate, and such an intent may be collected from the acts and conduct of the parties.[77]

§ 430. An assignment of a lessor's interest under a lease without a transfer of any rights in the reversion, is equivalent to an assignment of rent. The validity of this mode of transfer was adjudicated in an early English case upon a devise of rents. The case was this: "Lessee for thirty years of a parcel of land lets it for twenty-eight years, rendering £34 rent per annum; and after deviseth £28 parcel of that rent to his three sons, severally to every of them a third part. One of them brings debt for his part of the rent. . . . Gawdy and Fenner held, that the action well lay; for there is no doubt but that rent may be devised and be divided from the reversion; for it is not merely a thing in action, but *quasi* an inheritance. . . . Popham and Clench *é contra.* For as the lessee by his own act shall not divide the lessor's contract, nor apportion his action; so likewise the law favors the lessee, that the act of the lessor shall not charge him with divers actions, or double distress, but upon his voluntary attornment; and the contract being entire cannot be apportioned. But Popham agreed, that the rent was well devisable, and by that means severable from the reversion."[78] This case left in doubt the question whether a grantee of rents, by a grant *inter vivos,* could maintain an action for them in his own name. It was argued that such an action lay not, for default of privity; for the privity of estate remained with the lessor, and no privity of contract passed to the grantee; and of such opinion were two justices. But the two other justices were of opinion that the attornment of the tenant made a privity, for his attornment is a consent to the grant, and that the grantee shall have the rent.[79] But in a later case it was "adjudged, that where the lessor assigned his rent without the reversion, that the assignee (if the tenant agrees) may maintain an action of debt for the rent, because the privity of contract is transferred."[80] So that whatever doubt may have originally existed upon this point, it is now well settled that the assignee of rent (without the reversion) reserved on a lease for years may have debt for the rent against the lessee.[81] And any other remedy, such as attachment for

[77] Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910.

[78] Ards v. Watkin, 2 Cro. Eliz. 637.

[79] Robins v. Cox, 1 Lev. 22.

[80] Marle v. Flake, 3 Salk. 118. To same effect see Fisher v. Deering, 60 Ill. 114, overruling Chapman v. McGrew, 20 Ill. 101.

[81] Vin. Abr. "Estate" B, b. 18, pl. 10; Bac. Abr. "Rent" M; Gilbert on

rent which is open to the landlord, may be availed of by the assignee to recover the rent.[82]

The English law seems now to be definitely settled that under the statute of 32 Hen. VIII, an assignee of the rent, without the reversion, could recover when there was an attornment, and that such an assignee could, under the statute of 4 Anne, recover without an attornment.[83] To give the assignee of the reversion a more complete remedy 4 and 5 Anne, chapter 16, section 9, was adopted, dispensing with the necessity for an attornment. In many states of the Union, this latter act has been adopted, and the decisions of their courts conform to its provisions. When rent is assigned, without the reversion, the assignee may sue the lessee for rent accruing after the assignment; because the privity of contract is transferred.[84] An assignment of the rent before it is due will enable the assignee to maintain an action in his own name; but if made after the rent is due, it being a mere chose in action, the assignment will not convey any right of action to the assignee, nor divest the lessor of the right to maintain the action.[85]

Rents, 165-6; 4 Cruise Dig., Title 28, ch. 3, §§ 19, 20, 21, 31; Allen v. Bryan, 5 B. & C. 512; Demarest v. Willard, 8 Cow. (N. Y.) 206; Farley v. Craig, 11 N. J. L. 312; Ryerson v. Quackenbush, 26 N. J. L. 236, 251; Willard v. Tillman, 2 Hill (N. Y.) 274; Leonard v. Burgess, 16 Wis. 41; Martin v. Martin, 7 Md. 368; Abrams v. Sheehan, 40 Md. 446; Abercrombie v. Redpath, 1 Iowa 111; Watson v. Hunkins, 13 Iowa 547.

[82] Haywood v. O'Brien, 52 Iowa 537, 3 N. W. 545.

[83] Williams v. Haywood, 1 E. & E. 1040, 102 E. C. L. 1040, 28 L. J. Q. B. 374. The court say: "In our opinion stat. 4 Anne, c. 16, § 19, renders attornment unnecessary in such a case as the present; and, by force of that statute, the same privity is created between the plaintiff, as grantee of the rent, and the defendant, the tenant of the land out of which the rent issues, as if the defendant had actually attorned to the plaintiff. Attornment is stated by Lord Coke to be an agreement of the tenant to the grant of the seignory or of a rent. . . . Co. Litt. 309a. Stat. 4 Anne, c. 16, § 9, appears to have been intended to meet both parts of this definition. . . . The statute, therefore, in terms creates the same privity, between the grantee of the rent and the tenant of the lands out of which it issues, as an attornment would have done if the tenant had actually attorned to the grantee."

[84] Pfaff v. Golden, 126 Mass. 402; Hunt v. Thompson, 2 Allen (Mass.) 341; Kendall v. Carland, 5 Cush. (Mass.) 74; Patten v. Deshon, 1 Gray (Mass.) 325; Ryerson v. Quackenbush, 26 N. J. L. 236; Allen v. Bryan, 5 B. & C. 512; Demarest v. Willard, 8 Cow. (N. Y.) 206; Willard v. Tillman, 2 Hill (N. Y.) 274; Childs v. Clark, 3 Barb. Ch. 52; Moffatt v. Smith, 4 N. Y. 126.

[85] Ryerson v. Quackenbush, 26 N. J. L. 236.

As has already appeared in regard to assignments of a reversion, no formal act of attornment is necessary where the lessor assigns the lease alone, the lessee at once being under legal obligation to pay the rent to the assignee.[86] In case part of the crop is reserved as rent, an assignment of rent would give the assignee the right to maintain replevin for the crop as soon as the share to be paid as rent had been divided off by the tenant.[87]

The right of an assignee of a reversion to the rent incident to it is subject to all the equities or just demands of the tenants or other incumbrances affecting and controlling the payment of rent. Where a landlord gives an order on his tenant, which the tenant accepts, to pay the accruing rent to a third person, such person thereby acquires an equitable lien on the rent. A purchaser of the reversion with full knowledge of the facts is estopped from claiming the rent so assigned.[88]

II. *By Lessee.*

§ 431. Transfer of lessee's interest.—Although in its origin a lessee's interest consisted in a mere contractual right against the owner of the land, it early grew to be a recognized estate in the land known as a chattel real which carried with it the ordinary rights and incidents of property and of ownership. So lessees have the common law right to assign or transfer their interest to a third person, to put him into possession of the property, and to clothe him with all their rights and privileges under the contract, and this right can only be restrained by express stipulation. The right to transfer the whole includes the right to transfer any interest less than the whole. The well-settled rule at common law gives the owner of a leasehold estate the right to alienate his interest, either by assigning the lease *in toto* or by sub-letting a part of the premises.[89] Making a sublease is not

[86] Kelly v. Bowerman, 113 Mich. 446, 71 N. W. 836; Perrin v. Lepper, 34 Mich. 292.

[87] Lufkin v. Preston, 52 Iowa 235, 3 N. W. 58.

[88] Abrams v. Sheehan, 40 Md. 446.

[89] **Alabama:** Crommelin v. Thiess, 31 Ala. 412; Nave v. Berry, 22 Ala. 382. **Georgia:** Robinson v. Perry, 21 Ga. 183, 68 Am. Dec. 455. **Iowa:** Goldsmith v. Wilson, 68 Iowa 685, 28 N. W. 16. **Indiana:** Taylor v. Moffatt, 2 Blackf. 304. **Illinois:** Howland v. White, 48 Ill. App. 236; Kew v. Trainor, 150 Ill. 150, 37 N. E. 223, affirming 50 App. 629. **Kansas:** Mabry v. Harp, 54 Kan. 398, 36 Pac. 743. **Kentucky:** Montague v. Jamison, 16 Ky. L. R. 238. **Louisiana:** Weatherly v. Baker, 25 La. Ann. 229. **Maine:** Wheeler v. Hill, 16 Me. 329. **Minnesota:** Gould v. Sub-District No. 3, 8 Minn. 427. **Mississippi:** Harris v. Frank, 52

a ground for which the landlord may reënter in the absence of any express provisions to that effect.[90]

A lease for an indeterminate period, with a reservation of rent, is assignable, since it creates a tenancy from year to year.[91] But one stipulating that the holding may be determined by either party on four days' notice, gives to the lessee no certain indefeasible interest which he may transfer to another.[92] Equity will not enjoin the assignment of a lease on the ground that the proposed assignee is insolvent, where the assignor's responsibility for rent will continue.[93]

A parol contract restricting the right of the lessee to assign or sublet would be inadmissible as a collateral stipulation because it would contradict the terms of the lease. In the construction of a written contract for the purpose of determining whether a parol agreement is consistent with it, its legal implications and incidents should be considered as written out and incorporated in it. If this were done there would be found in a lease an express stipulation that the lessees might assign their term to whomsoever they pleased, and that their assignee should have the same right to possess and enjoy that they themselves had. The parol proof offered would conflict with this stipulation and would be incompetent.[94] With regard to the right to assign leasehold estates, no stress should be laid upon the use of the word assigns; if the lease is made to the lessee, his executors, or administrators, his assigns are included in himself, and the right to assign, unless restrained, is incident to his estate.[95]

An exception to the general rule has been made in case of a lease upon shares. A lease upon shares is, according to this view, a personal contract and not assignable where the amount of rent received must depend on the character and skill of the lessee, or where it gives the lessee the use of the lessor's tools on condition that they may be properly kept. Such a personal lease is forfeited by an assignment and attempt to transfer possession, and the lessor may take immediate steps to recover the premises. Under such a lease the land-

Miss. 155. **No. Carolina:** Krider v. Ramsay, 79 N. Car. 354. **New York:** Howard v. Ellis, 4 Sandf. 369; Brouwer v. Jones, 23 Barb. 153; De Forest v. Byrne, 1 Hilt. 43. **Ohio:** Crowe v. Riley, 63 Ohio St. 1, 57 N. E. 956. **Tennessee:** Eastham v. Crowder, 10 Humph. 194. **English:** Crusoe v. Bugby, 2 W. Bl. 766, 3 Wils. 234; Mayor &c. v. Pattison, 10 East 130, 136.

[90] Pearcy v. Heath, 1 Ky. L. R. 407.

[91] Jackson v. Hughes, 1 Blackf. (Ind.) 421.

[92] Say v. Stoddard, 27 Ohio St. 478.

[93] McBee v. Sampson, 66 Fed. 416.

[94] Nave v. Berry, 22 Ala. 382.

[95] Church v. Brown, 15 Ves. 258, 263.

lord has a right to choose his tenant, and he may be willing to lease upon shares to one man, and yet be wholly unwilling to let another have possession on any terms. So with reference to the use of his farm implements, one might be a prudent, careful man who would take good care of them, while another more reckless would not be allowed to use them on any terms.[96]

Not only is it the general rule, subject to this exception, that the ownership of a chattel real carries with it the right to assign and transfer such interest, but it is further true that after the creation of the estate, no restriction can be placed upon the alienation of a leasehold. It is laid down by Lord Coke that "if a man be possessed of a lease for years, . . . and give or sell his whole interest or property therein, upon the condition that the donee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of a reverter, and it is against trade and traffic and bargaining and contracting between man and man."[97] The rule is different, however, in regard to the original contract of lease. In the instrument creating the estate, a condition by which a lease is to be void if the lessee assigns is clearly good in a term for years or for life. It is not a capricious exercise of power on the part of the lessor. In a lease for agricultural purposes, the lessor is interested in having a good tenant and one who understands his business. He is more so in a lease for mining purposes, where greater skill is required and more confidence is necessarily reposed in accounting for the tolls or rent.[98] Therefore, it may be stated as a general rule that an unauthorized assignment is only valid when the lease itself contains no restriction against assignment or sub-letting.[99]

An assignment of the lease carries with it a clause giving the tenant the right to renew at the end of the term and as well as all other clauses.[100] The right of renewal conferred by a lease constitutes a part of the tenant's interest in the land and may be sold and assigned by him, and the benefits of this right may be enforced by the assignee.[101]

[96] Randell v. Chubb, 46 Mich. 311, 9 N. W. 429; Lewis v. Sheldon, 113 Mich. 102, 61 N. W. 269.

[97] 2 Co. Inst. 30, cited in Turner v. Johnson, 7 Dana (Ky.) 435, 438.

[98] Hargrave v. King, 5 Ired. Eq. (N. Car.) 430.

[99] Crommelin v. Thiess, 31 Ala. 412; Nave v. Berry, 22 Ala. 382; Mabry v. Harp, 53 Kan. 398, 36 Pac. 743; Goldsmith v. Wilson, 68 Iowa 685, 28 N. W. 16; Gould v. Sub-District No. 3, 8 Minn. 427.

[100] Sutherland v. Goodnow, 108 Ill. 528.

[101] McClintock v. Joyner, 77 Miss. 678, 27 So. 837.

§ 432. Statutory provisions against assignment and subletting have been enacted in some states and to that extent the right existing at common law to transfer leasehold estates has been modified and changed. Thus, in Kansas,[102] in Kentucky[103] and in Missouri,[104] a tenant who has a term for less than two years is forbidden to assign it without the consent of his landlord and, if he does so, it works a forfeiture of the lease at the election of the lessor. But an assignment of a lease for a term of two years or more, without landlord's consent, does not operate as a forfeiture or authorize the landlord to reënter, although the term would expire in less than two years from the date of the assignment.[105] However, in spite of such a statute, the right of action for injury to possession is in the tenant and not in the landlord. The wrongful ouster of a tenant by a stranger is not of itself a legal ground for recovery by a landlord against a stranger.[106] So where a lessee permits another to occupy a part of the house rented, retaining the control in himself, there is no sub-tenancy.[107] It resulted from such a statute that a term from month to month could not be sold on an execution against the tenant without the consent of the landlord. To sanction a transfer, by means of legal process, of the tenant's interest in such an estate, would be to afford an easy mode of evading the plain meaning of the law.[108] Where a person in good faith purchases of a tenant, having a term of less than two years, an interest in his lease, without the assent of the landlord, such contract is voidable only not absolutely void. With the subsequent assent of the landlord the contract becomes valid; all depends on the action of the landlord.[109] Contracts in contravention of the statute are not to be held void unless the court, from an examination of the statute, shall judge such to have been the intent of the legislature.[110]

§ 433. In Georgia it is provided by statute that an estate for years, if it be in lands, passes as realty. Such an estate "carries with it the right to use in as absolute a manner as a greater estate."[111] It is

[102] Gen. St. 1889, § 3620.

[103] Rev. St. 1894, § 2292; R. S. 1889, § 6368.

[104] Rev. St. 1889, § 4107.

[105] Grizzle v. Pennington, 14 Bush (Ky.) 115; Montague v. Jamison, 15 Ky. L. R. 238.

[106] Walden v. Conn, 84 Ky. 312, 1 S. W. 537.

[107] Waller v. Morgan, 18 B. Mon. (Ky.) 136.

[108] Holliday v. Aehle, 99 Mo. 273.

[109] Mabry v. Harp, 53 Kan. 398, 36 Pac. 743; Waite v. Teeters, 36 Kan. 604, 14 Pac. 146.

[110] Bemis v. Becker, 1 Kan. 226.

[111] Code 1895, §§ 3109, 3111.

further enacted in regard to the relation of landlord and tenant that "when the owner of real estate grants to another simply the right to possess and enjoy the use of such real estate, either for a fixed time or at the will of the grantor, and the tenant accepts the grant, the relation of landlord and tenant exists between them. In such case no estate passes out of the landlord and the tenant has only a usufruct, which he cannot convey except by the landlord's consent, and which is not subject to levy and sale; and all renting or leasing of such real estate for a period of time less than five years shall be held to convey only the right to possess and enjoy such real estate and to pass no estate out of the landlord, and to give only the usufruct, unless the contrary be agreed upon by parties to the contract, and so stated therein."[112] These sections were held to furnish no ground why an estate for years could not be bought and sold like any other real estate. The section denying the right of the tenant to convey applies to the case where the tenant has a mere use.[113] However, if the tenant holds from year to year, he has no estate in the land, and therefore cannot assign his interest, so that the term cannot become a part of the tenant's assets in case of his insolvency.[114] Without the landlord's consent, the tenant has no right to transfer his lease, and the transferee would be a mere intruder subject to be summarily ousted by the landlord.[115] Furthermore, a tenant has no right to impose a sub-tenant upon the landlord without his consent, and if it is attempted, the sub-tenant becomes the tenant of the landlord, if he elects to recognize him as such, and not the tenant of the tenant who placed him upon the premises, without the consent of the landlord. The landlord so recognizing the sub-tenant, may proceed against him for holding over, or he may refuse to recognize the tenancy and proceed to expel the person placed upon the premises by the tenant, without his consent, as an intruder, in any manner prescribed by law for the expulsion of trespassers or intruders.[116] But in order for the relation of landlord and tenant to exist between the owner of the property and a sub-tenant, some affirmative action must be had by the landlord showing that he elected to treat the sub-tenant as his

[112] Code 1895, § 3115.

[113] Clark v. Herring, 43 Ga. 226.

[114] Stultz v. Fleming, 83 Ga. 14, 9 S. E. 1067.

[115] Bass v. West, 110 Ga. 698, 36 S. E. 244; Stultz v. Fleming, 83 Ga. 14, 9 S. E. 1067.

[116] McBurney v. McIntyre, 38 Ga. 261; Smith v. Turnley, 44 Ga. 243, 247; McConnell v. East Point Land Co., 100 Ga. 129, 28 S. E. 80; Hudson v. Stewart, 110 Ga. 37, 35 S. E. 178.

own tenant, it not being sufficient that the landlord has knowledge of the sublease and makes no objection to it.[117]

§ 434. In Texas the statute against assignment reads that a person renting lands shall not rent or lease said lands during the term of his lease to any other person without first obtaining the consent of the landlord, his agent or attorney.[118] This statute has application to sub-lettings as well as assignments and was enacted to secure to the owners of lands the selection of persons to occupy and care for them, as well as to secure them the right to have none occupy their lands whose ability or willingness to pay the rents contracted for was not satisfactory. Under the statute persons renting lands or tenements stand as they would, in the absence of such statute, under contracts containing covenants against sub-lettings or assignments; and on violation of the statute, the rights and remedies of the parties are the same as they would be under covenants. Such remedies a landlord may waive, and when he does so, the legal relation between the parties must be determined by common law principles.[119] But when the landlord does not waive the restrictions raised by the statute, a person holding under an illegal sub-letting is a trespasser;[120] so far as the landlord is concerned he may be treated as an employe of the lessee.[121] A covenant in a lease that the lessee has a right to sublet the premises runs with the land and authorizes the lessee to assign the lease. Such assignment conveys the term. After assignment by lessee he could not surrender the lease or any right under it. Authority to sub-let carries with it authority to assign, and a lessee holding under a lease authorizing him to sub-let may mortgage his interest.[122] For a landlord to accept rent from an assignee of the term would constitute a waiver of a forfeiture caused by a breach of the statutory provision. While an assignment does not come strictly within its letter, it is within the spirit of the statute. Both assignments and sub-leasing are equally within the evil sought to be remedied by this law.[123]

[117] Hudson v. Stewart, 110 Ga. 37, 35 S. E. 178.

[118] Civ. St. 1895, § 3250.

[119] Forrest v. Durnell, 86 Tex. 647, 26 S. W. 481.

[120] Rose v. Riddle, 3 Tex. App. Civ. Cas., § 299; Matthews v. Whitaker, (Tex.) 23 S. W. 538.

[121] Forrest v. Durnell, 86 Tex. 647, 26 S. W. 481.

[122] Menger v. Ward, 87 Tex. 622, 30 S. W. 853, affirming 28 S. W. 831.

[123] Gulf &c. R. Co. v. Settegast, 79 Tex. 256, 15 S. W. 228.

§ 435. Where the whole of the term of a leasehold is assigned, there is no relation of landlord and tenant between the assignor and assignee but only that of seller and purchaser; and if the original lessor had no title when the lease was made, there is a failure of consideration and the assignor cannot recover unpaid installments of purchase money. An assignment of a term for years is governed generally by the rules applicable to the sale of personal property; and, on such sale, while as to the quality of the thing sold *caveat emptor* is the general rule, the seller impliedly warrants the title.[124] The rule has been expressly applied to the sale of a lease that in a contract for such sale there is an implied undertaking to make out the lessor's title and right to demise, as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity.[125] Yet there are authorities taking the opposite view to the effect that no covenants are implied on the assignment of a lease.[126]

The doctrine has been advanced that the assignee, before proceeding against the lessee on the assignment, must attempt to hold the original lessor or show him to be insolvent. If an assignee is evicted through a defect in the lessor's title, he may sue the lessor for compensation; but in case of a mere assignment of a lease, the assignor is not liable to restore the purchase money in case of eviction, and especially in a case where the lessor's representatives have not been previously resorted to, or shown to be insolvent.[127]

[124] Jeffers v. Easton, 113 Cal. 345, 45 Pac. 680; Wetzell v. Richcreek, 53 Ohio St. 62; Souter v. Drake, 5 B. & Ad. 992; Farrer v. Nightingal, 2 Esp. 639; 2 Bl. Com. 451; Benjamin on Sales, 631; 1 Parsons on Contracts (8th ed.) 573, *et seq.*

[125] Souter v. Drake, 5 B. & Ad. 992, 1002, per Lord Denman, quoted in Wetzell v. Richcreek, 53 Ohio St. 62.

[126] Waldo v. Hall, 14 Mass. 486; Blair v. Rankin, 11 Mo. 440. In the latter case it is said: "Although the words grant or demise, will in a *lease* create an implied covenant, against the lessor, yet it is nowhere said that the same words will in an assignment create an implied covenant against the assignor. The object and intent of the parties in making an assignment is to put the assignee in the place of the lessee, and when that is done, the assignee ceases to have any further concern with the contract unless he has bound himself by express covenants. This is the view of the question that was taken by the court in the case of Waldo v. Hall, 14 Mass. 486, and the court says: 'We can find no case of an action by an assignee against an assignor, upon a *covenant in law* for an eviction in consequence of an act done by the original lessor. It must be admitted that the dicta of Sugden, Buller, and some of the more ancient authors create some doubt in relation to the matter.'"

[127] McClenahan v. Gwynn, 3 Munf. (Va.) 556.

In an action for the consideration for an assignment of a lease for a term of years, an eviction by the landlord for non-payment of rent would in no way operate as a defense.[128] To defeat the suit it is incumbent on the assignee to show that he has been evicted by a paramount title or that the title under which he held from the assignor has failed.[129] In the sale of a lease of a house, if the vendor fails to show the lease to the vendee and does not inform him of a covenant therein, that in case of destruction of the house by fire the lease shall terminate and become void, this is such a concealment as vitiates the contract. So in case the house be destroyed by fire in a short time, equity will relieve the vendee by enjoining the vendor from collecting the purchase money, and by directing his notes for the same to be given up and cancelled.[130] In every contract for the sale of land, a condition is implied that the vendor shall convey a good title; and if the sale be of a lease the condition is implied that the lessor had such a title as would make the lease good.[131]

It is, of course, competent for the parties to introduce into the assignment any covenant or stipulation pertinent to the subject which they have agreed upon; and it is not unusual for the assignor to covenant that the indenture of lease is good, that he has power to assign, that he will save the assignee harmless from former grants and incumbrances, and for quiet enjoyment. A guaranty executed contemporaneously with the delivery of the assigned lease, and the payment of the balance of the purchase price becomes a part of the contract of assignment and rests upon sufficient consideration. It amounts to an express covenant of the assignor's title.[132]

§ 436. What passes on an assignment.—In a deed of assignment or conveyance of leaseholds, there was a clause to the effect that the lessees transferred "all their right, title and interest of, in and to the engines, boilers, tanks, and all other fixtures and personal property situate upon and appertaining to the above leasehold interest and oil well." It was held that this clause did not pass or convey the oil that was in the oil tanks at the date of said deed, although it was on the leasehold estate, as it did not appertain to the leasehold interest which was conveyed.[133] The word "lease," when used in a contract of as-

[128] Howard v. Britton, 71 Tex. 286, 9 S. W. 73.

[129] Peck v. Hensley, 20 Tex. 673.

[130] Snelson v. Franklin, 6 Munf. (Va.) 210.

[131] Fry Spec. Per., § 354; Purvis v. Rayer, 9 Price 488; Krause v. Kraus, 58 Ill. App. 559.

[132] Wetzell v. Richcreek, 53 Ohio St. 62.

[133] Dresser v. Transportation Co., 8 W. Va. 553.

signment to designate the interest transferred, has a definite legal signification—it means the estate in the land. An agreement in writing selling a "lease" does not carry with it oil that had heretofore been pumped from an oil-well on the land so leased. Such a contract is not vague or ambiguous and parol evidence is inadmissible to contradict or vary its terms.[134]

§ 437. In accordance with the principle that the form of the instrument of assignment is immaterial,[135] it has been held that a memorandum sufficient to satisfy the statute of frauds can be collected from letters and telegrams.[136] It is well settled that the memorandum must contain within itself, or by some reference to other written evidence, the names of the vendor and vendee, and all the essential terms and conditions of the contract expressed with such certainty as may be understood from the memorandum and other written evidence referred to, without any aid from parol testimony.[137] But it is not a fatal objection that the messages come from an agent who does not disclose his principal's name.[138] The provisions of the statute are complied with if the names of competent contracting parties appear in the writing, and if a party be an agent, it is not necessary that the name of the principal shall be disclosed in the writing; the principal may sue or be sued as in other cases.[139]

If a party purchase what is in reality but a leasehold estate and take of the lessee, or his assignee, a transfer or conveyance, in form an absolute conveyance in fee, yet in judgment of law, such party is only assignee of the terms, and tenant of the lessor. The mere form of the deed, though professing to pass a fee simple estate, will not operate as a disseisin of the superior landlord's estate, but only as an assignment of the unexpired term.[140] A conveyance of leased

[134] McGuire v. Wright, 18 W. Va. 507.

[135] Craig v. Summers, 47 Minn. 189, 49 N. W. 742; Pelton v. Place, 71 Vt. 430, 46 Atl. 63; Walsh v. Martin, 69 Mich. 29, 37 N. W. 40.

[136] Kingsley v. Siebrecht, 92 Me. 23, 42 Atl. 249.

[137] Williams v. Robinson, 73 Me. 186.

[138] Kingsley v. Siebrecht, 92 Me. 23, 42 Atl. 249.

[139] Thayer v. Luce, 22 Ohio St. 62; Pugh v. Chesseldine, 11 Ohio St. 109; Dykers v. Townsend, 24 N. Y. 57; Lerned v. Johns, 9 Allen (Mass.) 419; Hunter v. Giddings, 97 Mass. 41; Williams v. Bacon, 2 Gray (Mass.) 387; Salmon Falls Mfg. Co. v. Goddard, 14 How. (U. S.) 446; Browne on St. of Frauds, § 373; 3 Parsons on Contracts (5th Ed.), p. 10.

[140] McLennan v. Grant, 8 Wash. 603, 36 Pac. 682; Worthington v. Lee, 61 Md. 530; Esty v. Baker, 48 Me. 495.

premises by the lessee to one having notice of the lease, operates merely as an assignment of the term, and although the term has expired before the grantee takes the conveyance and goes into possession, yet if he has notice that the premises are held by his grantor as tenant to another, and there has never been any surrender of possession to the landlord, there will be deemed to be a holding over with the consent of the landlord, and the grantee will become a tenant from year to year or at will and liable for the stipulated rent.[141]

A bequest in a will of all the testator's interest in a certain described estate operates as an assignment of his interest as lessee in the estate.[142]

In an assignment merely of a leasehold estate which is limited and defined by the original deed, an *habendum* clause is not necessary.[143]

§ 438. The transfer of a lease by assignment may be by indorsement on the back of the lease or by separate instrument,[144] and in the latter case such instrument, being a transfer of an interest in land, may properly be recorded; but it will not operate as constructive notice to a subsequent purchaser, if it fail to describe the premises, and define the term, or to contain language of description by which the original lease can be recognized as the thing transferred.[145] An indorsement upon the original lease with reference to it incorporates the description of the premises, and the terms upon which they are to be held into the assignment, and the delivery of the lease makes apparent the intent to convey the estate.[146] No authority is necessary on the point that the expression "all my right, title and interest in and to a certain indenture of lease" is ample to pass all the interest of the lessor, to the extent of the lease, not only to the premises therein demised, but also to the rents accruing thereunder.[147] In case the lessees do not use the word "assign" in the instrument executed by them, but use the word "sold," this is equivalent to "assign" and is sufficient to effect a transfer of the leasehold estate.[148]

[141] De Pere Co. v. Reynen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155.

[142] Martin v. Tobin, 123 Mass. 85.

[143] Strong v. Garfield, 10 Vt. 497.

[144] Esty v. Baker, 48 Me. 495; Cleveland &c. R. Co. v. Mitchell, 74 Ill. App. 602.

[145] Martindale v. Price, 14 Ind. 115.

[146] Sanders v. Partridge, 108 Mass. 556.

[147] Sanders v. Partridge, 108 Mass. 556; Keeley Brewing Co. v. Mason, 102 Ill. App. 381; Barnes v. Northern Trust Co., 169 Ill. 112, 48 N. E. 31; Patten v. Deshon, 1 Gray (Mass.) 325; Blake v. Sanderson, 1 Gray (Mass.) 332.

[148] Cleveland &c. R. Co. v. Mitchell, 74 Ill. App. 602.

An assignment of a lease in blank is a nullity. The affixing of a hand and seal to a piece of blank paper never can be considered an assignment by deed or note in writing within the requisition of the statute of frauds. To allow the subsequent filling up of the deed by a third person, to have relation back to the time of the sealing and delivery of the blank paper in consequence of some parol agreement of the parties, is to open the door to fraud and perjury and to defeat the provisions of the statute.[149]

An assignment, just like a deed in fee, must be completed by delivery and the essential requisite to the validity of a deed is that when placed in the hands of a third party, it has passed beyond the control of the grantor for all time. In case a jury could rightly infer that the lessee did not part with all control and dominion over the lease, but that he might have the right to recall the assignment, they would be justified in holding it did not take effect as a valid instrument.[150]

Where a lessee is forbidden to assign without the consent of the lessor, such consent must be obtained before he can charge the assignee on the contract. If the lessee had no authority to assign the lease, or to permit the assignees to occupy the premises, the assignment tendered would have transferred no use of the premises for the remainder of the term. If it operated even as a permission to the assignees to occupy, it would for that very reason have operated as a determination of the assignor's estate. The assignees had a right to a legal surrender of the premises for the remainder of the term, and not merely to a transfer formal but valueless.[151] Although such a transfer without the written consent of the landlord operates under the statute as a forfeiture, that does not render the contract void between the parties, and the assignee has a right of action against the lessee for failing to put him in possession.[152] After an assignee has entered under an assignment, and occupied the premises, he is clearly estopped to deny the validity thereof on the ground that it was not assented to by the lessors. The terms of the lease by which no valid assignment could be made without the assent in writing of the lessors was a condition for the benefit of the lessors which they might waive, and they did waive it by recognizing the assignee as their tenant and receiving rent from him as such. By such assignment and acceptance of the lease, the assignee is bound to the performance of its con-

[149] Jackson v. Titus, 2 Johns. (N. Y.) 430.

[150] Canale v. Copello, 137 Cal. 22, 69 Pac. 698; Kenney v. Parks, 125 Cal. 146, 57 Pac. 772.

[151] Austin v. Harris, 10 Gray (Mass.) 296.

[152] Thompson v. Gray, 15 Ky. L. R. 783.

ditions, and his liability for rent is to be governed by the terms of the lease, and not restricted to actual occupation.[153]

§ 439. A leasehold estate, created by an instrument under seal, may be assigned by an instrument not under seal.[154] The rule that an instrument under seal can be assigned only by an instrument under seal, applied to an assignment of the lease itself, as a contract, is well settled at law; and a lease, being under seal, could only be assigned by an instrument under seal.[155] But this objection is not decisive, because a leasehold estate can be transferred in other ways than by an assignment of the instrument by which it is created. A lease, by whatever form of instrument it is made, conveys to the lessee an estate or interest in the lands. He may in turn convey to another any subordinate interest, or his entire estate in any appropriate form, without regard to the form in which he acquired his own title. The leasehold estate may be transferred by devise, by sale on execution as a chattel, or by sale by an administrator as personal assets. In all these cases the purchaser becomes bound to the lessor to pay the rent and perform the covenants that run with the land, because the law imposes that obligation upon him by reason of his succession to the estate of the lessee. The same result follows from any transfer by the lessee of his entire estate. A seal is not essential to such a transfer, even of a lease for more than seven years. No written instrument is necessary except to satisfy the statute of frauds. The real question in every case is whether the instrument is sufficient to satisfy the statute of frauds.[156]

§ 440. That the English statute of frauds extends to agreements for the assignment of a lease was settled in early cases,[157] and the same result has been reached in the United States without regard to minor variations in the phraseology of the statutes here.[158] Contracts

[153] Blake v. Sanderson, 1 Gray (Mass.) 332.

[154] Keeley Brewing Co. v. Mason, 102 Ill. App. 381; Barnes v. Northern Trust Co., 169 Ill. 112, 48 N. E. 31; Barrett v. Trainor, 50 Ill. App. 420; Bordereaux v. Walker, 85 Ill. App. 86; Sanders v. Partridge, 108 Mass. 556; Stillman v. Harvey, 47 Conn. 26; Warren v. Leland, 2 Barb. (N. Y.) 613; Holliday v. Marshall, 7 Johns. (N. Y.) 211; Troxell v. Wheatley, 2 Luz. Leg. Reg. (Pa.) 37.

[155] Wood v. Partridge, 11 Mass. 488; Brewer v. Dyer, 7 Cush. (Mass.) 337; Bridgham v. Tileston, 5 Allen (Mass.) 371.

[156] Sanders v. Partridge, 108 Mass. 556.

[157] Anonymous, Vent. 361; Poultney v. Holmes, 1 Stra. 405; Browne on St. of Frauds, § 320.

[158] Kingsley v. Siebrecht, 92 Me.

for the sale of leasehold interests, though such interests are technically only chattel interests, are within the mischief intended to be guarded against by the statute. There are in many states leases of land to be built upon, running for long periods with covenants for renewal, which are of great value. A court would therefore hesitate to hold that a statute of frauds did not extend to contracts for the sale of leasehold interests.[159] If there be a verbal contract between parties for an assignment of the unexpired term of a lease for life, such contract is within the statute of frauds for two reasons. First, because it is an attempted assignment of a leasehold interest, the term being for the life of the original lessor, and second, because it was not performable in one year.[160]

It has been argued that a person having orally agreed with a lessee to take his place in a lease—having entered into possession and having paid rent in checks,—is estopped, when sued by the landlord for rent, from showing there was no assignment of the lease in writing.[161] But an estoppel arises only where one has led another to act upon the assumption of the existence of a certain state of facts, and where the latter would be prejudiced if the other party were allowed afterwards to show that the facts were otherwise than as he had represented them. Nothing of this kind arises; the landlord has entered into no new contract, undertaken no obligation, nor done anything in consequence of it. The original lessors remain liable on the lease for the rent for the whole of the term and, if rent is not paid, the landlord has a prompt and efficacious remedy by which he can recover possession of the premises. It does not operate to his prejudice or injury to show that the occupant did not acquire any valid right or title to the estate created by the lease.[162]

23, 42 Atl. 249; Smith v. Smith, 9 Ky. L. R. 100; Sanders v. Partridge, 108 Mass. 556; Durand v. Curtis, 57 N. Y. 7; Welsh v. Schuyler, 6 Daly (N. Y.) 412; Potter v. Arnold, 15 R. I. 350; Briles v. Pace, 13 Ired. L. (N. Car.) 279; Johnson v. Reading, 36 Mo. App. 306; Hunt v. Coe, 15 Iowa 197; Chicago Attachment Co. v. Davis &c. Co., 142 Ill. 171, 31 N. E. 438, reversing 33 Ill. App. 362.

[159] Potter v. Arnold, 15 R. I. 350, 5 Atl. 379.

[160] Tiefenbrun v. Tiefenbrun, 65 Mo. App. 253; Nally v. Reading, 107 Mo. 350, 17 S. W. 978; Johnson v. Reading, 36 Mo. App. 306.

[161] Carter v. Hammett, 12 Barb. (N. Y.) 253, s. c. 18 Barb. 608; Chicago Attachment Co. v. Davis &c. Co., 33 Ill. App. 362, reversed in 142 Ill. 171, 31 N. E. 438.

[162] Welsh v. Schuyler, 6 Daly (N. Y.) 412.

§ 441. The validity of a parol assignment of a valid parol lease was raised in England at the Lent Assizes in the year 1808. *Shepherd, Sergeant,* contended that though there might be a good parol demise for a term under three years, yet no lease for any period, however short, could be assigned, unless by deed or writing, signed by the party assigning, or his agent thereunto lawfully authorized. On the other side *Best, Sergeant,* argued that the leases mentioned as requiring to be assigned by writing, must be such leases as are required to be created by deed or writing. "As a lease from year to year could be originally made by parol, there was no reason why it might not be assigned by parol, and the words of the statute would bear this interpretation which was clearly consistent with its general import." But Sir A. M'Donald, C. B., held that the assignment was void for not being by deed or note in writing; and therefore nonsuited the plaintiff.[163] In this country, however, it has been held that a tenancy held by parol may be transferred by parol. The position that a tenancy from year to year could only be conveyed or surrendered by a contract in writing and that a parol agreement for its sale or surrender was void under the statute of frauds was thought untenable. "The tenancy was from year to year, and existed only in parol," said the court, "and if valid in him, it would be strange if he could not transfer it in the same way."[164] In another American case the doctrine was laid down generally that a lease for a term less than the statutory period for parol leases, whether written or not, may be surrendered or transferred by oral agreement. "What greater mischief there can be in a verbal surrender or transfer," says Chief Justice Gibson, "than there is in the verbal constitution of a lease, has not been shown and it is not to be supposed that the legislature intended to establish a distinction without a reason for it. . . . The two English decisions do not bind us as precedents; and they are too contracted to bind us by their spirit. . . . I take it, therefore, a lease for less than three years, whether written or not, may be surrendered or transferred by an oral expression of assent."[165]

There is authority for the view that part performance takes a parol contract of assignment out of the statute of frauds, although such a doctrine has been restricted in some jurisdictions to suits

[163] Botting v. Martin, 1 Camp. 317, followed in Preece v. Corrie, 5 Bing. 24.

[164] Ross v. Schneider, 30 Ind. 423; Peters v. Barnes, 16 Ind. 219.

[165] McKinney v. Reader, 7 Watts (Pa.) 123.

in equity.[166] Granting that the statute of frauds requires an assignment of a lease to be in writing, irrespective of the duration of the term, this cannot apply where the contract has been fully executed by the payment of the consideration on the one side, and the delivery and retention of possession on the other. The lessor, who has recognized its validity, which the parties themselves have never questioned, cannot set up the statute against the lessee and still less against his surety.[167]

§ 442. Where one other than the lessee occupies leased premises during the continuation of the term and pays rent, he is prima facie in as assignee of the term.[168] While an assignee of a lease is liable on the covenants therein only by reason of privity of estate and not by reason of his occupation of the premises, an assignment may sometimes be inferred in fact by the occupation of the assignee. This was done in a case where premises leased by one partner were occupied by his firm, which was held liable on the covenants in the lease.[169] After a lessee has gone into possession of the demised premises, the occupation of them by a stranger raises a presumption that he is an assignee of the term, and makes him *prima facie* liable for rent on the privity of estate.[170]

It may be stated as a general rule that where a person other than the lessee enters upon and occupies leased premises or pays the rent, the law infers an assignment to him of the lease. But this presumption may, in either case, be rebutted by proof that there never was, in fact, such an assignment, or that the instrument of assignment was invalid.[171] The fact of possession is sufficient evidence in the first instance of an assignment when a suit for rent is brought against an alleged assignee. The fact of an assignment is a transaction between the defendant and the lessee, of which the plaintiff

[166] Chicago Attachment Co. v. Davis &c. Co., 142 Ill. 171, 31 N. E. 438, reversing 33 Ill. App. 362.

[167] Wiley, Estate of, 12 Phila. (Pa.) 152; Dewey v. Payne, 19 Neb. 540, 26 N. W. 248.

[168] Ecker v. Chicago &c. R. Co., 8 Mo. App. 223.

[169] Guinzburg v. Claude, 28 Mo. App. 258.

[170] Williams v. Woodard, 2 Wend. (N. Y.) 487.

[171] Cross v. Upson, 17 Wis. 618; Welsh v. Schuyler, 6 Daly (N. Y.) 412; Quackenboss v. Clarke, 12 Wend. (N. Y.) 555; Astor v. Lent, 6 Bosw. (N. Y.) 612, 617; Mason v. Breslin, 40 How. Pr. (N. Y.) 436, 442; Frank v. New York &c. R. Co., 122 N. Y. 197, 215, 25 N. E. 332; Wittman v. Milwaukee &c. R. Co., 51 Wis. 89, 8 N. W. 6; Dickinson Co. v. Fitterling, 69 Minn. 162, 71 N. W. 1030; Ecker v. Chicago &c. R. Co., 8 Mo. App. 223.

is not cognizant, but the defendant is. There is no hardship, therefore, in concluding him by his possession, unless he discloses the true state of his title.[172] It is enough for the plaintiff to give general evidence from which the assignment may be inferred; payment of rent being *prima facie* evidence of an assignment of the whole term.[173] If there be no assignment, the defendant is not liable to the lessor, and under the statute of frauds an assignment must be in writing or it is void. But as the law infers an assignment from certain facts proved, the inference must be of a valid operative assignment, such an one as was sufficient to transfer the term. It is incumbent on the defendant to prove either that there was no assignment, or that it was one void in law.[174] The presumption of law, where a man is shown to be in possession of leasehold premises, without anything more, is that he is in as assignee of the original tenant.[175] Where heirs of a lessee were sued for rent of the leased premises, it was held that the defendants being in possession, the law would refer that possession to a rightful rather than to a wrongful title by supposing the defendants to be privy to the term granted to their father, the original lessee; and if their possession was referable to some other title, it was for them to show it, for that must be a matter lying within their own knowledge.[176]

The presumption of a valid assignment could be rebutted by showing the occupant of the premises held as under-tenant without even a bare knowledge of the original lease. But after the lessee deserts the building and abandons the lease, the sub-tenant's continued occupation of the premises with the consent of the owner and payment of rent to him constitutes a surrender of the original lease.[177] The presumption of an assignment could also be overthrown by showing that the occupant never told the lessors he was holding under the lease, did not mislead them in any way to their injury, and that a written assignment was never made effectual by delivery.[178] The New York Court of Appeals has intimated that the cases might,

[172] Quackenboss v. Clarke, 12 Wend. (N. Y.) 555; Armstrong v. Wheeler, 9 Cow. (N. Y.) 88; Williams v. Woodard, 2 Wend. (N. Y.) 487; Bedford v. Terhune, 30 N. Y. 453. See also Walsh v. Martin, 69 Mich. 29, 37 N. W. 40.

[173] 2 Phillips Evidence, 150.

[174] Bedford v. Terhune, 30 N. Y. 453.

[175] Acker v. Witherell, 4 Hill (N. Y.) 112.

[176] Page v. McGlinch, 63 Me. 472; Doe v. Murless, 6 M. & S. 110; Doe v. Williams, 6 B. & C. 41, 13 E. C. L. 31.

[177] Snyder v. Parker, 75 Mo. App. 529.

[178] Canale v. Copello, 137 Cal. 22, 69 Pac. 698.

perhaps, be questioned in so far as they may be said to authorize proof of a wrongful entry in rebuttal of a presumed assignment.[179] But the suggested limitation has no application in a case where evidence is offered to show an occupation conjointly with one of the original lessees and supposedly with his permission. In that case the occupant has a right to go to the jury on the question of fact whether or not he had an assignment of the lease, and assumed any of its obligations.[180]

That an assignment of a lease causes a forfeiture does not prevent the usual inference arising from occupation. There is no reason why a presumption of an assignment would not arise, even in a proceeding to enforce the forfeiture. The fact that an assignment will forfeit the lease is a strong motive for concealing the fact of assignment and the character of the possession of the assignee. Thus the existence of such a condition of forfeiture in the lease is, if anything, an additional reason why a third person in possession should be presumed to be an assignee of the lessee and compelled to explain the character of his possession.[181]

§ 443. A receiver appointed by a court to take charge of a lessee's property does not thereby become an assignee of the term.[182] A receiver is merely a ministerial officer of the court, or, as he is sometimes called, the hand of the court. The title to the property does not change upon an appointment of a receiver; and if he is required to take property into his custody, such custody is that of the court.[183] Speaking of a decree appointing receivers of a railway company, Mr. Justice Wells said: "It had no effect to change the title, or create any lien upon the property. Its purpose, like that of an injunction *pendente lite,* was merely to preserve the property until the rights of all parties could be adjudged. The receivers are officers of the court for this purpose and act under its direction and control."[184] So, on principle, the law seems to be that if a receiver of

[179] Frank v. New York &c. R. Co., 122 N. Y. 195, 215, 25 N. E. 332.

[180] Day v. Greenebaum, 31 N. Y. S. 610, 82 Hun 533.

[181] Dickinson Co. v. Fitterling, 69 Minn. 162, 71 N. W. 1030.

[182] Bell v. American Protective League, 163 Mass. 558, 40 N. E. 857; Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Quincy &c. R. Co. v. Humphreys, 145 U. S. 82, 97, 12 S. Ct. 787. *Contra* United States Trust Co. v. Wabash &c. R. Co., 150 U. S. 287, 14 S. Ct. 86.

[183] Union Bank v. Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013; Thompson v. Phenix Ins. Co., 136 U. S. 287, 297, 10 S. Ct. 1019.

[184] Ellis v. Boston &c. R. Co., 107 Mass. 1, 28.

an insolvent corporation takes possession of its leasehold estates, he is liable only for a reasonable rent during the time that he retains possession; that he does not become an assignee of the term and is not liable on the covenants of the lease.[185]

In New York a receiver of an insolvent corporation has vested in him by statute the title of the insolvent, so there are cases in that state in which it is asserted that there is no difference between an assignee and a receiver who takes possession of the leasehold premises.[186]

§ 444. Where a sheriff, under an execution, sells a term for years, it operates as an assignment at law, and, when he sells a term in possession of the debtor, he can put a vendee in possession.[187] Upon such a sale, however, he must execute an assignment of the lease, in writing to the purchaser, and if he merely puts the execution creditor in possession, the debtor may recover it again in ejectment.[188] It has been held that it requires only a memorandum of the sale, signed by the officer making the sale, to satisfy the statute, and his return may constitute a sufficient memorandum,[189] even though made subsequently to the sale.[190]

A court will not take jurisdiction in equity to compel a lessee, whose term for years has been sold under an execution, to deliver up to the purchaser the counter-parts of his lease and sub-leases which are recorded. An assignment and sub-leases made by the lessee subsequently to the sale are void and do not constitute a cloud upon the title affording ground for relief in equity. The purchaser at the execution sale stands in the position of an assignee in law of the term for years, with substantially the same right as if it had been voluntarily assigned to him. His remedy at law to enforce his rights as such assignee is plain, adequate and complete.[191] An execution purchaser of a leasehold interest must take it, if at all, subject to all the conditions of the lease, whether the same are recorded or not.

[185] Bell v. American &c. League, 163 Mass. 558, 40 N. E. 857.

[186] Attorney-General v. Life & F. Ins. Co., 4 Paige (N. Y.) 224; Booth v. Clark, 17 How. (U. S.) 322, 331.

[187] Taylor v. Cole, 3 Term R. 292; McNeil v. Ames, 120 Mass. 481; Joslin v. Ervien, 50 N. J. L. 39; Borland's Appeal, 66 Pa. St. 470.

[188] Doe v. Jones, 9 M. & W. 372; Doe v. Brawn, 5 B. & Ald. 243.

[189] Sanborn v. Chamberlin, 101 Mass. 409; Remington v. Linthicum, 14 Pet. (U. S.) 84, 92; Hanson v. Barnes, 3 Gill & J. (Md.) 359; Barney v. Patterson, 6 H. & J. (Md.) 182.

[190] Freeman on Executions, § 299.

[191] McNeil v. Ames, 120 Mass. 481.

But he may disclaim all interest under his purchase and avoid further liability on the covenants of the lease.[192]

A purchaser, on foreclosure of a mortgage on a leasehold, becomes an assignee of the lease and therefore liable on the covenant during his enjoyment of the demised premises.[193]

These results do not follow unless there has been a sale effecting a change in the ownership of the leasehold. So a decree of sale of a leasehold on a lien judgment does not invest the lienor with a right of entry or with the legal title so as to make him liable on the covenants in the lease.[194] Moreover, it has been held that a purchaser at a chancery sale of an unexpired term of a leasehold is not chargeable with the contract rental for the balance of the term. The theory of the court was that money paid by the purchaser should be applied as rent and the original lessee should make up the balance. In stating the reasons for this decision the court said that "The contrary suggestion carries with it its own refutation."[195]

§ 445. There is a wide distinction in law between an assignee of a lease and a sub-tenant. The former is personally liable to the landlord for all the covenants and conditions imposed upon the lessee, while the latter is liable only to the lessee, who is alone responsible to the landlord.[196] An underlease vests only a partial estate in the second lessee, a reversion being left in his lessor; whereas, an assignment transfers the whole interest of the first lessee to the assignee. The test is whether the grant leaves a reversionary interest in the assignor or operates to transfer his entire term. The essential nature of the conveyance is not effected by the particular words employed, and though the instrument purport to be a lease or demise, it may still be an assignment.[197] When a lessee assigns his interest in the whole or a part of the demised premises for the residue of the unexpired term, the assignee is substituted in place of the original lessee as tenant. But where the demised premises are let for a part only of the unexpired term, the new tenant is only a sub-lessee, and is not a tenant to the landlord.[198]

[192] Snowden v. Memphis Park Ass'n, 7 Lea (Tenn.) 225.

[193] State v. Martin, 14 Lea (Tenn.) 92.

[194] Merchants' Ins. Co. v. Mazange, 22 Ala. 168.

[195] Tradesman Pub. Co. v. Knoxville &c. Co., 95 Tenn. 634, 32 S. W. 1097, 31 L. R. A. 593.

[196] Dartmouth College v. Clough, 8 N. H. 22; Sansing v. Risinger, 2 Tex. App. Civ. Cas., § 713; Krider v. Ramsay, 79 N. Car. 354.

[197] Constantine v. Wake, 1 Sweeny (N. Y.) 239.

[198] Lee v. Payne, 4 Mich. 106.

It is well settled that the common law gives the lessor no right of action on any of the covenants of the original lease against the sub-tenant or under-lessee because there is no privity of contract between the lessor and the sub-lessee and because there is no privity of estate.[199] A sub-lessee is not in a general sense the tenant of the original lessor.[200] There is no privity between the landlord and sub-tenant, arising merely from that relation as will subject the sub-tenant to liability for the debt of the tenant for rent.[201] At common law a landlord could not sue a sub-lessee upon the covenants of the original lease, and a statute allowing a landlord to enforce his lien by attachment against the sub-tenant, has been held not to change the common law rule about suing on covenants.[202]

The Missouri statute gives a lien and attachment against an under-tenant or sub-lessee as well as against the original lessee and to that extent the common law is repealed,[204] but the statute cannot be fairly construed to give the landlord the right to sue the sub-lessee in an action at law upon the covenants of the lease to the tenant when no lien is sought against the crop grown on the premises and no right of attachment exists. It does not follow that because a lien or attachment is given against a sub-lessee that an action at law is given in all cases.[205]

In case the original lessee is insolvent and unable to pay the rent, the question then arises whether the under-lessee should be permitted to enjoy the profits and possession of the estate without accounting for the rent to the original lessor. There would be no remedy at law. But courts of equity will relieve the lessor and will direct a payment of rent to the lessor upon a bill making the original

[199] Robinson v. Lehman, 72 Ala. 401; St. Joseph &c. R. Co. v. St. Louis &c. R. Co., 135 Mo. 173, 36 S. W. 602; Grundin v. Carter, 99 Mass. 15; Ashley v. Young, 79 Miss. 129, 29 So. 822; McFarlan v. Watson, 3 N. Y. 286; Holford v. Hatch, 1 Doug. 183, 187.

[200] Gray v. Rawson, 11 Ill. 527; Giddings v. Felker, 70 Tex. 176, 7 S. W. 694; 2 Taylor on Landlord and Tenant (8th ed.), § 448; 1 Woodfall on Landlord and Tenant, p. 265; 1 Washburn Real Prop. (5th ed.), p. 546, § 5; Williams Real Prop., 336.

[201] Gibson v. Mullican, 58 Tex. 430; Harvey v. McGrew, 44 Tex. 412; Krider v. Ramsay, 79 N. Car. 354.

[202] St. Joseph &c. R. Co. v. St. Louis &c. R. Co., 135 Mo. 173, 36 S. W. 602.

[203] Rev. St. 1899, §§ 6376, 6384, 6388.

[204] Hicks v. Martin, 25 Mo. App. 359; Hulett v. Stockwell, 27 Mo. App. 328; Garroutte v. White, 92 Mo. 237.

[205] St. Joseph &c. R. Co. v. St. Louis &c. R. Co., 135 Mo. 173, 36 S. W. 602.

lessee and the under-tenant parties. For if the original lessee were compelled to pay the rent, he would have a remedy over against the under-tenant.[206]

§ 446. An underlease for the whole term is an assignment. Technical terms or special words are not necessary to an assignment; any language which shows the intention of the parties to transfer the property from one to the other is sufficient. The form of the instrument being immaterial, if it has the legal effect to pass to another the lessee's interest in the whole or in any part of the demised premises for his entire term, or the remainder of his term, it is an assignment.[207] Although by the under-lease, a rent exceeding the original rent is reserved, and it is expressly stipulated that the so-called under-tenant shall hold as tenant of his grantor, he is nevertheless in law the tenant of the original lessor.[208] If a lessee, by any instrument whatever, whether reserving conditions or not, parts with his entire interest, he has made a complete assignment; if he has transferred all his interest in a part of the premises he has made an assignment *pro tanto*.[209] A sub-tenant is one who leases all or a part of rented premises from the original lessee for a term less than that held by the latter, and in that case the lessee retains a reversionary interest. In such cases at common law, a sub-tenant's property was subject to distress, while he was not liable on the contract between lessor and lessee.[210] There is a diversity between the whole estate in part, and part of the estate in the whole or of any part.[211] The

[206] 1 Story's Eq. 687; Forrest v. Durnell, 86 Tex. 647, 26 S. W. 481.

[207] Hicks v. Downing, 1 Ld. Raym. 99; Beardman v. Wilson, L. R., 4 C. P. 57; Bedford v. Terhune, 30 N. Y. 453; Boston &c. R. Co. v. Boston &c. R. Co., 65 N. H. 393, 452, 23 Atl. 529; Trustees &c. v. Streeter, 64 N. H. 106, 5 Atl. 845; Dartmouth College v. Clough, 8 N. H. 22, 29.

[208] Wollaston v. Hakewill, 3 M. & G. 297, 322, 42 E. C. L. 161; Parmenter v. Webber, 8 Taunt. 593; Bac. Abr. Leases I, 3.

[209] Woodhull v. Rosenthal, 61 N. Y. 382, 391; Bedford v. Terhune, 30 N. Y. 453, 457; Boston &c. R. Co. v. Boston &c. R. Co., 65 N. H. 393, 452, 23 Atl. 529; Lloyd v. Cozens, 2 Ashm. (Pa.) 131, 138; Langford v. Selmes, 3 Kay & J. 220, 229; Palmer v. Edwards, Doug. 187, *n.*; Doe v. Bateman, 2 B. & Ald. 168; Pluck v. Digges, 5 Bligh (N. S.) 31, 65, Cro. Jac., 411; Com. Dig., Debb, E. But see Post v. Kearney, 2 N. Y. 394; Martin v. O'Conner, 43 Barb. (N. Y.) 514, 522.

[210] Wheeler v. Hill, 16 Me. 329; Krider v. Ramsay, 79 N. Car. 354; Forrest v. Durnell, 86 Tex. 647, 26 S. W. 481; Dartmouth College v. Clough, 8 N. H. 22; 1 Chitty's Pl. 36. *Contra*, Fulton v. Stuart, 2 Ohio 215.

[211] McNeil v. Kendall, 128 Mass. 245.

distinction between an assignment and a sub-lease depends solely upon the quantity of interest which passes and not upon the extent of the premises transferred. So the transfer of *part* of the premises for the *entire* term is an assignment and not a sub-lease.[212]

Where a tenant at will from year to year lets a portion of the premises held by him to another as his tenant at will, the latter is an under-tenant and not an assignee. And the same result will follow although the under-tenant becomes a tenant from year to year by continued occupation and payment of rent;[213] he would not be technically an assignee because the first tenant had no assignable interest.[214]

But it is also well settled that the same instrument may in law create an assignment of the term, as between the original lessor and the assignee, and also the relation of landlord and tenant between the parties to the second demise. As between the *original lessee* and his lessee, even though the original lessee demises the whole term, if the parties intend a lease, the relation of landlord and tenant as to all but strict reversionary rights will arise between them, notwithstanding the original lessee is divested of all reversionary rights, and his lessee is liable as assignee.[215] According to one view, a mere reservation of a new rent, or of a right of reëntry for a breach of any of the conditions of the lease, will not change the legal relations of the parties, and the introduction of covenants into the instrument does not change the legal effect of giving up the reversion.[216] The right of reëntry is not an estate or interest in land, nor does it imply a reservation of a reversion. It is a mere chose in action.

[212] Cook v. Jones, 96 Ky. 283, 28 S. W. 960; Den v. Alexander, 4 Dev. & B. (N. Car.) 40; Crusoe v. Bugby, 3 Wils. 234, 2 W. Bl. 766; Hicks v. Martin, 25 Mo. App. 359; St. Joseph &c. R. Co. v. St. Louis &c. R. Co., 135 Mo. 173, 26 S. W. 602.

[213] Curtis v. Wheeler, 1 Mood. & M. 493; Pleasant v. Benson, 14 East 234, 237; Peirse v. Sharr, 2 M. & R. 418; Austin v. Thomson, 45 N. H. 113.

[214] Whittemore v. Gibbs, 24 N. H. 484; 1 Cruise 244; 4 Kent 114.

[215] Stewart v. Long Island R. Co., 102 N. Y. 601, 8 N. E. 200; Craig v. Summers, 47 Minn. 189, 49 N. W. 742; Indianapolis &c. Union Co. v. Cleveland &c. R. Co., 45 Ind. 281; Lee v. Payne, 4 Mich. 106; Lloyd v. Cozens, 2 Ashm. (Pa.) 131, 138; Adams v. Beach, 1 Phil. (Pa.) 178; Prescott v. De Forest, 16 Johns. (N. Y.) 159; Bedford v. Terhune, 30 N. Y. 453.

[216] Craig v. Summers, 47 Minn. 189, 49 N. W. 742; Smiley v. Van Winkle, 6 Cal. 605; St. Joseph &c. R. Co. v. St. Louis &c. R. Co., 135 Mo. 173, 36 S. W. 602, citing Beardman v. Wilson, L. R., 4 C. P. 57; Doe v. Bateman, 2 B. & Ald. 168; Wollaston v. Hakewill, 3 Scott N. R. 593, 616; Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N. E. 920; Blumenberg v. Myres, 32 Cal. 93.

When enforced, the grantor is in through the breach of condition and not by the reverter.[217]

In a case arising before the Supreme Judicial Court of Massachusetts, a lessee for years demised the premises to another for a term equal to the whole of the unexpired term of the original lease, by a lease containing covenants by the lessee to pay rent at an increased rate and providing that the lessor might enter and take possession for breach of covenant, and that the lessee would quit and deliver up the premises to the lessor at the end of the term. In holding that this instrument was not an assignment Colt, J., said: "There is no reference in it to the original demise and no indication of an intention on the part of the sub-lessor to part with his whole interest in the leasehold estate or to lose control of it as lessor. The rent reserved was larger in amount than that reserved in the original lease and the lessee covenants to deliver up possession at the end of the term. But what is more in point, the right is reserved to the lessor to enter and expel the lessee for non-payment of rent. It is clear that the parties to this lease intended to create the relation of landlord and tenant between themselves. And it is the duty of the court to give effect to this intention, unless controlled by some positive rule of law."[218] The law is settled in Massachusetts that if the smallest reversionary interest is retained by the lessee, the tenant takes as sub-lessee and not as assignee.[219] In Iowa a doctrine similar to that of Massachusetts is in force. If the sub-lease reserves new rents and the sub-tenant covenants to deliver possession to the lessee and not to the original landlord, these covenants take from it the character of an assignment. As between the parties there is a reversionary interest in the lessee and not in the original landlord.[220]

Rights and Liabilities of Parties.

§ 447. The express covenants in a lease continue to be binding upon the covenantor notwithstanding his assignment of the lease.[221]

[217] Tied. Real Prop., § 277; Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N. E. 920; Schulenberg v. Harriman, 21 Wall. (U. S.) 44; Hooper v. Cummings, 45 Me. 359; Southard v. Central R. Co., 26 N. J. L. 13, 21; St. Joseph &c. R. Co. v. St. Louis &c. R. Co., 125 Mo. 173, 36 S. W. 602.

[218] Dunlap v. Bullard, 131 Mass. 161.

[219] Patten v. Deshon, 1 Gray (Mass.) 325; McNeil v. Kendall, 128 Mass. 245. See also Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 147.

[220] Collamer v. Kelley, 12 Iowa 319. Relying on Post v. Kearney, 2 N. Y. 394.

[221] Barhydt v. Burgess, 46 Iowa 476; Brosman v. Kramer, 135 Cal.

The reason of the rule is, that although by the assignment the privity of estate between lessor and lessee is terminated, there still remains the privity of contract between them, created by the lease, which is not affected by the assignment, although made with the assent of the lessor, and the lessee still continues liable on his covenant by virtue of this privity of contract.[222] If the covenant to pay rent be express the lessee is bound so long as the term continues; but if implied, he is discharged whenever he is divested of the estate.[223] "Where there is a covenant to pay rent, the lessee cannot terminate his liability by an assignment of the lease, although lessor may accept rent of the assignee or give his assent to the assignment.[224] If, however, there be no express contract to pay the rent, the lessee's liability will cease after the lessor consents to an assignment, and such assent may be inferred from his accepting rent of the assignee, or other act recognizing him as his tenant.[225] That is because the privity of estate is destroyed, and as there is no privity of contract between them, there is no longer any obligation, express or implied, on the lessee. But in order to destroy this privity of estate between lessor and lessee, there must be the concurrence of the lessor. It is not correct to state, as a rule of law, that a lessee who has not made an express covenant to pay rent may discharge himself to all future responsibility by assigning the lease."[226]

36, 66 Pac. 979; Wineman v. Phillips, 93 Mich. 223, 53 N. W. 168; Jones v. Parker, 163 Mass. 564, 40 N. E. 1044; Whetstone v. McCartney, 32 Mo. App. 430.

[222] Garner v. Byard, 23 Ga. 289, 68 Am. Dec. 527; Barhydt v. Burgess, 46 Iowa 476; Oswald v. Fratenburgh, 36 Minn. 270, 31 N. W. 173.

[223] Barhydt v. Burgess, 46 Iowa 476; Fanning v. Stimson, 13 Iowa 42; Kimpton v. Walker, 9 Vt. 191; Holliday v. Noland, 93 Mo. App. 403; Marsh v. Brace, Cro. Jac. 334; Brett v. Cumberland, Cro. Jac. 521; Patten v. Deshon, 1 Gray (Mass.) 325, 330; Farrington v. Kimball, 126 Mass. 313; Wall v. Hinds, 4 Gray (Mass.) 256; Blake v. Sanderson, 1 Gray (Mass.) 332; Sanders v. Partridge, 108 Mass. 556; Mason v. Smith, 131 Mass. 510; Peers v. Consolidated Coal Co., 59 Ill. App. 595; Port v. Jackson, 17 Johns. (N. Y.) 239. In a case where a lease signed by the lessees was never delivered to them but was assigned before delivery and delivered directly to the assignee, the lessees were held not to be liable on the covenants in the lease. Stetson v. Briggs, 114 Cal. 511, 46 Pac. 603.

[224] Cones v. Barnes, 45 Mo. App. 590; Fisher v. Milliken, 8 Pa. St. 111, 120; Shaw v. Partridge, 17 Vt. 626; Mills v. Auriol, 1 H. Bl. 433; Pfaff v. Golden, 126 Mass. 402.

[225] Jones v. Barnes, 45 Mo. App. 590; Whetstone v. McCartney, 32 Mo. App. 430.

[226] Consumers' Ice Co. v. Bixler, 84 Md. 437, 447, 35 Atl. 1086, per Boyd, J.

"A liability of the lessee arising from his express contract is permanently fixed during the whole term so that no act of his own can absolve him from the lessor's demands in respect to it."[227] The mere assignment of a lease by a lessee and acceptance of rent by the lessor from the assignee does not preclude the lessor from maintaining an action against the lessee on his covenant to pay rent and taxes.[228] It is a settled rule that an action of covenant will lie on a covenant in a deed against a lessee notwithstanding a third person be at the time the actual tenant, recognized as such by the lessor; and an action lies against the lessee's executors, notwithstanding he may have assigned in his lifetime, and the rent accrues subsequent to his death. The reason given for the rule is this, that the privity of contract of the testator is not determined by his death, and the executor shall be charged with all his contracts so long as he has assets.[229]

The lessor may pursue either lessee or assignee, or both at the same time, though he will be entitled to but a single satisfaction.[230] After an assignment of the lease, the lessor has a double and several security for the payment of his rent, either or both of which he may pursue till satisfaction is obtained. Therefore, the receipt of rent from the assignee of the lessee does not amount to a novation or release of the lessee, but is the assertion of a right which accrued to the lessor as an incident to the assignment.[231] Where a lessor sues

[227] Sutliff v. Atwood, 15 Ohio St. 186; Smith v. Harrison, 42 Ohio St. 180; Missouri &c. Co. v. Richardson, 57 Neb. 617, 78 N. W. 273.

[228] Wilson v. Gerhardt, 9 Colo. 585, 17 Pac. 705; Rector v. Hartford Deposit Co., 190 Ill. 380, 60 N. E. 528, affirming 92 Ill. App. 175; Harris v. Heackman, 62 Iowa 411, 17 N. W. 592; Wall v. Hinds, 4 Gray (Mass.) 256; Rees v. Lowry, 57 Minn. 381, 59 N. W. 310; Adams v. Burke, 21 R. I. 126, 42 Atl. 515; Pfaff v. Golden, 126 Mass. 402; Hunt v. Gardner, 39 N. J. L. 530; Edwards v Spalding, 20 Mont. 54, 49 Pac. 443; Mason v. Smith, 131 Mass. 510, 511; Edwards v. Spalding, 20 Mont. 54, 49 Pac. 443; Barnard v. Godscall, Cro. Jac. 309; Brett v. Cumberland, Cro. Jac. 521; Bachelour v. Gage, Cro. Car. 188; Pitcher v. Tovey, 4 Mod. 71, 76; Auriol v. Mills, 4 Term R. 94, 98, 99.

[229] Carley v. Lewis, 24 Ind. 23; Van Rensselaer v. Platner, 2 Johns. Cas. (N. Y.) 17.

[230] Whetstone v. McCartney, 32 Mo. App. 430; Taylor v. DeBus, 31 Ohio St. 468; Sutliff v. Atwood, 15 Ohio St. 186; Lodge v. White, 30 Ohio St. 569; Port v. Jackson, 17 Johns. (N. Y.) 239, 479; Boot v. Wilson, 8 East 311, *n.*; Arthur v. Vanderplank, 7 Mod. 198; Thursby v. Plant, 1 Saund. 237.

[231] Taylor v. DeBus, 31 Ohio St. 468; Stone, Succession of, 31 La. Ann. 311; Grommes v. St. Paul Trust Co., 147 Ill. 634, 648, 35 N. E. 820; Laird v. Mantonya, 83 Ill. App. 327.

an assignee of the lessee, the lease and not the assignment is the basis of the recovery, and it is not a fatal omission to fail to file a copy of the assignment.[232] A previous suit by lessor against the original lessee upon which nothing has been collected does not bar an action against the assignee.[233]

§ 448. The contract of the original lessee continues in force unless the lessor accepts the assignee as sole tenant and absolves the original lessee.[234] In order that an assignment shall discharge a lessee from express covenants, it is essential to show that there was some new leasing, or some understanding that the lessee be released, or some acts from which an intention to discharge the lessee can be inferred.[235] Mere acceptance of rent from an assignee does not discharge the lessee from an express covenant.[236] The recovery in an action against an assignee, not being for the full amount of the rent reserved, but only for the value of his own use and occupation, does not, beyond the satisfaction so received, affect the rights or the remedies of the lessor upon the covenants of the lease.[237] An express covenant to pay rent can be discharged by no mere collateral matter, and by nothing short of a mutual agreement.[238] "Doubtless it is competent," said Chief Justice Bigelow, "for a lessor to enter into such stipulations with an assignee as to accept him as sole tenant and to absolve the original lessee from his contract. But an intent to create a new contract and to annul the lease as against the original lessee must be clearly shown."[239] However, the law does not demand direct proof of an agreement in any form to establish such a discharge of the lessee. Acts of the parties, or circumstances inconsistent with any other conclusion, are sufficient to establish the fact of the surrender of the property by the lessee and his discharge by the lessor, and the acceptance of the assignee as tenant in his place. The fact that the lease provided that the lessee could not assign it without the assent of the lessor and his refusal to give

[232] Hardison v. Mann, 20 Ind. App. 404, 50 N. E. 899.

[233] Le Gierse v. Green, 61 Tex. 128.

[234] Laird v. Mantonya, 83 Ill. App. 327.

[235] Wineman v. Phillips, 93 Mich. 223, 53 N. W. 168; Stewart v. Sprague, 71 Mich. 50, 57, 38 N. W. 673; Bailey v. Wells, 8 Wis. 141.

[236] Harris v. Heackman, 62 Iowa 411, 17 N. W. 592; Deane v. Caldwell, 127 Mass. 242; Burnham v. Hubbard, 36 Conn. 539; Brosnan v. Kramer, 135 Cal. 36, 66 Pac. 979.

[237] Deane v. Caldwell, 127 Mass. 242; Inches v. Dickinson, 2 Allen (Mass.) 71; Dwight v. Mudge, 12 Gray (Mass.) 23.

[238] Burnham v. Hubbard, 36 Conn. 539.

[239] Way v. Reed, 6 Allen (Mass.) 364, 369.

such consent does not require a different conclusion. It is competent for the lessor to waive this condition by subsequent acts.[240] On the contrary, the lessee may by express contract continue his liability after an assignment and this would necessarily negative any inference that the assignee was accepted as a new tenant in place of the lessee. It is entirely within the province of the contracting parties to agree that the lessee shall remain as before principally and personally liable for the rentals, notwithstanding the substitution of another party as tenant.[241]

The effect of the assent by a lessor to a second assignment for a different use and occupation from that specified in the original lease would be to create a new tenancy and the original lessee's liability for rent would cease while such tenaney continued. It was contended by counsel for the lessor that the covenant to use the premises for a particular purpose was for the benefit of the lessor and could be waived. This might be true while the lessee was in occupation; but after he had parted with the estate, though still liable on his covenants to pay rent, a new contract could not be made in regard to the purpose for which the premises should be used, without his consent, given in such manner and under such circumstances as to show that he was still to be held liable under his lease.[242]

Though it appears that the lessee has assigned his lease for the remainder of the term to another party, yet it is competent for him to institute an action for any damages accruing to him by reason of a breach of the covenants of the lease by the lessor, while he held the lease, and to recover such damages it is proper that the lease be exhibited in evidence.[243]

§ 449. A lessee is liable as surety for the assignee. Though both lessee and assignee are liable to the lessor, yet the ultimate liability as between themselves, cannot depend upon which of the two he may, from interest or caprice, elect to pursue to the satisfaction of his demand. The estate is the consideration which the lessor furnished for his demand for rent, and from which it was expected to issue. The privity of estate between the lessor and the lessee, and upon which the personal liability of the lessee is founded, hav-

[240] Colton v. Gorham, 72 Iowa 324, 33 N. W. 76.

[241] Latta v. Weiss, 131 Mo. 230, 32 S. W. 1005.

[242] Fifty Associates v. Grace, 125 Mass. 161.

[243] Cleveland &c. R. Co. v. Wood, 189 Ill. 352, 59 N. E. 619, affirming 90 Ill. App. 551.

ing ceased, and by the assignment passed to the assignee, the latter, as between himself and the lessee, in the absence of any agreement, is to be regarded as primarily liable for the rent, and the personal liability of the lessee as collateral thereto. The lessee is liable in the nature of a surety for the assignee during the continuance of his interest, and although the assignee is not bound by an express promise, yet the law imposes a duty upon him to perform the covenants while he enjoys the estate.[244] So it was urged that the lessee was liable only in case the lessor failed to get the rent out of the assignee and if the property of the assignee was sufficient and the lessor allowed it to be taken out of his reach after being notified to proceed against it, the lessee would be discharged from liability.[245]

§ 450. The duration of a term after an assignment does not at all affect the obligation of a lessee upon his express covenant. By the common law, the liability of the lessee, on his express covenant to pay rent during the term, attaches to him and to his personal representatives, as long as assets remain in their hands, whether the term of the lease is for one year or for many, with or without a covenant for renewal, or in perpetuity. Numerous cases are reported, where the lease was perpetual or renewable forever, in which the same liability was found as in leases for a short term of years. Indeed, it seems, from the nature of the covenant itself, no distinction can be made on account of the duration of the term; it is a personal engagement to pay rent during the term; as long as assets can be found, the obligation may be enforced. The law imposes no limit upon the time within which covenants to pay money must mature. This is left entirely to the discretion of the contracting parties.[246] The force of an express covenant to pay rent, by construction of the whole instrument, may be modified and limited by other covenants. In construing one lease, the court found that the lessee, after the assignment of the term, was not liable under a particular covenant for the payment of rent after a reappraisement. In determining this question the court looked to the relations and interests which the respective parties had in the subject-matter, and con-

[244] Sutliff v. Atwood, 15 Ohio St. 186; Main v. Feathers, 21 Barb. (N. Y.) 646; Latta v. Weiss, 131 Mo. 230, 32 S. W. 1005; Smith v. Peat, 9 Exch. 161; Burnett v. Lynch, 5 B. & C. 589; Humble v. Langston, 7 M. & W. 517, 530; Woolveridge v. Steward, 1 Cr. & M. 644, 659.

[245] Latta v. Weiss, 131 Mo. 230, 240, 32 S. W. 1005.

[246] Taylor v. DeBus, 31 Ohio St. 468.

cluded that the assignees in possession were the proper parties to act in the reappraisement.[247]

§ 451. In case a lessee has been held to his liability for rent after an assignment, he will be entitled to recover the rent from his assignees.[248] Where a lessee has been compelled to pay damages to the lessor for breach of the covenants of the lease while his assignee is in possession, he can maintain an action against the assignee for neglect to perform the covenants, whereby the lessee suffered damage.[249] The effect of the assignment is that the lessee becomes a surety to the lessor for the assignee, to pay the rent and perform the covenants running with the estate, and the surety after paying the debt, or discharging the obligation to which he is liable, has his remedy over against the principal.[250] In a subsequent case Chief Justice Cockburn, while conceding that the assignee might be held on the ground of the implied contract, was of the opinion that the liability of the assignee might be put on another and preferable ground, namely, that when one person is compelled to pay damages for the legal default of another, he is entitled to recover, from the person by whose default the damage was occasioned, the money so paid, and that it was a matter of indifference whether the liability rested on an implied contract or on an obligation imposed by law; it was a duty the law enforces.[251] In case either of these grounds are adopted as the basis on which a lessee may maintain an action against an assignee, it is clear that he can do so only after he has paid the lessor for breach of the covenants of the lease by the assignee. If he is a surety, then he must pay the debt for which he is liable before he can recover of the principal.[252] If it is a debt imposed upon him by the default or act of the assignee it must of course be discharged before the liability of the assignee accrues.[253] This right of action in the lessee is not restricted to his immediate assignee, but is available against any subsequent one who accepts the estate.[254]

[247] Worthington v. Hewes, 19 Ohio St. 66.

[248] Patten v. Deshon, 1 Gray (Mass.) 325; Farrington v. Kimball, 126 Mass. 313; Mason v. Smith, 131 Mass. 510.

[249] Burnett v. Lynch, 5 B. & C. 589.

[250] Wolveridge v. Steward, 1 Cr. & M. 644, 660; Humble v. Langston, 7 M. & W. 517, 530.

[251] Moule v. Garrett, L. R., 7 Exch. 101, affirming L. R., 5 Exch. 132.

[252] Hoyt v. Wilkinson, 10 Pick. (Mass.) 31.

[253] Farrington v. Kimball, 126 Mass. 313.

[254] Wolveridge v. Steward, 1 Cr. & M. 644, 660; Moule v. Garrett, L. R., 5 Exch. 132, L. R., 7 Exch. 101; Farrington v. Kimball, 126 Mass. 313; Mason v. Smith, 131 Mass. 510.

But whether the lessee may recover from his first assignee such sums as he has been obliged to pay, arising out of the default of a second assignee to whom the first assignee has assigned all his interest, presents a very different question, in the absence of an express assumption by the first assignee. The implied promise to perform the duty imposed on him by the acceptance of the assignment must be limited to the time while he holds the estate under the assignment and while by virtue of his privity of estate with the lessor, he is liable to him for the performance of the covenants. Such promise cannot include the payments of any sums, except those which as assignee he assumes, and for which, when he assigns the lease, he is no longer liable to the lessee.[255] One in by mesne assignment is under an obligation to indemnify the original lessee against breaches of covenant in the lease, committed during the continuance of his own tenancy, but not for any subsequent breach.[256]

But in case the assignment is in direct violation of the terms of the lease and the lessors have not consented or done any act which would operate as a waiver, the assignee would be liable to his assignor for rent even before the latter had paid the rent to the original lessor. The assignee is not in a position to deny such liability until he has made some arrangement with the original lessors rendering the assignment valid. No relation of landlord and tenant exists between the assignee and the original lessors until the condition against assignment has been waived.[257]

An express covenant by the assignee to repair would enable the assignor to maintain an action against him for failure to repair even before the assignor himself had been made liable over to the lessor. In the case where this decision was made the leased premises were a turnpike road and the lessee was liable for accidents occurring from the disrepair of the road.[258]

§ 452. When the covenant to pay rent is implied in law, acceptance of rent directly from an assignee will discharge the original lessee.[259] If the lessee's obligation to pay rent is not founded upon an express agreement but is only implied in law from privity of

[255] Mason v. Smith, 131 Mass. 510.

[256] Brinkley v. Hambleton, 67 Md. 169, 177, 8 Atl. 904; Burnett v. Lynch, 5 B. & C. 589; Moule v. Garrett, L. R., 5 Exch. 132, L. R., 7 Exch. 101.

[257] Darmstaetter v. Hoffman, 120 Mich. 48, 78 N. W. 1014.

[258] Jouitt v. Lewis, 4 Litt. (Ky.) 160.

[259] Marsh v. Brace, Cro. Jac. 334; Stimmel v. Waters, 2 Bush (Ky.) 282.

estate between the parties, the assignment of the lease and surrender of possession to the assignees, with the consent of the lessor, to be implied from his acceptance of rent from the new tenant, extinguishes the privity of estate between the parties, and the consequent implied liability of the lessee to pay rent. So, where tenants holding over from year to year assign an estate and the assignee is accepted as a tenant by the landlords, the original tenant ceases to be liable for rent because he was only liable on an implied promise raised in law by his occupation.[260]

In another case a reservation of rent was followed by the clause, "the said lessees well and truly keeping and performing their part of these presents to be by them performed as aforesaid." This was not an express covenant to pay rent, but only an implied one, so that the original lessee was not liable for rent after an assignment of the lease. These words are not so strong as the words "yielding and paying," which by the better view do not create an express covenant.[261]

§ 453. A surety for a lessee is not discharged from liability on the express covenants of the lease by an assignment to any greater extent than the lessee himself would be discharged. A contract of guaranty presupposes another and original contract, to which it is collateral; it is an undertaking to answer for the performance of some contract of another. A failure to pay rent would, even after an assignment of a lease, be the default of the lessees, and the sureties would be liable as their guarantors.[262] If the lease provides that the lessee shall not assign or sub-let without written consent, there is an implied understanding that with such consent there may be an assignment or sub-letting, and the sureties are bound to know this when they executed their guaranty. Hence it would not operate to discharge them from their liability that the lessors should give such a written consent. That consent having been obtained at any time, it did not matter whether the lessees themselves sub-let or through an agent, nor did it matter that the agent was the lessor himself.[263] A material alteration in the relation of the original parties to each other, without the consent of the surety, will, however, operate as a discharge, as if the

[260] Lodge v. White, 30 Ohio St. 569.
[261] Fanning v. Stimson, 13 Iowa 42.
[262] Dietz v. Schmidt, 27 Ill. App. 114; Bradley v. Walker, 93 Ill. App. 609; Farnham v. Monroe, 35 Ill. App. 114; Oswald v. Fratenburgh, 36 Minn. 270, 31 N. W. 173; Almy v. Greene, 13 R. I. 350; Morgan v. Smith, 70 N. Y. 537, 544; Way v. Reed, 6 Allen (Mass.) 364; Hunt v. Gardner, 39 N. J. L. 530; Damb v. Hoffman, 3 E. D. Smith (N. Y.) 361.
[263] Morgan v. Smith, 70 N. Y. 537; Stein v. Jones, 18 Ill. App. 543.

lessor enlarges the time for performance or makes a new lease of the premises, either to the lessee or to some other person.[264] Furthermore, it has been said that the decided cases favor the proposition that one who signs a lease apparently as principal may show by parol that he did sign as surety to the knowledge of the other party to the instrument.[265]

§ 454. **Liability of lessor on covenant after assignment.**—Most of the cases which have arisen on the point of liability after assignment are cases of covenants by lessees, but the reasoning is equally good for covenants by lessors. A lessor who has expressly covenanted with his lessee for the performance of certain things cannot escape his liability on such covenants by assigning the reversion to another. "However it may be as to the benefits, lessors cannot get rid of the burden of their contracts by conveying their land. In the case of the tenant as in the case of the landlord, it cannot be endured that he should afterwards be deprived of his action on the covenant to which he trusted by an act to which he cannot object."[266] To a certain extent it is also true that the lessor remains liable to an assignee of the lessee, on the original covenants in the lease. Where a lease contains an agreement that the lessee may purchase the land during the continuance of the lease, the assignment of the lease conveys to and invests in the assignee the same right.[267] This rule must be restricted to cases where no terms of sale are stipulated for or the sale is to be for cash. If the sale is to be for credit, the lessor is under no obligation to give credit to any one but the original lessee, and a contract so personal in its nature cannot be assigned to another.[268]

§ 455. **An assignee of a lease is bound by privity of estate to perform the express covenants which run with the land,** but in the absence of express agreement on his part, he is liable only on such covenants as run with the land and only during such time as he holds the term.[269] When the assignee accepts the assignment of a lease, he

[264] Miller v. Stewart, 9 Wheat. (U. S.) 680; White v. Walker, 31 Ill. 422.

[265] Stein v. Jones, 18 Ill. App. 543.

[266] Carpenter v. Pocasset Manuf. Co., 180 Mass. 130, 133, 61 N. E. 816, per Holmes, C. J.; Jones v. Parker, 163 Mass. 564, 40 N. E. 1044.

[267] Kerr v. Day, 14 Pa. St. 112; Jackson v. Groat, 7 Cow. (N. Y.) 285; Laffan v. Naglee, 9 Cal. 662; Hall v. Center, 40 Cal. 63; Schroeder v. Gemeinder, 10 Nev. 355.

[268] Menger v. Ward, 87 Tex. 622, 30 S. W. 853.

[269] Myers v. Silljacks, 58 Md. 319; Donelson v. Polk, 64 Md. 501, 2 Atl. 824; Nickel v. Brown, 75 Md. 172, 23 Atl. 736; Gordon v. George, 12 Ind.

is charged with knowledge of the covenants therein and takes it *cum onere*, subject to the payment of the rent which shall thereafter become due and to the performance of the covenants running with the land, which by the terms of the lease, the lessee was bound to perform. Because of privity of estate he is liable upon covenants maturing and broken while title is held by him.[270] The law has been stated to be that "the assignee is answerable for the rent during his ownership of the term under the assignment, and his liability therefor arises out of the privity of estate, and this, without reference to any obligation assumed by him in the contract of assignment."[271] The original lessee is bound by the contract to make the payments. The assignee is bound by his acceptance of the lease to make good the covenant to pay rent therein contained. His liability is upon the covenants and arises not from any express assumption or agreement to pay it which might be contained in the written assignment, but from the privity of estate by reason of his ownership and right to enjoy the benefits of the lease.[272]

The assignee is in privity of estate but not in privity of contract with the lessor and is only liable on covenants which run with the land, such as covenants for rent, to pay taxes and to yield up premises in good repair.[273] Where rent is payable quarterly, an assignee is liable for rent for the entire quarter within which he became assignee, the rent not yet having accrued. The quarter's

408; Reid v. John F. Wiessner Brewing Co., 88 Md. 234, 40 Atl. 877; Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 N. E. 1105; Muldoon v. Hite, 6 Ky. L. R. 663; Le Gierse v. Green, 61 Tex. 128; Bonetti v. Treat, 91 Cal. 223, 27 Pac. 612; Darmstaetter v. Hoffman, 120 Mich. 48, 78 N. W. 1014; Grundin v. Carter, 99 Mass. 15; Gray v. Clement, 12 Mo. App. 579; Trask v. Graham, 47 Minn. 571, 50 N. W. 917.

[270] Graves v. Porter, 11 Barb. (N. Y.) 592; Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910; Bedford v. Terhune, 30 N. Y. 453, 458, 86 Am. Dec. 394; Gas Co. v. Johnson, 123 Pa. St. 576, 16 Atl. 799; Dunn v. Barton, 16 Fla. 765; West Virginia C. & P. Co. v. McIntire, 44 W. Va. 210, 28 S. E. 696; Webster v. Nichols, 104 Ill. 160; Journeay v. Brackley, 1 Hilt. (N. Y.) 447; Overman v. Sanborn, 27 Vt. 54; Bailey v. Wells, 8 Wis. 141.

[271] Bonetti v. Treat, 91 Cal. 223, 27 Pac. 612.

[272] Watson &c. Co. v. Casteel, 73 Ind. 296; McDowell v. Hendrix, 67 Ind. 513; Gordon v. George, 12 Ind. 408; Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. 196; Stewart v. Long Island &c. R. Co., 102 N. Y. 607, 8 N. E. 200.

[273] Peck v. Christman, 94 Ill. App. 435; Consolidated Coal Co. v. Peers, 97 Ill. App. 188; Trask v. Graham, 47 Minn. 571, 50 N. W. 917; Van Rensselaer v. Bonesteel, 24 Barb. (N. Y.) 365; Post v. Kearney, 2 N. Y. 394.

rent in such cases is not to be apportioned.[274] There is no reason why the same rule should not apply as to taxes. If the covenant to pay taxes be general, it would be satisfied by payment within the year so as to save the lessor harmless. The lessee would not be at fault till the taxes became delinquent. If there had been no breach of the covenant to pay taxes, the assignee would take the leasehold estate *cum onere* as to them also.[275] The general rule is that the assignee of a lease takes it subject to a covenant therein to pay taxes, and a subsequent assignment by him will not relieve him from liability occurring during the continuance of his title.[276] So, where such an obligation rested on the original lessee, an assignee of the lease would likewise be liable to pay taxes on all improvements erected on the leased premises during the term.[277]

If a party enters as a sub-tenant, he is bound by the terms of the original lease, of the existence and terms of which he is bound to take notice. So, if the sub-tenant holds possession after the term of the original lease has matured, he is guilty of unlawfully and forcibly detaining possession of the premises.[278] It has even been held that a collateral agreement by the lessee which was not put on record, would bind a sub-lessee, for it was the duty of the latter to inform himself of the covenants undertaken by the lessee.[279]

§ 456. The liability of an assignee upon the covenants of a lease continues only so long as the privity of estate continues; when that ceases his liability ceases. That an assignee of a lease may, by reassignment, divest himself of all liability upon the lease, is well established.[280] He may do this without giving notice to the lessor or ob-

[274] Graves v. Porter, 11 Barb. (N. Y.) 592; Trask v. Graham, 47 Minn. 571, 50 N. W. 917.

[275] Trask v. Graham, 47 Minn. 571, 50 N. W. 917.

[276] State v. Martin, 14 Lea (Tenn.) 92, 52 Am. R. 167; Salisbury v. Shirley, 66 Cal. 223, 5 Pac. 104; Wills v. Summers, 45 Minn. 90, 47 N. W. 463.

[277] Huddell, In re, (Pa.), 10 Am. St. 559, *n*.

[278] Blachford v. Frenzer, 44 Neb. 829, 62 N. W. 1101.

[279] Duhn v. Barton, 16 Fla. 765.

[280] Smith v. Ingram, 90 Ala. 529, 8 So. 144; Johnson v. Sherman, 15 Cal. 287, 76 Am. Dec. 481; Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N. E. 920; Chicago Attachment Co. v. Davis &c. Co., 142 Ill. 171, 178, 31 N. E. 438; Trabue v. McAdams, 8 Bush (Ky.) 74; Meyers Bros. v. Gaertner, 106 Ky. 481, 50 S. W. 971; Readey v. American &c. Co., 60 Ill. App. 501; Hintze v. Thomas, 7 Md. 346; Nickel v. Brown, 75 Md. 172, 23 Atl. 736; Donelson v. Polk, 64 Md. 501, 2 Atl. 824; Reid v. John F. Wiessner Brewing Co., 88 Md. 234, 40 Atl. 877; Durand v. Curtis, 57 N. Y. 7; Jacques v. Short, 20 Barb. (N. Y.) 269; Davis v. Morris, 36 N. Y. 569; Grundin v. Carter, 99 Mass. 15; Sanders v. Partridge,

taining his leave; and notwithstanding a condition in the original lease that the lessee shall not assign without the license of the lessor.[281] In one case the illustration was put that if an assignee of a lease kept possession of the premises out of which he made a profit and assigned to a beggar, he would thereby completely relieve himself from all liability for rent as assignee of the term, so strongly is it held that the liability is only by reason of the privity of estate and not at all by reason of the possession.[282] However, the assignee of a lease cannot discharge his liability to pay the rent reserved by anything short of an actual absolute transfer of the unexpired term.[283] So, a transfer of a leasehold interest by the assignee three days before rent accrued, not accompanied by a transfer of possession, was held not to destroy the assignee's privity of estate. The assignee remained in possession, and by claiming and receiving subsequently accruing rent from an undertenant, he had the beneficial enjoyment when the covenant to pay rent to the lessor was broken. "Under such circumstances," said the Pennsylvania Court, "the privity out of which his liability to pay arose was not destroyed by the assignment."[284]

There must be a consenting assignee before an assignment of a lease is complete. An assignment stands in no other light than any other contract; it could not be made by the assignor alone, without the consent of the assignee. The delivery of the lease might not be necessary, but the acceptance of the assignment, either express or implied, is certainly requisite to its validity.[285]

Conveyance of an equitable title by giving a title bond is not such a transfer as will relieve him from liability. The conveyance must be by deed duly executed and recorded.[286] A person to whom the equitable title of leasehold property belongs on the day rent accrues, is not responsible for rent. It does not matter how extensive the equity may be, or that the tenant has contracted to convey the property to him on demand and the full price has been paid, so that in every point of view the purchaser was the absolute owner except as to the legal title, there is still no responsibility for rent because

108 Mass. 556; Taylor v. De Bus, 31 Ohio St. 468; Tibbals v. Iffland, 10 Wash. 451, 39 Pac. 102.

[281] Tibbals v. Iffland, 10 Wash, 451, 39 Pac. 102.

[282] Taylor v. Shum, 1 B. & P. 21; Borland's Appeal, 66 Pa. St. 470.

[283] Trabue v. McAdams, 8 Bush (Ky.) 74.

[284] Negley v. Morgan, 46 Pa. St. 281, 285, per Strong, J.

[285] Beattie v. Parrott Silver &c. Co., 7 Mont. 320, 17 Pac. 451; Maynard v. Maynard, 10 Mass. 456; Townson v. Tickell, 3 B. & Ald. 31, 5 E. C. L. 28.

[286] Mayhew v. Hardesty, 8 Md. 479.

the purchaser does not have the legal title and you cannot sue any one in a court of law except the one who has the legal title. So, in a jurisdiction where a deed does not convey legal title till it has been recorded, an assignee cannot be held liable at law on the covenants of a lease till the instrument of assignment has been duly recorded.[287]

Nevertheless, it remains true that a reassignment may be made for the express purpose of avoiding liability, and will be effective to accomplish that purpose, even though a premium is given to induce an acceptance of the transfer. There is no fraud in the assignee of a lease reassigning his interest with a view to getting rid of the lease; hence, he may reassign it to a beggar, or to a married woman or to a person on the point of leaving the country.[288] A reassignment by the assignee to the original lessee would discharge the assignee from the covenants under the lease.[289] But a partial assignment over would not have this effect.[290] Abandonment of demised premises by an assignee does not operate to rid him of this estate therein, and consequently as the liability on the covenants of the lease rests on privity of estate, mere abandonment, not destroying the privity, would not release him from liability.[291] And furthermore, it is true that even a valid transfer of his interest will not have the effect of discharging an assignee from liability for breaches of covenant already committed.[292]

§ 457. The assignee of a leasehold estate is not bound by the covenants of the lease till the transfer has been completed by his acceptance of the assignment. If the assignment is made by the assignor at his own instance or under an arrangement between third parties, and the assignee has no knowledge of the assignment and never accepts it, he is not bound by it.[293] Acceptance by an assignee of a general assignment does not bind him as assignee of a lease, unless he elects

[287] Nickel v. Brown, 75 Md. 172, 23 Atl. 736.

[288] Johnson v. Sherman, 15 Cal. 287, 76 Am. Dec. 481; Tyler v. Giesler, 74 Mo. App. 543; Johnston v. Bates, 16 Jones & S. (N. Y.) 180; Tate v. McCormick, 23 Hun (N. Y.) 218; Tibbals v. Iffland, 10 Wash. 451, 39 Pac. 102.

[289] Dengler v. Michelssen, 76 Cal. 125, 18 Pac. 138; Beattie v. Parrott Silver &c. Co., 7 Mont. 320, 17 Pac. 451.

[290] Muldoon v. Hite, 6 Ky. L. R. 663.

[291] Bonetti v. Treat, 91 Cal. 223, 27 Pac. 612; Blake v. Sanderson, 1 Gray (Mass.) 332.

[292] Consolidated Coal Co. v. Peers, 150 Ill. 344, 37 N. E. 937, affirming 39 Ill. App. 453; State v. Martin, 14 Lea (Tenn.) 92.

[293] MacFarland v. Heim, 127 Mo. 327, 29 S. W. 1030.

to acept the lease.[294] The devisee of an unexpired term, who does not enter upon the demised premises nor in any way signify his intention to accept the lease, is not liable for the rent. When one becomes assignee of a lessee by operation of law, he is not, in general, chargeable with the performance of the covenants of the lease until he enters or does some act showing his acceptance. He may accept without entry, but he is not compelled to take the assignment.[295] A devisee is an assignee in law, and, never having entered upon the demised premises, nor done any act to signify acceptance of the lease, would not be liable as assignee upon the covenants of the instrument.[296]

§ 458. An actual entry by an assignee upon the demised premises is not necessary in order that he should be bound by the covenant to pay rent, for, by accepting an interest under the conveyance, he incurs the responsibility connected with the estate.[297] The cases decide that the assignee of the whole premises is liable for the rent of the whole, though only in possession of a part;[298] that the assignee of a separate part is liable for rent only of the part assigned;[299] that rent is due from the assignee of a lease only by virtue of his privity of estate with the landlord;[300] and there is no reason for holding that the assignee of an undivided interest in a leasehold is liable in proportion to his possession which does not create the liability, and not in proportion to his estate, which does.[301] In an extreme case an assignee

[294] Smith v. Ingram, 90 Ala. 529, 8 So. 144. Assignees under general assignment may accept or refuse leasehold estates and an arrangement for the acceptance of rent from one until he exercises his option will not amount to a waiver of the breach caused by the assignment. Medinah Temple Co. v. Currey, 162 Ill. 441, 44 N. E. 839.

[295] Whitcomb v. Starkey, 63 N. H. 607, 4 Atl. 793; Williams v. Bosanquet, 1 B. & B. 238.

[296] Whitcomb v. Starkey, 63 N. H. 607, 4 Atl. 793.

[297] Benedict v. Everard, 73 Conn. 157, 46 Atl. 870; Babcock v. Scoville, 56 Ill. 461; Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. 196; Breckenridge v. Parrott, 15 Ind. App. 411, 44 N. E. 66; Trabue v. McAdams, 8 Bush (Ky.) 74; Smith v. Brinker, 17 Mo. 148; Willi v. Dryden, 52 Mo. 319; St. Louis Pub. Schools v. Boatmen's Ins. Co., 5 Mo. App. 91; University of Vermont v. Joslyn, 21 Vt. 52; Walton v. Cronly, 14 Wend. (N. Y.) 63; Williams v. Bosanquet, 1 B. & B. 238, 5 E. C. L. 609; Burton v. Barclay, 7 Bing. 745; Walker v. Reeves, 2 Doug. 461; Cook v. Harris, 1 Ld. Raym. 367.

[298] Negley v. Morgan, 46 Pa. St. 281.

[299] Astor v. Miller, 2 Paige (N. Y.) 68, 78; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643, 653.

[300] Taylor v. Shum, 1 B. & P. 21.

[301] St. Louis Pub. Schools v. Boatmen's Ins. So., 5 Mo. App. 91; Babcock v. Scoville, 56 Ill. 461.

under an assignment indorsed on a lease was held liable on the covenants for payment of rent, although neither the lessee nor assignee occupied under the lease and the rent was collected from sub-tenants by an agent of the lessee.[302]

One decision has been found which seems inconsistent with the foregoing rule. There the assignee of an undivided interest in a leasehold, in possession of the whole, was held liable for the entire rent, to the exclusion of the assignee and owner of a part interest who was out of possession. The privity of estate which creates the liability was declared to be one of actual possession and enjoyment.[303] And in another case in the same jurisdiction it has been asserted that possession is the foundation and boundary of the liability of the assignee.[304]

The assignment of a lease for the whole term, whether absolute, or subject to a proviso for reassignment in a certain event, is, as far as concerns the interest to be transferred, exactly the same. The whole interest is assigned and the whole is to be reassigned; it vests absolutely, till such reassignment, in the party who is to reassign, and is not less absolute because, by agreement between the immediate parties, the assignor may entitle himself to a reconveyance of the term. In the intermediate time, or till such reassignment, the assignee stands in the shoes of the assignor and is, as against the lessor, subject to all the liabilities created by the lease. So that if in one case, he is liable without entry or occupation, he is equally so in the other.[305] Lord Thurlow said it was no matter whether the person sued as assignee took the lease as a pledge or as a purchase, he could not take the estate without taking the burden.[306]

In Missouri and New York the doctrine of making a distinction between absolute assignments and those by way of mortgage, which was advanced in the early English cases and subsequently discarded, seems to be still law. Possession in the assignee is necessary in those states in order to create a liability to pay rent; the assignee

[302] Sanders v. Partridge, 108 Mass. 556.

[303] Damainville v. Mann, 32 N. Y. 197.

[304] Carter v. Hammett, 18 Barb. (N. Y.) 608.

[305] Williams v. Bosanquet, 1 B. & B. 238, 262, 5 E. C. L. 609; Sparkes v. Smith, 2 Vern. 275; Pilkington v. Shaller, 2 Vern. 374; Lucas v. Comerford, 1 Ves. Jr. 235; McMurphy v. Minot, 4 N. H. 251; Dartmouth College v. Clough, 8 N. H. 22; Farmers' Bank v. Mutual Assur. Soc., 4 Leigh (Va.) 69; Mayhew v. Hardesty, 8 Md. 479; Eaton v. Jaques, 2 Doug. 455, holding the contrary, is expressly overruled.

[306] Lucas v. Comerford, 1 Ves. Jr. 235.

must be in a position to receive the benefits, before he can be made to suffer the burden. Possession is the basis of his liability. But this applies only to transfers by way of security where possession is not taken by the assignee.[307]

However, as regards third persons the rights of an assignee are not complete till he enters into possession of the premises. Prior to entry he may maintain ejectment to recover possession of the leasehold estate, but he cannot maintain trespass in respect to the premises unless he has actually entered into possession of them.[308] A lienor, buying at the sale under proceeding to enforce his lien, does not become an assignee liable on the covenants of the lease.[309]

§ 459. Who are entitled as assignees of the reversion.—The prevailing rule as stated in the preceding section, is that a mortgagee of a leasehold estate, whether in or out of possession is an assignee of the lease and as such is liable on all the covenants which run with the land. It has been held, however, in a jurisdiction where a mortgage does not convey the legal estate, that a mortgagee of the reversion would not be liable to a lessee upon the covenants of a lease. The mortgage created no privity between the parties. It passed no estate in the land, but gave only a lien.[310] It was claimed to be different with a mortgagee in possession, and that he had such an estate as would make him liable upon covenants running with the land. In New York the law is that when the mortgagee takes possession, he then has all the right, title, and interest of the mortgagor.[311] In California, on the other hand, it is held that the interest of a mortgagee in possession is the same as that of one out of possession.[312] The Minnesota court passing upon this question were of opinion that the decisions in California were in accordance with the better reason. The mere act of the parties, of going into possession and consenting to or acquiescing in it could not have the effect to pass the mortgagor's estate to the mortgagee. The fact that possession is added cannot change the lien of a mortgage into an estate.[313]

[307] Smith v. Brinker, 17 Mo. 148; Willi v. Dryden, 52 Mo. 319; McKee v. Angelrodt, 16 Mo. 283; Tallman v. Bresler, 56 N. Y. 635, affirming 65 Barb. (N. Y.) 369.

[308] Ryan v. Clark, 14 A. & E. N. S. 65, 73, 68 E. C. L. 65; Harrison v. Blackburn, 17 C. B. N. S. 678, 112 E. C. L. 678.

[309] Merchants' Ins. Co. v. Mazange, 22 Ala. 168

[310] Cargil v. Thompson, 57 Minn. 534, 59 N. W. 638.

[311] Astor v. Hoyt, 5 Wend. (N. Y.) 603; Moffatt v. Smith, 4 N. Y. 126.

[312] Johnson v. Sherman, 15 Cal. 287; Dutton v. Warschauer, 21 Cal. 609.

[313] Cargil v. Thompson, 57 Minn. 534, 59 N. W. 638.

A grantee of a reversion acquires only a right of action for a subsequent breach of the terms of letting, but none for a breach occurring prior to the conveyance. The purchaser in such case acquires only a right to the premises in the condition in which they are at the time of the conveyance.[314] So the assignee is only liable for breaches of covenant during such time as he continues to hold the reversionary interest.[315]

§ 460. An assignee of part of leased premises is liable for his pro rata share of the rent reserved in the lease, but he is not liable for the entire rent.[316] Where a covenant running with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to different individuals, the covenant will attach upon each parcel *pro tanto,* and the assignee will be answerable for his proportion only of any charge upon the land, which was a common burden upon the whole.[317] If the landlord seeks to recover of an assignee for a part of the permises according to the value of the land, it is the business of the jury on evidence produced to apportion the rent to the value of the land.[318]

The case is somewhat different where an assignee of a portion of a leasehold estate has no entire interest in any part of the premises, but a partial undivided interest in the whole, as where separate deeds of assignment of individed thirds were executed by the lessee. These three assignees held the entire interest of the original lessee, not as joint purchasers, but by separate deeds of assignment, each of them an undivided third. If no one of them has taken actual possession, they are not jointly liable for the whole rent, but each assignee is severally liable for a part only, according to his interest in the premises as compared with the whole interest under the lease.[319] So, where a lease was made to two and one assigned his interest, the assignee was

[314] Haeussler v. Holman &c. Co., 49 Mo. App. 631.

[315] Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910.

[316] Hogg v. Reynolds, 61 Neb. 758, 86 N. W. 479; Van Rensselaer v. Bradley, 3 Denio (N. Y.) 135; Fulton v. Stuart, 2 Ohio 216; Curtis v. Spitty, 1 Bing. N. C. 756; Woodhull v. Rosenthal, 61 N. Y. 382; Babcock v. Scoville, 56 Ill. 461; Astor v. Miller, 2 Paige (N. Y.) 68, 78; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643, 653; Lansing v. Van Alstyne, 2 Wend. (N. Y.) 561; Stevenson v. Lambard, 2 East 575.

[317] Van Horne v. Crain, 1 Paige (N. Y.) 455; Astor v. Miller, 2 Paige (N. Y.) 68, 78; Harris v. Frank, 52 Miss. 155; Babcock v. Scoville, 56 Ill. 461; Stevenson v. Lambard, 2 East 575.

[318] Van Rensselaer v. Bradley, 3 Denio (N. Y.) 135, § 668.

[319] Babcock v. Scoville, 56 Ill. 461.

liable only for one-half the rent because he is liable only on the circumstance of privity of estate and not because he is in possession. If a lease is made to two, the lessor and lessees are privies in estate as well as privies in contract. Each lessee is in privity of estate with the lessor as to one undivided half of the leasehold, and no more, because the two halves together make the whole estate. Where one of these lessees assigns, the other lessee remains in privity of estate with the landlord only for the half which remains. As he is liable by virtue of this privity, it would seem that he should be liable only in proportion to it. As he is privy as to one-half, he should pay rent for one-half and no more. His estate in the land is the ground of liability and this estate remains the same, whether he is in actual possession of all the property leased or a part of it, or has no actual possession at all. Where the assignee holds in severalty, it has never been questioned that he is liable only for the rent of his separate part of the premises; and where he has an undivided interest in the whole leasehold, no reason is apparent for any different rule.[320]

The foregoing reasoning would seem not to include covenants for the performance of acts other than the payment of rent, such as the covenant to surrender possession at the end of the term. Consequently, an action for breach of a covenant to deliver up possession was successfully maintained against assignees of undivided interests in a term for years. While assignees of a leasehold as tenants in common, they are jointly and severally liable on covenants to repair and yield up possession at the end of the term. If they are not jointly and severally liable, one tenant in common owning a small undivided interest might prevent the delivery of the property in its entirety. While one of the tenants in common remains, the unity of possession is undivided, and as to those at least who continue in possession, the unity of obligation flows from unity of possession. Assignees of undivided and unequal interests in a lease, while holding as tenants in common, are jointly and severally liable on covenants in the lease to repair and deliver up the demised premises at the end of the term. Such covenants run with the land, while the personal privity of contract between the lessor and the lessee remains unaffected.[321]

§ 461. Where a lessee makes a general assignment of all his property of every sort and description for the benefit of his creditors, it is sufficiently comprehensive to pass to the trustee or assignee the grant-

[320] St. Louis Pub. Schools v. Boatmen's Ins. Co., 5 Mo. App. 91.

[321] Coburn v. Goodall, 72 Cal. 498, 14 Pac. 190.

or's interest in the term. But the trustee is not bound to accept such a transfer of the term; he has his election to take it or not according to the best interest of the creditors, and unless he elects to take it or goes into possession and occupies the premises he will not be bound by the covenants of the lease.[322] It has been uniformly held that an assignee for the benefit of creditors may accept the assignment and enter upon the execution of the trust without becoming the assignee of the lease held by the insolvents, unless he elects to do so.[323] The failure of the assignor to enumerate property in the inventory does not have the effect of limiting the grant so that leasehold property of the debtor comprehended within the general terms of the deed shall not pass by the deed.[324] Just when the assignee will be held to have accepted the lease and bound himself to perform its covenants is a matter of doubt, and no general rule can be laid down as to the effect of specific acts of the assignee in determining whether there has been an election to take the leasehold as a part of the assigned property. An examination of the adjudged cases is valuable as fixing the general principle by which they are governed. This general principle seems to be that the assignee will not be held to have accepted the lease, unless it be shown that he has done so expressly, or by unequivocal acts inconsistent with the right of entry by the landlord, has indicated an election to appropriate the leasehold estate.[325] Lord Ellenborough held in one case that the allowing of the bankrupt's cows to remain on a leased farm for two days and ordering them to be milked there, was an adoption of the demise so as to make the assignees the tenants of the lessor.[326] In another case Chief Justice Abbot held that the assignee elected to accept the lease by using the premises for the benefit of the creditors.[327] These cases establish the position that taking pos-

[322] Smith v. Ingram, 90 Ala. 529, 8 So. 144; Dorrance v. Jones, 27 Ala. 630; White v. Griffing, 44 Conn. 437; Horwitz v. Davis, 16 Md. 313; Boyce v. Bakewell, 37 Mo. 492; Carter v. Hammett, 12 Barb. (N. Y.) 253, 263; Commonwealth v. Franklin Ins. Co., 115 Mass. 278; Faxon, Ex parte, 1 How. (U. S.) 404; Copeland v. Stephens, 1 B. & Ald. 593; Turner v. Richardson, 7 East 336; Gibson v. Courthope, 1 D. & R. 205, 16 E. C. L. 33; Wheeler v. Bramah, 3 Camp. 340; Thomas v. Pemberton, 7 Taunt. 206; Hill v. Dobie, 8 Taunt. 325; Ansell v. Robson, 2 Cr. & J. 610; Hanson v. Stevenson, 1 B. & Ald. 303; Medinah Temple Co. v. Curry, 162 Ill. 441, 44 N. E. 839.

[323] Smith v. Goodman, 149 Ill. 75, 36 N. E. 621; Martin v. Black, 9 Paige (N. Y.) 641, 644; Washburn, In re, 11 Nat. Bank Reg. 66; Journeay v. Brackley, 1 Hilt. (N. Y.) 447.

[324] Smith v. Goodman, 149 Ill. 75, 36 N. E. 621.

[325] Smith v. Goodman, 149 Ill. 75, 36 N. E. 621.

[326] Welch v. Myers, 4 Camp. 368.

[327] Clark v. Hume, Ry. & M. 207.

session of the leasehold estate, and holding it for the benefit of the creditors, though for ever so short a time, by virtue of the assignment, is the true test. This does not mean that if the assignee entered only for the purpose of obtaining possession of goods, it would be an acceptance, for that would, in no just sense, be taking possession of the premises. But if an assignee took possession of a store to use it as a place to sell the goods, it falls directly within the principle of the cases referred to. If that was the object, it is immaterial how long the possession was retained, as when once the election was made the assignee could not recede from it.[328] Carrying on business on the premises[329] or intermeddling with the farm land of a bankrupt[330] has been held sufficient to establish an acceptance by the assignee. If an assignee assumes to dispose of a leasehold estate by sale, that amounts to an acceptance. It is difficult to see how an assignee in bankruptcy can sell the lease of the bankrupt and receive therefor money for the benefit of the creditors, without accepting the assignment of the lease.[331]

§ 462. The assumption by an assignee of a lease of all the obligations and liabilities of the assignor, creates a privity of contract as well as privity of estate between the lessor and the assignee; so that where the assignee of the lease at the time of the assignment covenants under seal to assume all the covenants of the original lessor, he remains liable on the covenants of the lease after an assignment over just as if he were an original lessee, bound by express covenants.[332] It is clear that the assignee may by contract between himself and the lessor bind himself to the full performance of all the covenants of the lease, irrespective of the fact whether he parts with the title thereafter by a further assignment, or whether he ever enters into possession himself. That the memorandum of assignment is a valid, independent contract, if supported by a sufficient consideration, cannot be gainsaid; failure to name the lessor as a promisee in the memorandum is imma-

[328] Dorrance v. Jones, 27 Ala. 630; Horwitz v. Davis, 16 Md. 313.

[329] Clark v. Hume, 1 ... & M. 207.

[330] Thomas v. Pemberton, 7 Taunt. 206.

[331] White v. Griffing, 44 Conn. 437, 449; Hastings v. Wilson, Holt N. P. 290. See also, Turner v. Richardson, 7 East 336.

[332] Springer v. De Wolf, 194 Ill. 218, 62 N. E. 542, 93 Ill. App. 260; Consumer's Ice Co. v. Bixler, 84 Md. 437, 35 Atl. 1086; Lindsley v. Schnaider Brew. Co., 59 Mo. App. 271; Wilson v. Lunt, 11 Colo. App. 56, 52 Pac. 296; Adreon v. Hawkins, 4 H. & J. (Md.) 319; Rawlings v. Duvall, 4 H. & McH. (Md.) 1; Iggulden v. May, 9 Ves. 325, 330.

terial. A seal affixed to a contract of assignment would furnish technical consideration. Moreover, the fact that it was optional with the lessor to consent to the assignment and that the lessor consented, presumably on the faith of the independent contract, furnishes a substantial consideration. The memorandum, therefore, establishes a privity of contract between the lessor and assignee which can only be terminated by the joint action of both parties. It recites that the transfer is subject to all the covenants in the lease, and accepted by the assignee with all the responsibilities for the faithful performance of the covenants of the lease. Any other reading of the memorandum would be devoid of meaning.[333] The true basis on which an assignee's liability to the lessor can be maintained is the principle so often announced in modern cases that where one makes a promise to pay another the debt which he owes, an action will lie by him for whose benefit the promise is made. It is a question of the application of this rule. There is a diversity of opinion in courts of last resort in this country, growing out of the particular view that each tribunal has taken as to the ground of the liability of the grantee who assumes the payment of a mortgage upon the property conveyed to him; some holding that his liability depends upon the equitable doctrine of subrogation, and that the obligation he assumes can be enforced only in an equitable proceeding, while others hold that it arises out of contract and constitutes a legal liability, enforceable in an action at law. Surely if the grantee may be sued at law by the mortgagee on the promise expressed, when it was made, only to the grantor, there can be no objection on principle to a suit by the lessor against the assignee even after transfer, and in the absence of the privity of estate which might be essential where there was no express promise. It has been so decided, and there are many cases which uphold this application of the doctrine.[334] Accepting a deed-poll conveying an interest in real

[333] Lindsley v. Schnaider Brew. Co., 59 Mo. App. 271; Willi v. Dryden, 52 Mo. 319.

[334] Wilson v. Lunt, 11 Colo. App. 56, 52 Pac. 296; Lehow v. Simonton, 3 Colo. 346; Green v. Morrison, 5 Colo. 18; Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652; Mulvaney v. Gross, 1 Colo. App. 112, 27 Pac. 878; Brewer v. Dyer, 7 Cush. (Mass.) 337; Carnegie v. Morrison, 2 Metc. (Mass.) 381; Mellen v. Whipple, 1 Gray (Mass.) 317; Arnold v. Lyman, 17 Mass. 400; Hall v. Marston, 17 Mass. 575; Center v. McQuesten, 18 Kan. 476; Johnson v. Knapp, 36 Iowa 616; Taylor v. De Bus, 31 Ohio St. 468; Frank v. Maguire, 42 Pa. St. 77; Laurence v. Fox, 20 N. Y. 268; Port v. Jackson, 17 Johns. (N. Y.) 238. The supreme court of California in an *obiter dictum* found in the case of Bonetti v. Treat, 91 Cal. 223, 229, dissent from the rule stated in the text. The assignee's "covenant, contained in the assign-

estate, which recites an agreement on the part of the grantee to pay money for or on account of the grantor, binds him to perform that agreement.[335] No difficulty arises from the lack of consideration for the assignee's assumption of covenants, as the transfer of the lease is a sufficient consideration for the undertaking of the assignee to pay rent.[336]

The express covenant of an assignee to fulfill the covenants of the lessee in the lease is in legal effect that he will fulfill the unbroken covenants in said lease; that he will from that time take the place of the original lessees, and fulfill their covenants. It would be a species of fraud to hold him responsible for the past neglect or breaches of covenant of the original lessee.[337] But if the assignee by express covenant with the assignor, bind himself to pay the rents and perform all the covenants in the lease contained, and required to be done and performed on the part of the lessee, such a covenant not only binds the assignee to fulfill the covenants during his own time, but makes him liable for breaches before his time.[338] In an assignment of certain leases, the lessee stipulated that the assignee should have and hold the leases under the terms thereof, and under and subject to the rents and covenants therein reserved and contained on the part of the lessee to be paid, kept, done, and performed. By accepting the assignment with that stipulation, and causing it to be recorded, and receiving the leases thereunder, the assignee became bound to perform all the unperformed

ment to him," to pay all rent that may fall due, from time to time, by virtue of the provisions of the lease, "and his entry into possession as assignee under the assignment, created the relation of landlord and tenant between him and the lessor, and his holding was by privity of estate, and not by privity of contract, as claimed by respondent. The lessor was not a party to nor was he in any way benefited by the contract of assignment. The liability of the assignee to the lessor was, therefore, created solely by the covenant of the lease to pay the rent, which is a covenant running with the land, and not by the contract of assignment, the non-performance of which is enforceable only by the lessee."

[335] Edwards v. Spalding, 20 Mont. 54, 49 Pac. 443.

[336] Pike v. Brown, 7 Cush. (Mass.) 133, 138; Foster v. Atwater, 42 Conn. 244; Hubbard v. Ensign, 46 Conn. 576; Woodruff v. Baldwin, 72 Conn. 439, 44 Atl. 748.

[337] Townsend v. Scholey, 42 N. Y. 18; Farmers' Bank v. Mutual Assur. Soc., 4 Leigh (Va.) 69; Tillotson v. Boyd, 4 Sand. (N. Y.) 516, 521; Lewes v. Ridge, 2 Cro. Eliz. 863; Grescot v. Green, 1 Salk. 199; Church Wardens v. Smith, 3 Bur. 1271.

[338] Farmers' Bank v. Mutual Assur. Soc., 4 Leigh (Va.) 69.

terms of the leases. He stepped into the lessee's shoes and assumed his obligations.[339]

§ 463. What constitutes an assumption of covenants by assignee.—Where a lease was assigned "with all its covenants, terms and conditions," it was urged that this created a privity of contract between the assignee and the lessor and made the assignee liable on the covenants of the lease after he had reassigned it; but the court was of the contrary opinion. There was no undertaking, promise or agreement in express terms on the part of the assignee to pay the rent reserved in the lease. The assignment of the lease *"with all its covenants, terms and conditions"* had no wider scope than a bare assignment, so there was no independent agreement binding the assignee at all. These words added nothing to the legal effect of the assignment. They were not contractual words of the assignee. They embodied no promise by him to the lessor. They were simply words of description and not words of contract, and they imposed no greater obligation on the assignee than would have existed, had they been entirely omitted from the assignment.[340] The same has been held of the words "subject to the originally reserved ground rent" in an assignment; these are words of description merely, and do not import a covenant on the part of the assignee to pay the ground rent.[341] It is also well established that the words "subject to the payment of rent" are words of qualification and not words of contract. Such an expression does not create any liability by the assignee to indemnify his assignor for payments of rent accruing after the assignee had assigned over, and this whether the assignment be by deed-poll or indenture.[342] Taking a deed to premises "subject to" the terms of a title bond, or "subject to" an outstanding mortgage creates no personal liability on the grantee to pay off incumbrances.[343] But where mortgaged land is conveyed and the deed of conveyance recites that the grantee assumes the mortgage debt, this imposes a personal liability on him to pay the mortgage in question. Such is the well settled

[339] Woodland Oil Co. v. Crawford, 55 Ohio St. 161, 44 N. E. 1093.

[340] Reid v. John F. Wiessner Brewing Co., 88 Md. 234, 40 Atl. 877; Wahl v. Barroll, 8 Gill. (Md.) 288; Wolveridge v. Steward, 3 M. & Sc. 561, 30 E. C. L. 521.

[341] Wahl v. Barroll, 8 Gill. (Md.) 288; Wolveridge v. Steward, 3 M. & Sc. 561, 30 E. C. L. 521.

[342] Consolidated Coal Co. v. Peers, 166 Ill. 361, 46 N. E. 1105; Walker v. Physick, 5 Barr (Pa.) 193.

[343] Comstock v. Hitt, 37 Ill. 542; Hammer v. Johnson, 44 Ill. 192; Fowler v. Fay, 62 Ill. 375; Dean v. Walker, 107 Ill. 540. But see, Campbell v. Shrum, 3 Watts (Pa.) 60.

law.[344] So a recital in an assignment of a lease that the assignee assumes the covenants in the lease has a similar effect. It has been argued that the word "assumes" is not broad enough to impose a personal liability. But if it is intended simply that the assignee shall take the leasehold subject to the covenants in the lease, the clause in which the word "assumes" appears is not necessary. Unless that word is used to impose a personal liability on the assignee, it is wholly unnecessary, and serves no purpose. A rule of construction requires courts to give force and effect, if possible, to all the language used. So the effect of the expression under consideration is to establish a privity of contract between the assignee and the lessor.[345] In one case an assignment was made part of a leasehold estate created by a lease which showed the rent annually becoming due under it was payable as one sum at one stated time. In a separate sentence came the agreement that as part of the consideration of the deed of assignment, the assignee agreed to pay the rent of said premises that may annually become due. The deed first recited that the land conveyed by it was part of the leased "premises," and the agreement was to pay the rent of "said premises" that may annually become due. The "premises" mentioned in the agreement were held to be not the premises conveyed by the deed, but the entire leased premises, for upon these alone did any rent annually become due. Therefore the court concluded that the assignee had bound himself for the payment of the entire rent reserved in the lease.[346]

IV. *Conditions Against Assignment and Subletting.*

§ 464. A covenant in a lease against alienation without license is at least as old as Dumpor's case,[347] but this by no means proves such a covenant to be a usual one. Though in the Court of Exchequer it was held that on an agreement for a lease, with all usual and reasonable covenants, a covenant not to under-lease or assign is implied,[348] and Lord Kenyon determined that an agreement for a lease, with fair

[344] Dean v. Walker, 107 Ill. 540; Springer v. De Wolf, 194 Ill. 218, 62 N. E. 542, affirming 93 App. 260; Stout v. Folger, 34 Iowa 71; Drury v. Tremont Imp. Co., 13 Allen (Mass.) 168; Locke v. Homer, 131 Mass. 93; Sparkman v. Gove, 44 N. J. L. 252; Schley v. Fryer, 100 N. Y. 71, 2 N. C. 280; Douglass v. Cross, 56 How. Pr. (N. Y.) 330.

[345] Springer v. De Wolf, 194 Ill. 218, 62 N. E. 542, 93 Ill. App. 260.

[346] Woodruff v. Baldwin, 72 Conn. 439, 44 Atl. 748.

[347] 4 Coke 119b.

[348] Folkingham v. Croft, 3 Anstr. 700.

and reasonable covenants, implied a covenant not to assign or underlet, without leave of the landlord in writing,[349] yet it has been decided both by Lord Thurlow and Lord Eldon that a covenant not to assign without license, does not come within the meaning of a contract to give a lease with common and usual covenants without some more express stipulation.[350] In this conclusion Sir William Grant finally concurred,[351] having been in doubt in two previous cases when he felt himself bound by earlier decisions.[352] It was said elsewhere that the question of usual covenants was a proper subject of inquiry as to the usual and customary covenants in the neighborhood.[353] If in plain terms the lessee agrees not to underlet or assign the lease without the written consent of the lessor and then follows the mutual agreement that, in case of default in any of the covenants of the lessee, the lessor has a right to declare the term ended and reënter; this is not a mere covenant not to assign, but it is a power of reëntry for a breach of a covenant, and this has the force of a condition.[354] It is usually true that, in the construction of deeds, courts will incline to interpret the language as a covenant rather than as a condition,[355] and covenants against assignment or underletting are not favorably regarded by the courts and are liberally construed in favor of the lessses, so as to prevent the restriction from extending any further than is necessary.[356] But the intention of the parties to the instrument, when clearly ascertained, must control.[357] A condition in a lease for years or for life that the lease is to be void if the lessee assigns is valid and enforceable,[358] and where a lease prohibits sub-letting, no valid sub-lease can

[349] Morgan v. Slaughter, 1 Esp. N. P. 8.

[350] Henderson v. Hay, 3 Brown, ch. 632; Church v. Brown, 15 Ves. 258, 271.

[351] Browne v. Raban, 15 Ves. 528, 531.

[352] Vere v. Loveden, 12 Ves. 179, 184; Jones v. Jones, 12 Ves. 186, 189.

[353] Boardman v. Mostyn, 6 Ves. 467, 471.

[354] Kew v. Trainor, 150 Ill. 150, 37 N. E. 223, 50 Ill. App. 629.

[355] Gallagher v. Herbert, 117 Ill. 160, 7 N. E. 511.

[356] Presby v. Benjamin, 169 N. Y. 377, 62 N. E. 430, reversing 53 App. Div. 637; Riggs v. Pursell, 66 N. Y. 193; Boyd v. Fraternity Hall Assn., 16 Ill. App. 574; Goldsmith v. Wilson, 68 Iowa 685, 28 N. W. 16; Caley v. Portland, 12 Colo. App. 397, 56 Pac. 350; Medinah Temple Co. v. Currey, 58 Ill. App. 433; Hutchinson v. Ulrich, 145 Ill. 336, 34 N. E. 556; Eckhart v. Irons, 128 Ill. 568, 20 N. E. 687; Livingston v. Stickles, 7 Hill (N. Y.) 253.

[357] Kew v. Trainor, 150 Ill. 150, 37 N. E. 223, 50 App. 629.

[358] Roe v. Sales, 1 M. & S. 297; Hargrave v. King, 5 Ired. Eq. (N. Car.) 430; Emery v. Hill, 67 N. H. 330, 39 Atl. 266.

be made without the lessor's consent.[359] Such rights are recognized by courts of equity, and the sub-letting of an apartment in an apartment house has been enjoined where the lease contained a covenant against it.[360] A condition against sub-letting would only continue as long as the term lasted, and when the lessee had elected to exercise an option to purchase the property, a second sale by him before he acquired legal title would not be a breach of the covenant against sub-letting causing a forfeiture.[361]

An ordinary condition against sub-letting authorizes the lessor to enter upon the lessee and terminate the lease for breach of condition and, although not expressly conferred, a similar right would exist against a sub-tenant. The only use of such a clause to enforce a forfeiture for sub-letting would be against a sub-tenant, and text-books assume that a careful landlord will put it in his leases.[362] Yet but one case is referred to for the position that a landlord may evict a sub-tenant under such a clause, and in that case it was assumed without question.[363]

In estimating the value of a leasehold term the right of the lessee to sub-let or assign becomes a material question, and it is error for a judge to instruct that in estimating the damages sustained by a lessee by reason of being evicted, the fact that the lease was not assignable without the lessor's consent was immaterial. The lessee's affairs or his purposes might have been changed, and it is manifestly a diminution of the value of property that its beneficial enjoyment must depend upon the continuance of the purposes, condition or employment of its possessor, or on the will of another person.[364]

§ 465. That an assignment contrary to a restriction in a lease is not absolutely void but voidable only at the election of the lessor is a well established general principle.[365] A covenant not to underlet or assign is made solely for the benefit of the lessor or his assigns, and he or they only can take advantage of it and terminate the estate

[359] Meyer v. Rothschild, 46 La. Ann. 1174, 15 So. 383; Emery v. Hill, 67 N. H. 330, 39 Atl. 266.

[360] Barrington &c. Assn. v. Watson, 38 Hun (N. Y.) 545.

[361] Deglow v. Meyer, 12 Ky. L. R. 954.

[362] Frazier v. Caruthers, 44 Ill. App. 61.

[363] Arnsby v. Woodward, 6 B. & C. 519.

[364] Rice v. Baker, 2 Allen (Mass.) 411.

[365] Springer v. Chicago &c. Co., 102 Ill. App. 294; Betts v. Dick, 1 Pennew. (Del.) 268; Mabry v. Harp, 53 Kan. 398, 36 Pac. 743; Bemis v. Wilder, 100 Mass. 446; Holman v. Delin, 30 Ore. 428, 47 Pac. 708; Montecon v. Faures, 3 La. Ann. 43.

demised by an entry for breach of the condition.[366] In the absence of any agreement to the contrary, however, this right of the lessor may be transferred and may be enforced by one to whom the reversion has been assigned by the lessor.[367] The clause in a lease providing that the premises shall not be assigned without the written assent of the lessors is clearly for the benefit of the lessors only. It does not render the assignment when otherwise made absolutely void, but voidable only at the option of the lessors or their representatives.

Any act done by a landlord, knowing of cause of forfeiture, affirming the existence of the lease and recognizing the lessee as his tenant, is a waiver of such forfeiture.[368] Where a lease prohibits the subletting of a part or the assignment of any less portion than the whole, a breach of such restriction cannot be taken advantage of by the lessee. If the lessor does not avoid a contract of the prohibited kind, it will bind the lessee.[369] It is not for the lessee to set up the breach of his own covenant not to assign or sub-let, to defeat the assignee's right. Such a stipulation is inserted for the benefit of the lessor and those claiming under him, who alone can take advantage of any breach. This is equally true whether the stipulation is in the form of a covenant or is a condition with a right of reëntry reserved. In either case the lease is valid till the lessor has exercised his right to terminate it.[370] An assignment of a lease contrary to its terms does not of itself divest the leasehold estate, which passes to the assignee subject only to the lessor's claim for damages or right to reënter; and the assignment is sufficient consideration to support a promisory note.[371] An assignment of a lease, though made against the terms of the instrument, passes a subsisting title to the assignee. He becomes the owner of the leasehold estate, and as such would be liable on all the covenants which run with the land, and bound to pay rent as long as the lease was allowed to continue.[372]

[366] Shumway v. Collins, 6 Gray (Mass.) 227; Montecon v. Faures, 3 La. Ann. 43; Hardware Co. v. McCarty, 10 Colo. App. 200, 209, 50 Pac. 744; Chicago Attachment Co. v. Davis &c. Co., 33 Ill. App. 362; Webster v. Nichols, 104 Ill. 160, affirmed, 25 N. E. 669.

[367] Cordeviolle v. Redon, 4 La. Ann. 40.

[368] Webster v. Nichols, 104 Ill. 160; Randol v. Tatum, 98 Cal. 390, 33 Pac. 433.

[369] Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. 356.

[370] Shattuck v. Lovejoy, 8 Gray (Mass.) 204; Bemis v. Wilder, 100 Mass. 446.

[371] Spear v. Fuller, 8 N. H. 174; Eldredge v. Bell, 64 Iowa 125, 19 N. W. 879; Winkler v. Gibson, 2 Kan. App. 621.

[372] Spear v. Fuller, 8 N. H. 174. The case of Hynes v. Ecker, 34 Mo. App. 650, holds that assignees would not be liable for rent till the lessor

After an assignment in violation of a condition in a lease, it is incumbent on the lessors to reënter in order to terminate the lease and revest the estate in them; until they do this they are not reinvested of their old estate.[373] So the owner of the reversion cannot, by merely assuming that the lease has been terminated by such violations of its conditions, confer any right to immediate possession upon another by the execution of a lease of the same premises to him, without having taken any legal steps to cancel the prior lease or to retake possession.[374] A tenant by sub-letting merely assumes the risk of being ousted if his landlord does not acquiesce in the contract; he does not convert himself into a trespasser or an insurer.[375]

It does not prevent a recovery of rent from a lessee that the lessor refuses to give his written consent to an assignment of the lease, such consent being essential to a valid transfer. Nor is the refusal to give such consent a ground for the cancellation of the lease at the instance of the lessee. Such conduct is not an unlawful abuse of the privisions of the contract requiring written consent to a sub-letting.[376]

§ 466. An ordinary covenant against sub-letting and assignment is not broken by a transfer of the leased premises by operation of law but the covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law.[377] Where a lessee covenanted "not to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the premises," and afterwards gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold; this was held to be no forfeiture, for all the words used in the lease

had given his assent to the assignment as required by the lease. "Lessees, restrained from assigning without leave, can have assigns only of two sorts," says Rombauer, P. J., in the opinion, "either an assign approved by the landlord or an assign by appointment or designation of law; they cannot have an assign of their own appointment, unapproved by the landlord." The fallacy of this reasoning lies in the failure to distinguish between the power to assign and the right to assign.

[373] Spear v. Fuller, 8 N. H. 174; Shattuck v. Lovejoy, 8 Gray (Mass.) 204; Godfrey v. Black, 39 Kan. 193; Holman v. De Lin, 30 Ore. 428, 47 Pac. 708; Deglow v. Meyer, 12 Ky. L. R. 954; Comyn's Land. & Ten. 104, Co. Lit. 214 b.

[374] Winkler v. Gibson, 2 Kan. App. 621.

[375] Hundley v. Moore, 6 Ky. L. R. 519.

[376] Hill v. Rudd, 99 Ky. 178, 35 S. W. 270.

[377] Parks v. Union Mfg. Co., 14 Ky. L. R. 206; Farnum v. Hefner, 92 Cal. 542, 28 Pac. 602; Jackson v. Corliss, 7 Johns. (N. Y.) 531; Riggs v. Pursell, 66 N. Y. 193, 198; Jackson v. Silvernail, 15 Johns. (N. Y.) 278.

point to some act to be done by the tenant himself, and there is a distinction between acts that the party does voluntarily and those that pass *in invitum;* and judgments in contemplation of law, always pass *in invitum.*[878] But it appearing upon a second suit that the tenant had given the warrant of attorney for the express purpose of enabling the creditor to take the lease in execution, this was held to be in fraud of the covenant, and therefore a forfeiture, so the landlord could recover the premises in ejectment under the clause of reëntry.[879] A colorable sale on execution, resorted to for the purpose of transferring the term, would be a breach of a covenant against voluntary assignment.[880] It has also been held that the assignees under a bankruptcy commission might dispose of a lease without incurring a forfeiture on the ground that a commission of bankruptcy is a statutable execution and that there was not any difference between the compulsory cause under which the sale was made in that case and a sale on execution. The term "assigns" in the covenant related to voluntary assigns and not to assignees in law.[881] But the lessor might have provided against the assignment under the commission by an express proviso;[882] or even against a sale on execution.[883] In view of the settled rule that an assignment by operation of law passes a leasehold estate to the assignee discharged from an ordinary covenant against assignment, the same result has been held to follow where the transfer arises from voluntary proceedings in insolvency as well as where the proceedings are *in invitum,* provided there is no indication that the proceedings are colorable, merely, for the purpose of effecting the transfer in fraud of the lessor.[884] But an express condition against assignments by operation of law would be broken by an involuntary assignment, such express mention of the mode of assignment being essential to cause a forfeiture,[885] and a breach would also be caused by a lessee's general assignment, accompanied by the entry of his assignee.[886] The clause against assignment by operation of law may

[878] Doe v. Carter, 8 Term R. 57.

[879] Doe v. Carter, 8 Term R. 57; Doe v. Hawke, 2 East 481.

[880] Farnum v. Hefner, 79 Cal. 575, 21 Pac. 955.

[881] Doe v. Bevan, 3 M. & S. 353; Sherman, Ex parte, Buck 462; Philpot v. Hoare, Ambl. 480, 2 Atk. 219.

[882] Roe v. Galliers, 2 Term R. 133; Doe v. Clarke, 8 East 185. See also, Randol v. Scott, 110 Cal. 590, 42 Pac. 976.

[883] Farnum v. Hefner, 79 Cal. 575, 21 Pac. 955; Davis v. Eyton, 7 Bing. 154; Doe v. David, 5 Tyrw. 125.

[884] Smith v. Putnam, 3 Pick. (Mass.) 221; Bemis v. Wilder, 100 Mass. 446.

[885] Farnum v. Hefner, 79 Cal. 575, 21 Pac. 955.

[886] Smith v. Goodman, 149 Ill. 75, 36 N. E. 621.

be unnecessary in case of a general assignment, as it has been held that a general assignment for the benefit of creditors is a voluntary assignment and not one by operation of law. The act by which the title to the assigned estate is transferred from the assignor to the assignee is purely voluntary on the part of the former. Voluntary assignments for the benefit of creditors are transfers without compulsion of law. They are termed "voluntary" to distinguish them from such as are made by compulsion of law, as under statutes of bankruptcy and insolvency.[387] The authorities generally seem to sustain the position that when an assignment by the lessee is a voluntary one, the lease does not pass to the assignee by operation of law, but by act of the party, and the distinction in this regard between voluntary and involuntary assignments is well defined.[388]

§ 467. The rule is universally admitted that a covenant not to assign a lease is not broken by an underletting;[389] but it is said that the converse of this is not true, and that an assignment is a violation of a stipulation not to underlet. It does not necessarily follow that the lessor, as he did not choose that the tenant should assign, therefore intended to restrain underletting. But, on the other hand, it would be very strange, if the landlord meant to restrain underletting, that he should not mean to forbid the tenant to part with the whole interest.[390] So the rule has become incorporated in the text-books that a covenant not to underlet restrains assignment. From this conclusion there has been a vigorous dissent by Chief Justice Beasley of the New Jersey Court. He points out that the doctrine is of modern origin and, since it was first expounded, has received no sanction from the English cases. "Was it very strange," proceeds the learned Justice in criticism of the reason for the rule, "that if the landlord meant to restrain underletting that he should not mean to forbid the tenants to part with his whole interest. A person advised of his legal position might very intelligently do this. In many respects an underlease is more unfavorable to the owner of the land than an assignment. An

[387] Medinah Temple Co. v. Currey, 162 Ill. 441, 44 N. E. 839, reversing 58 Ill. App. 433.

[388] Holland v. Cole, 1 H. & C. 67; Rochford v. Hackman, 9 Hare 475; Brandon v. Aston, 21 Eng. Ch. 23.

[389] Field v. Mills, 33 N. J. L. 254; Moore v. Guardian Trust Co., 173 Mo. 218, 73 S. W. 143; Den v. Post, 25 N. J. L. 285; Jackson v. Harrison, 17 Johns. (N. Y.) 66; Jackson v. Silvernail, 15 Johns. (N. Y.) 278; Crusoe v. Bugby, 2 W. Bl. 766, 3 Wils. 234; Kinnersley v. Orpe, 1 Doug. 56; Holford v. Hatch, 1 Doug. 183; Hargrave v. King, 5 Ired. Eq. (N. Car.) 430; Copland v. Parker, 4 Mich. 660.

[390] Greenaway v. Adams, 12 Ves. 395; Den v. Post, 25 N. J. L. 285.

undertenant taking the possession does not put himself in privity of estate with the original lessor; nor is he liable to him for the performance of the covenants running with the land, such as the covenant to pay rent, or to keep the premises in repair. An assignee of the lease, on the contrary, can claim no such disconnection or exemption. Is it then so improbable that a landlord might be willing to permit an assignment and yet might be opposed to an undertenancy? That he might say to his tenant, 'You may turn over your whole interest, because the assignee will, in point of estate, be in privity with me, and will be compellable to perform the most important covenants in the lease, but I cannot consent to receive an undertenant who will be a stranger to my title and whom I can hold to no responsibility?' I am at a loss to perceive anything irrational or even improbable in a provision of this kind."[891]

In Cruesoe v. Bugby,[892] the covenant was that "the lessee, his executors, or administrators, shall not nor will at any time or times during this demise, assign, transfer or set over, or otherwise do or put away this present indenture of demise, or the premises hereby demised or any part thereof" without the consent of the lessor. It was held that this did not restrain sub-letting. *"Assign, transfer and set over"* are mere words of assignment, and *"otherwise do or put away"* signifies any other mode of getting rid of the premises entirely and cannot be applied to the making of an underlease. "The lessor, if he pleased," say the court, "might certainly have provided against the change of occupancy as well as against an assignment, but he has not done so by words which admit of no other meaning." But where the proviso was "not to assign or otherwise part with the premises or any part thereof, for the whole or *any part of the term*," these words were taken to include an underlease.[893] A provision that "the leseee and his administrators shall not set, *let* or assign over" renders it impossible to sub-let without incurring a forfeiture, the distinction resting on the use of the word "let." "The case of Crusoe v. Bugby," said Justice Butler in pronouncing this decision, "though a pretty strong one, does not come up to the present one, for there the word let is not used; but that is a material word here, and we cannot reject it."[894]

[891] Field v. Mills, 33 N. J. L. 254, 257. To same effect see, Sheets v. Selden, 7 Wall. (U. S.) 416; Livingston v. Stickles, 7 Hill (N. Y.) 253; Fox v. Swann, Styles 482; Lynde v. Hough, 27 Barb. (N. Y.) 415.

[892] 2 W. Bl. 766, 3 Wils. 234.

[893] Doe v. Worsley, 1 Camp. 20; Roe v. Sales, 1 M. & S. 297.

[894] Roe v. Harrison, 2 Term R. 425; Lynde v. Hough, 27 Barb. (N. Y.) 415.

The general rule might be stated to be that where all the words of a covenant against assignment could have distinct effect and operation, without referring at all to an underlease, underletting is not forbidden; but when some word or words in the covenant necessarily refer to a sub-lease, sub-letting is forbidden.

A statutory provision against assignment would not prevent the lessee from sub-letting the premises.[395]

§ 468. A covenant not to assign or sub-let is not necessarily broken because some one other than the lessee shares in the benefits and advantages of a leasehold estate. The use of the third party may be by virtue of a mere license, and a covenant not to sub-let is not broken by licensing a third person to do certain acts on the land. In general, a grant is to be regarded as a license rather than a lease where there is no term, no reservation of rent, and no possession conferred.[396] Therefore, an agreement by a lessee of a building to allow a third person, in consideration of an annual payment by him, to place a sign upon the outside wall of the building, for a stated time, is not a breach of the covenant in the lease not to underlet any part of the premises. This was a license and not a lease. It was permission to do a particular act, namely, to affix a sign to the wall, and gave no authority to do any other act on the premises. The fact that the permission was paid for, and that the act permitted was a continuing one, are ordinary elements of a license. Every license to do an act upon land involves the exclusive occupation of the land by the licensee, so far as is necessary to do the act, and no further. It was clearly the intention that the licensee should have no other right in the premises than to affix his sign to them. An agreement of this nature cannot be construed as a lease.[397]

Where a lease provided that the lessee should not "release or assign his lease of the premises," it was held that a mere sub-lease of a portion of the premises for thirty days, which hardly amounted to more than a license to occupy, did not constitute the breach.[398] In another case a tenant was enjoined not to *sub-let the whole or assign the lease;* such language contains a strong implication that the tenant might sub-let parts of the premises. In connection with the circumstance that at

[395] Moore v. Guardian Trust Co., 173 Mo. 218, 245, 73 S. W. 143.

[396] Pence v. St. Paul &c. R. Co., 28 Minn. 488, 11 N. W. 80; Sommers v. Reynolds, 103 Mich. 307, 61 N. W.

[397] Lowell v. Strahan, 145 Mass. 1, 12 N. E. 401, 1 Am. St. 422.

[398] Leduke v. Barnett, 47 Mich. 158, 10 N. W. 182.

the time the lease was executed the lessee was then sub-letting parts thereof, it is conclusive that the parties intended the sub-letting of parts less than the whole.[399] Nevertheless, a stipulation in ordinary form against underletting would be broken by a sub-lease of any part of the demised premises. The extent of the premises sub-let would ordinarily be immaterial.[400] A covenant against assignment in a lease to two was held to be broken by an assignment of the undivided moiety of one lessee to the other lessee. The covenant though it related to the estate of the two, necessarily involved the interest of each; it meant that neither of them could assign the whole or any part of his interest without consent; otherwise a tenant might assign all but a sixty-fourth part. An assignment of sixty-three parts would be a breach of the covenant.[401]

A tenant by placing a servant in charge of leased premises during his absence does not, as a matter of law, violate a covenant not to sub-let without the landlord's consent. Even under a liberal construction of the covenant, to constitute a violation of the lease, the lessee must have attempted to put in possession of the premises a new tenant, not a new occupant. To be a tenant a person must have some estate, be it ever so little, such as that of a tenant at will or on sufferance. A person may be in occupation of real estate simply as a servant or licensee of his master. Therefore, if the lessee sought to place his porter in occupation of the premises as caretaker or as servant, he was entirely within his rights.[402] According to an unofficially reported case in Kentucky, a covenant against sub-letting or assignment is not broken by the renting of pasture rights on a farm after the crop has been gathered, because the tenant still continues in possession.[403]

A lease of a house to a single woman contained the proviso that it was let "only for herself to occupy as a residence," with covenants against disposition of a whole or any part. It was held that her marriage to a widower with four children and the continued residence of all in the house was not a breach of the proviso or covenants. The whole instrument taken together clearly contemplated that the lessee should occupy the premises in person, but it did not follow that the narrow construction contended for was the true one. That construc-

[399] Spencer v. Commercial Co., 30 Wash. 520, 71 Pac. 53; Roosevelt v. Hopkins, 33 N. Y. 81.

[400] Boston, C. & M. Ry. Co. v. Boston &c. R. Co., 65 N. H. 393, 451–457, 23 Atl. 529; Emery v. Hill, 67 N. H. 330, 39 Atl. 266

[401] Varley v. Coppard, L. R., 7 C. P. 505.

[402] Presby v. Benjamin, 169 N. Y. 377, 62 N. E. 430, reversing 53 App. Div. 637.

[403] Harwood v. Hopkins, 4 Ky. L. R. 631.

tion would exclude every one, relative, companion and friend, as well as husband. If the lessor had intended that, he should have used language clearly expressing such an intent and should not have left it to be inferred from language of doubtful meaning. The lease as drawn could fairly and reasonably be so interpreted as to allow the lessee to receive a relative, friend, or husband, as a companion.[404]

Where a lease is jointly to two, and by an arrangement between them, each occupies a several portion of the premises, such several uses cannot justly be regarded as breaches of a covenant not to underlet.[405]

§ 469. Change in business relations as breach of covenant not to sub-let.—A stock in trade of a lessee upon the leased premises was sold on execution by one of his creditors, but the goods were not removed from the store and the business was carried on therein as before, by permission of the lessee. The lessee remained in the store and conducted the business as before, except that the money received from sales went to the purchaser. The latter had nothing to do with the business except to go to the store daily for a short time and sign checks. The lessee never formally assigned, transferred, or disposed of his interest in the lease. On this state of facts there was held to be no breach of a covenant not to assign or sub-let. The lessee was there managing and controllng the business, as he had done before the stock was sold; certainly he had not assigned or parted with his lease, neither had he formally underlet the leased premises. It seems clear that an action for a trespass to the leased premises would necessarily have been brought in the name of the lessee and that he could at any time have lawfully required the purchaser to remove the goods from the store.[406] In another case a lessee occupied premises as a lumber yard and sold out his business to defendant with an agreement that defendant should have the right to occupy the leased premises as long as the lessee himself was entitled to do so. It was held this was not a license but an assignment of the term and justified the landlord in terminating the lease. The arrangement was in legal effect and practical operation, an assignment of the lease. There was no formal assignment of the lease, but there was an equitable transfer of it. No greater right could have been enjoyed, had there been a formal and regular assignment of the lease and premises. The purpose of the

[404] Schroeder v. King, 38 Conn. 78. [406] Munkwitz v. Uhlig, 64 Wis. 380,
[405] Boyd v. Fraternity Hall Ass'n, 25 N. W. 424.
16 Ill. App. 574.

stipulation in the lease was to reserve to the lessor the right to say who should occupy the premises. By the stipulation in the lease, the lessee was prohibited from placing any other person in possession of the premises without the written consent of the lessor. By the arrangement made he sold the right to use the premises and placed the defendant in possession.[407] Where a tenant without license from his landlord takes a third party into partnership with him and lets such party into joint possession with him, it is not a breach of a covenant not to sub-let, even though the partnership is formed for the express purpose of not breaking the covenant against sub-letting.[408] Yet if one of the new partners taken into the firm by the lessee is put in exclusive possession of a portion of the leased premises, that would be a breach of the covenant not to assign or underlet.[409] Moreover, the execution of an instrument of assignment in ordinary form would have the effect of constituting the transaction a violation of the stipulation. So if one firm is dissolved and another one formed and the lease is assigned to the new partnership by the original one, this has been held a breach of a condition against assignment.[410] And in a case where a partnership formed a corporation and a firm lease was assigned to the new corporation, this transfer forfeited the lease. The formation of the corporation by the members of the old firm and others who were allowed to become stockholders presents additional objections to those in the case of the admission of new members to the firm. As new stockholders may acquire control of the corporation, it is plain that the personal integrity and carefulness which the lessors sought to secure by the provision in the lease against the lessee's assignment of it, would cease and the recklessness of others might be substituted; and the lessors would be deprived of the security against careless injury to the property for which they stipulated. The change from a partnership to a corporation was a substantial change and not a mere matter of form.[411]

§ 470. Rule in Dumpor's case.—In trespass between Dumpor and Symms it appeared that a lease had been made with a proviso that the lessee or his assigns should not alien the premises to any person

[407] Indianapolis &c. Union v. Cleveland &c. R. Co., 45 Ind. 281.

[408] Boyd v. Fraternity Hall Ass'n, 16 Ill. App. 574; Roe v. Sales, 1 M. & S. 297; Roosevelt v. Hopkins, 33 N. Y. 81; Hargrave v. King, 5 Ired. Eq. (N. Car.) 430.

[409] Roe v. Sales, 1 M. & S. 297.

[410] Varley v. Coppard, L. R., 7 C. P. 505.

[411] Emery v. Hill, 67 N. H. 330, 39 Atl. 266.

or persons, without the special license of the lessors. And afterwards the lessors by their deed licensed the lessee to alien, or demise the land or any part of it, to any person or persons. It was resolved by the court after argument that the first alienation by license had determined the condition so that no alienation which might afterwards be made could break the proviso, or give cause of entry to the lessors, for the lessors could not dispense with an alienation at one time and require that the estate should remain subject to the same proviso thereafter.[412] Though disapproved of, this decision was acted on for a long time. "The profession have always wondered at Dumpor's case," said Chief Justice Mansfield, "but it has been law so many centuries that we cannot now reverse it."[413] Lord Eldon said: "Though Dumpor's case always struck me as extraordinary, it is the law of the land."[414] Accordingly, the case has been affirmed by many subsequent decisions, and was even carried further, for it was held that whether the license to assign was general or particular, as "to one particular person subject to the performance of the covenants in the original lease," still the condition was gone, and the assignee might assign without license.[415] At length the law in England was changed by act of Parliament and there the rule of Dumpor's case ceased to be law, so far as it relates to conditions in leases, and to licenses and waivers of such conditions.[416]

§ 471. In the United States the rule in Dumpor's case, while subject to some adverse criticism, has generally been received as settled law, though in many of the cases where the topic arose, no actual decision upon the precise point was necessary.[417] A condition cannot

[412] Dumpor's Case, 4 Coke 119b.

[413] Doe v. Bliss, 4 Taunt. 735.

[414] Brummell v. Macpherson, 14 Ves. 173.

[415] Brummell v. Macpherson, 14 Ves. 173.

[416] 22 and 23 Vict., c. 35, and 24 Vict., c. 38.

[417] Chipman v. Emeric, 5 Cal. 49; Gannett v. Albree, 103 Mass. 372; Pennock v. Lyons, 118 Mass. 92; Merrifield v. Cobleigh, 4 Cush. (Mass.) 178; Magwire v. Tyler, 25 Mo. 484; Dougherty v. Matthews, 35 Mo. 520; Bleecker v. Smith, 13 Wend. (N. Y.) 530; Dakin v. Williams, 17 Wend. (N. Y.) 447, s. c. 22 Wend. 201; Reid v. John F. Wiessner Brew. Co., 88 Md. 234, 40 Atl. 877; Siefke v. Koch, 31 How. Pr. (N. Y.) 383; Lynde v. Hough, 27 Barb. (N. Y.) 415; Murray v. Harway, 56 N. Y. 337; Conger v. Duryee, 90 N. Y. 594, 12 Abb. N. C. 43; Wertheimer v. Circuit Judge, 83 Mich. 56, 47 N. W. 47; Dickey v. McCullough, 2 Watts & S. (Pa.) 88; Sharon Iron Co. v. City of Erie, 41 Pa. St. 341; McKildoe v. Darracott, 13 Gratt. (Va.) 278. Reference is made to an exhaustive article in 7 Am. Law Rev. 616 for a review of the American authorities. On page 640 the conclusions

be exempted from the operation of the rule by construing it to be a covenant, and making it the foundation of a personal action against the grantee, although a party who contracts to keep a condition may be liable on the contract after the condition has been discharged as such by a waiver of a particular breach.[418]

An early case in New York inclined to the view restricting the rule in Dumpor's case that a dispensation is equivalent to a release, to negative or prohibitory conditions, which if broken are wholly gone, holding it does not apply to conditions which, like a stipulation against underletting, admits of a recurrent breach.[419] The New York Court of Appeals, however, after examining at length the doctrine of recurring conditions, almost, if not entirely, repudiated the distinction. The covenants continue, but the particular breach which is the cause of forfeiture does not. A breach must consist of a specific act or omission and continues until the landlord elects to affirm or disaffirm the lease.[420] However this decision may affect the law in New York, it is settled that both in England and in this country the doctrine of continuing conditions is recognized and applied.[421] According to this view, it is no answer to a breach of a covenant not to underlet, that the lessor had waived another and distinct breach of such covenant in the same lease.[422]

of the writer are summarized as follows: "We conceive, therefore, that we have shown that the rule in question was never good law, of recognized authority, or in accord with modern decisions; that to overrule it, or, rather, to repudiate its imaginary authority will not only relieve the law of today of an incubus, and bring our system of real property into harmony with common sense, but will, in so doing, involve little or no disturbance to settled estates or vested titles of ownership. And, finally, that the argument of long standing, which is the whole and only ground of acquiescence in its authority by modern judges, ought, in view of these facts, to avail nothing; as an admitted error should receive no greater tolerance, merely because it is venerable.

[418] Sharon Iron Co. v. City of Erie, 41 Pa. St. 341; Dakin v. Williams, 17 Wend. (N. Y.) 447; Conger v. Duryee, 90 N. Y. 594, 12 Abb. N. C. 43; Dickey v. McCullough, 2 Watts & S. (Pa.) 88.

[419] Bleecker v. Smith, 13 Wend. (N. Y.) 530.

[420] Conger v. Duryee, 90 N. Y. 594, 12 Abb. N. C. 43.

[421] Doe v. Jones, 5 Exch. 498; Bennett v. Herring, 3 C. B. N. S. 370, 91 E. C. L. 370; Doe v. Shewin, 3 Camp. 134; Doe v. Ulph, 13 A. & E. N. S. 204, 66 E. C. L. 204; Penniall v. Harborne, 11 A. & E. N. S. 368, 63 E. C. L. 368; Wilson v. Wilson, 14 C. B. 616, 78 E. C. L. 616; Farwell v. Easton, 63 Mo. 446; Alexander v. Hodges, 41 Mich. 691, 3 N. W. 187.

[422] Seaver v. Coburn, 10 Cush. (Mass.) 324; Farr v. Kenyon, 20 R. I. 376, 39 Atl. 241.

The covenant by a lessee that he or others having his estate in the premises will not assign the lease without the written consent of the lessor does not by its true construction extend so far as to prohibit a reassignment to the lessee himself without a new and special consent of the lessor. By the lease itself, the lessor consents to take the lessee as his tenant for the full term mentioned in the lease. This consent is available for any reassignment to the original lessee during the term. There is, therefore, no breach of the covenant. The statement that the reassignment has never been consented to means only that no special consent has been given, and this is unnecessary.[423]

The entire destruction of a condition against assignment caused by a general license to assign has been held not to be so far-reaching as to effect a covenant for renewal. It could not be insisted that the renewal lease be executed without any covenant against assigning or sub-letting, because a general license to assign had been given during the original term. The covenant in the case where this conclusion was reached was for renewal on the terms of the executed lease, and a waiver of condition during the term was not in the least inconsistent with the contract for renewal on the terms of the executed lease. The only estate which the lessee could assign or sub-let was the term created by the original lease, and, consequently, that estate was the only one in respect to which the license to sub-let or assign could operate.[424] The right to a renewal is not an estate.[425]

§ 472. Special license to assign or sub-let.—An agreement to waive a condition against one sub-tenant is not a waiver of the condition as to other parties. The consent that this tenant might enter and conduct a certain business is a restrictive waiver of the condition, and applies only to the particular tenant and to the business to be carried on by him. The terms of the lease are not waived, generally, by such a waiver of a condition as to a single sub-tenant.[426] In one case premises were assigned by consent of lessor under express agreement that the assignee should not assign without the written consent of the lessor. The assignee thereby assumed the position of the original lessee, and the condition against assignment was binding on him. Here the license to assign was expressly limited to a particular person and was on the condition that no further assignment of the lease should be made without the written consent of the lessor; in addition

[423] McCormick v. Stowell, 138 Mass. 431.

[424] North Chicago St. R. Co. v. Le Grand Co., 95 Ill. App. 435.

[425] Sutherland v. Goodnow, 108 Ill. 528.

[426] Wertheimer v. Circuit Judge, 83 Mich. 56, 47 N. W. 47.

the assignee covenanted that he would perform all the covenants and conditions of the original lease to be kept by the lessee. "We do not regard Dumpor's case one which would control here," say the court, "even if we were inclined to follow it. We perceive no reason why the rule that a license once granted removes the condition, may not be controlled by the contract of the parties."[427]

§ 473. If an assignee is led to act on the assumption that the assignment will not be relied upon as a ground for forfeiture, the lessor cannot subsequently enforce the forfeiture.[428] Thus, in one case a farm was demised for a term of years on a contract that the lessees should plant and cultivate a fruit orchard for a share of the crop. After several years' occupation, the lessor attempted to forfeit the lease for an assignment in violation of agreement made the first year of the lease, but the court denied him this right. "It is difficult to imagine a case," said the court, "where the enforcement of a forfeiture would be more unjust. This action was not commenced till the fourth year after the execution of the lease, and three years after the prohibited assignment; and it is quite apparent that the lessees have performed the burdensome part of their contract without having received any substantial remuneration. They created a valuable property by preparing the soil and planting and taking care of the trees until they are about in a condition to bear fruit, and now the lessor proposes to take possession of the land thus improved and appropriate, without consideration, the results of this money and labor."[429]

By advising a prospective sub-tenant to lease from the lessee, a landlord estops himself from insisting on a covenant against sub-letting. The lessor not only told the sub-tenant that he had leased the store, but told him the lessees had power to sub-let, and begged him to take a sub-lease. In this he not only held out the lessee as having full power of disposition, but he advised the sub-tenant to take a lease.[430] Where the owner of property confers upon another an apparent title to or power of disposition over it, he is estopped from asserting his title as against an innocent third party. The rights of such third party do not depend upon the actual authority of the one with whom he dealt, but upon the act of the owner which precludes him from disputing the authority he has apparently conferred.[431]

[427] Kew v. Trainor, 150 Ill. 150, 37 N. E. 223, affirming 50 Ill. App. 629.

[428] Emery v. Hill, 67 N. H. 330, 39 Atl. 266; Indianapolis &c. Union v. Cleveland &c. Ry. Co., 45 Ind. 281, § 496.

[429] Randol v. Scott, 110 Cal. 590, 42 Pac. 976.

[430] Hill v. Wand, 47 Kan. 340, 27 Pac. 988.

[431] McNeil v. Tenth Nat. Bank, 46 N. Y. 325.

The acceptance of rent by a landlord subsequent to an underletting and with knowledge thereof is a waiver of the condition against subletting.[432] After receiving rent of an assignee with a knowledge of the assignment, it is clear that the lessor could not afterwards, consistently with good faith, assert his right to enforce a forfeiture for breach of a condition against assignment.[433] But if at the time of the acceptance of rent he had no knowledge of the underletting, the judgment would be in favor of the lessor.[434] However, mere tolerance of a sub-letting is not tantamount to a license. A landlord, by overlooking a former underletting, does not waive the right of reëntry for a subsequent underletting. Such a proposition is too far-reaching to be acceptable, for on that principle, if a landlord once knew that his premises were out of repair, and did not sue instantly, he could never afterward reënter for a breach of covenant for their not being repaired.[435] The acceptance of rent already accrued, accompanied by an express agreement that the breach of condition is not thereby waived, does not affect the right of the lessor to enter for a breach of condition. There is nothing inconsistent between the acceptance of rent due and the enforcement of the right to enter.[436] The same principle applies when the rent is payable in advance; acceptance of such rent is not a waiver of forfeiture although a sub-lease has been made subsequent to the time when the rent was due, but during the time which was covered by the rent payment.[437]

The mere fact that the lessor arranged with a general assignee of the lessee for the payment of rent during the time that he was using the property, without declaring to accept under the lease, in no way proved an intention to waive any condition of forfeiture. The assignee had the right to accept or refuse the lease, and until he had made his election, the lessor had a right to deal with him, as to the use of the property, without reference to the lease. It clearly appeared that it was not the intention of either party that the payment of rent by the assignee should be in any sense a recognition of his right to hold the property under the lease.[438]

[432] Goodright v. Davids, Cowp. 803; Frauerman v. Lippincott, 39 Mo. App. 478.

[433] O'Keefe v. Kennedy, 3 Cush. (Mass.) 325; Harrington v. Hall, 126 Mich. 704, 86 N. W. 153; Randol v. Tatum, 98 Cal. 390, 33 Pac. 433; Goodright v. Davids, Cowp. 803.

[434] Roe v. Harrison, 2 Term R. 425.

[435] Doe v. Bliss, 4 Taunt. 735.

[436] Miller v. Prescott, 163 Mass. 12, 39 N. E. 409; Kimball v. Rowland, 6 Gray (Mass.) 224.

[437] Meath v. Watson, 76 Ill. App. 516.

[438] Medinah Temple Co. v. Currey, 162 Ill. 441, 44 N. E. 839, reversing 58 Ill. App. 433.

CHAPTER VII.

TERMINATION OF TENANCY.

1. Disclaimer by Tenant, §§ 474–481.
2. Forfeiture for Breach of Conditions, §§ 482–501.
3. Effect of Non-payment of Rent, §§ 502–537.
4. Surrender, §§ 538–553.
5. Restoration of Possession to Landlord, §§ 554–566.
6. Emblements, §§ 567–573.

§ 474. **Introductory.**—There are various modes in which the holding of a tenant may come to an end. Thus, an ordinary term for years will terminate by the mere lapse of time, and a tenancy from year to year may be determined at the commencement of any of the recurring periods by giving notice such as is required by statute in the jurisdiction where the property is situated. The same is true of tenancies at will and by sufferance. A holding of any kind is also brought to an end by the destruction of the subject-matter of the contract. When the subject-matter of a lease is destroyed, the estate of both the lessor and lessee ends, and the relation cannot thereafter survive. It makes no difference how or by whom the destruction was accomplished, the result is the same. To say that the relation of landlord and tenant could continue after the destruction of the subject-matter is the same as to say that something could spring from and be maintained by nothing.[1]

Furthermore, misconduct on the part of the tenant may cause him to lose his right to claim the benefit of the relation. By disclaimer and repudiation of the tenancy, the tenant forfeits his rights under a lease for years or at will. Express provisions in a lease may also give a landlord the right to declare the termination of an estate upon the tenant's failure to perform certain covenants or agreements. Such a power in the lessor is known as a right to forfeit for breach of condition. Non-payment of rent is not of itself a ground for forfeiture at

[1] Utah Optical Co. v. Keith, 18 Utah 464, 56 Pac. 155; Kerr v. Merchants' Exch. Co., 3 Edw. Ch. (N. Y.) 315; Graves v. Berdau, 26 N. Y. 498; Winton v. Cornish, 5 Ohio 477; Shawmut &c. Bank v. City of Boston, 118 Mass. 125. See also, § 184.

common law, but statutes giving a landlord the right to forfeit a lease on this ground on compliance with certain requisites are common throughout the United States. The general doctrine regarding the power of contracting parties to rescind their contract and relieve themselves of further liability by mutual consent applies to contracts of lease, and the only limitation upon such action is that the mode of surrendering the leasehold estate shall comply with the requirements of the statute of frauds.

The phrase "express stipulation terminating a lease" has been defined to include a termination occurring by lapse of time and cases where forfeiture was expressly declared to follow from a breach of condition, but not to include cases where the effect of a breach of condition was left to inference. That the lease must expire "by reason of some express stipulation thereof" was the language of the statute under construction, not by inference, not by operation of law, but by express stipulation of the parties that the lease shall expire or become void on the fulfilment of the condition. If a lease be given on condition that the premises should not be underlet, without stating what effect a breach of the condition would have, it is only by inference that the conclusion is reached that the parties intended that the lease should terminate upon the fulfilment of the condition, because the common law would so regard it, after proper steps had been taken to terminate the lease. The lease contains no express provision for its termination otherwise than by lapse of time, and therefore a justice of the peace would have no jurisdiction to entertain such a question of forfeiture in a summary proceeding to regain the possession of land.[2]

I. *Disclaimer by Tenant.*

§ 474a. Effect of repudiation of tenancy.—The rule of the common law is, that whenever a tenant undertakes to disavow his relationship by a hostile claim of ownership in himself, this repudiation of the loyalty of his obligations will operate as a forfeiture of the lease, at the election of the landlord, who may proceed to consider the tenant as a stranger and trespasser and eject him accordingly.[3] "Any act of

[2] **Lang v. Young, 34 Conn. 526.**

[3] **Alabama:** Tillotson v. Doe, 5 Ala. 407; Wells v. Sheerer, 78 Ala. 142; Dahm v. Barlow, 93 Ala. 120, 9 So. 598. **California:** Conner v. Jones, 28 Cal. 59; Van Winkle v. Hinckle, 21 Cal. 342. **Illinois:** Doty v. Burdick 83 Ill. 473; Fusselman v. Worthington, 14 Ill. 135; Wall v. Goodenough, 16 Ill. 415. **Indiana:** Tobin v. Young, 124 Ind. 507, 24 N. E. 121. **Kansas:** Douglas v. Anderson, 32 Kan. 350, 4 Pac. 257; Goodman v. Malcolm, 5 Kan. App. 285,

the lessee," says Lord Bacon, "by which he disaffirms or impugns the title of his lessor, occasions a forfeiture of the lease. For to every lease the law tacitly annexeth a condition that if the lessee do anything that may impair the interest of his lessor, the lease shall be void, and the lessor may reënter. Indeed, every such act necessarily determines the relation of landlord and tenant; since to claim under another and at the same time to controvert his title, to hold under a lease and at the same time to destroy the interest out of which the lease ariseth, would be the most palpable inconsistency. A lessee may thus incur a forfeiture of his estate by act *in pais* or by matter of record. . . ."[4] By a lease the use of the property demised is conferred, and if the tenant exercises an act of ownership, he is no longer protected by his tenancy.[5]

When a tenant disclaims to hold under his lease, he becomes a trespasser, and his possession is as adverse, and as open to the action of his landlord as a possession acquired originally by wrong. The act is conclusive on the tenant. He cannot revoke his disclaimer and adverse claim, so as to protect himself during the unexpired term of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right.[6] In order to have this effect, the disloyal acts of the tenant

48 Pac. 439. **Kentucky:** Farrow v. Edmundson, 4 B. Mon. 605, 41 Am. Dec. 250; Meraman v. Caldwell, 8 B. Mon. 32, 46 Am. Dec. 537. **Louisiana:** Thayer v. Waples, 26 La. Ann. 502. **Maine:** Campbell v. Procter, 6 Me. 12; Currier v. Earl, 13 Me. 216. **Michigan:** Fuller v. Sweet, 30 Mich. 237, 18 Am. R. 122; Morse v. Byam, 55 Mich. 594, 22 S. W. 54. **Missouri:** Stephens v. Brown, 56 Mo. 23. **New Jersey:** Van Blarcom v. Kip, 26 N. J. L. 351. **New York:** Jackson v. Wheeler, 6 Johns. 272; Jackson v. Thomas, 16 Johns. 293; Jackson v. Vincent, 4 Wend. 633. **North Carolina:** Vincent v. Corbin, 85 N. Car. 108; Head v. Head, 7 Jones L. 620. **Pennsylvania:** Newman v. Rutter, 8 Watts 51; Willard v. Earley (Pa.), 14 Atl. 426. **South Carolina:** Trustees v. Jennings, 40 S. Car. 168, 42 Am. St. 854; Smith v. Asbell, 2 Strob. 141, 146; Trustees &c. v. Meetze, 4 Rich. L. 50. **Tennessee:** Duke v. Harper, 6 Yerg. 230, 27 Am. Dec. 462; Ladd v. Riggle, 6 Heisk. 620. **Vermont:** Chamberlin v. Donahue, 45 Vt. 50. **Virginia:** Allen v. Paul, 24 Gratt. 332. **Wisconsin:** Evans v. Enloe, 70 Wis. 345, 34 N. W. 918, 36 N. W. 22. **United States:** Willison v. Watkins, 3 Pet. 43; Peyton v. Stith, 5 Pet. 485; Walden v. Bodley, 14 Pet. 156; Zeller v. Eckert, 4 How. 289. **England:** Hovenden v. Annesley, 2 Sch. & L. 607; Grubb v. Grubb, 10 B. & C. 816; Davies v. Evans, 9 M. & W. 48; Vivian v. Moat, L. R. 16 Ch. Div. 730.

[4] Bacon's Abr. tit. Leases and Terms for Years, T. 2.

[5] Farrant v. Thompson, 5 B. & Ald. 826; Agate v. Lowenbein, 57 N. Y. 604.

[6] Willison v. Watkins, 3 Pet. (U. S.) 43.

must be open, continued and notorious, so as to preclude all doubt as to the character of the holding or the want of knowledge on the part of the owner.[7] To allow a tenant to agree and profess to hold possession under the landlord, and at the same time hold covertly for himself, or for another's advantage, would be to enforce and uphold a gross fraud, which the law will never do.[8]

§ 475. The most certain general test of the sufficiency of a disclaimer to create a forfeiture is, whether the tenants' holding is thereby rendered so adverse as to put the statute of limitations in operation in his favor, whereby his adverse possession would ripen into a fee by the lapse of time. The stringent rules of the common law as to the forfeiture of his term by a tenant, which were founded on the system of feudal tenures, are inapplicable in this country, and have been greatly modified by statutory provisions.[9] A tenant, when served with notice to quit at the end of the current period, said: "It does not make any difference to me. I am not here under him. I am here under another man." This was held to be a repudiation of the landlord's title, and an action of ejectment would lie against the tenant without waiting for the expiration of the term, because, by claiming to hold under another, the occupant lost his rights as a tenant.[10] But the statement of a tenant in possession under an agreement to purchase, that he was not holding only as the mere tenant, was not such a renunciation of the allegiance of an unqualified tenant to a technical landlord as would work a forfeiture of the term.[11]

Where the tenancy was at will, the acts of the tenant in allowing an extent running against him to be levied on the land were held so inconsistent with the nature of the holding that it was a repudiation of the tenancy, and ended the will.[12] So, a tenant at will forfeits his estate by selling his interest.[13]

§ 476. Generally, attornment, or delivery of possession, to a stranger or adverse claimant, or any act disavowing the title of the landlord, and claiming a superior hostile title or ownership, amount-

[7] Zeller v. Eckert, 4 How. (U. S.) 289.

[8] Springs v. Schenck, 99 N. Car. 551, 6 Am. St. 552.

[9] Dahm v. Barlow, 93 Ala. 120, 9 So. 598.

[10] Willard v. Earley (Pa.), 14 Atl. 426.

[11] Reeder v. Bell, 7 Bush (Ky.) 255.

[12] Campbell v. Procter, 6 Me. 12.

[13] Danes Abr., Vol. 5, p. 15; Jackson v. Babcock, 4 Johns. (N. Y.) 418.

ing to a repudiation of the tenancy, will constitute a ground for forfeiture.[14] Thus giving up possession to an adverse claimant forfeits the tenant's term.[15] Attornment to a stranger without the consent or approval of the landlord has the same effect.[16] The moment the tenant sets up a hostile title in another, the lease becomes forfeited and the landlord's right of entry complete. Where a tenant disclaims holding under the landlord from whom he received the possession, and attorns to a stranger, the attornment, being void in law, does not operate as a disseisin of the landlord. He may, however, elect so to consider it and bring his action for a disseisin.[17]

There can be no adverse possession by a tenant during his term by his mere intention so to hold, and without doing some act which would amount to adverse possession.[18] So, the lease of a tenant is not forfeited by his mere *claim* to hold adversely to the landlord under whom he entered.[19]

§ 477. Conveyance by tenant.—By the old common law rule a tenant might forfeit his estate by act *in pais*, as where he aliens the estate in fee. Bacon thus states the matter: "But then the alienation must be by such mode of conveyance as displaces or divests the estate of the reversioner; for if it have not that effect, the law will not adjudge it a forfeiture. It must be, therefore, by feoffment with livery; for this only operates upon the possession, and effects a disseisin. It cannot be by a grant, or any conveyance in the nature of a grant, such as lease and release, bargain and sale; conveyances of this kind operating only on the grantor's interest and passing only what he may lawfully depart with."[20] This is now changed in England by a statute providing that a feoffment shall not have any tortious effect.[21] But this only serves to emphasize the fact that a conveyance under the statute of uses never could have the effect of a forfeiture, because it passed no greater interest than the tenant could lawfully convey,

[14] Dahm v. Barlow, 93 Ala. 120, 9 So. 598.

[15] Doe v. Flynn, 1 C. M. & R. 137; Kyle v. Stocks, 31 U. C. Q. B. 47.

[16] Fortier v. Ballance, 10 Ill. 41; Woodward v. Brown, 13 Pet. (U. S.) 1; Blue v. Sayre, 2 Dana (Ky.) 213; Elms v. Randall, 4 Dana (Ky.) 519; Steinhauser v. Kuhn, 50 Mich. 367, 15 N. W. 513; Lyon v. La Master, 103 Mo. 612, 15 S. W. 767; Doe v. Pittman, 2 N. & M. 673, 28 E. C. L. 586; Doe v. Flynn, 1 C. M. & R. 137.

[17] Blue v. Sayre, 2 Dana (Ky.) 213; McCartney v. Auer, 50 Mo. 395.

[18] Abbey Homestead Asso. v. Willard, 48 Cal. 614.

[19] Montgomery v. Craig, 3 Dana (Ky.) 101.

[20] Bacon's Abr. tit. Leases and Terms for Years, T. 2; McMichael v. Craig, 105 Ala. 382, 16 So. 883.

[21] 8 and 9 Vict., ch. 106, § 4.

and this would not affect the rights and interests of the landlord.[22] When a tenant conveys a greater interest than he has in premises, a feoffment with livery of seisin which would work a forfeiture of his estate will not be presumed; it is equally probable that the more common species of assurance of lease and release or bargain and sale was adopted, which, though in terms purporting to convey a fee, in reality transfers no more or greater estate than the grantor had.[23]

In the United States, as well as in England, the rule as to forfeiture by conveyance has been modified by statute in some jurisdictions. Such acts in effect provide that no conveyance shall forfeit the tenant's rights. Examples of this kind of legislation are to be found in Alabama[24] and in New York.[25] The supreme court of the former state thus declares the law: "The true doctrine is, that nothing done or suffered by a tenant for life can operate a forfeiture of his estate to the tenant in remainder, but that his estate may be divested and passed as any other, either through muniments of title executed by him or through a possession adverse to him for the statutory period and the operation of law thereon."[26]

§ 478. By matter of record.—A lessee may incur a forfeiture under the ancient common law "where he sues out a writ or resorts to a remedy which claims or supposes a right to the freehold; or where, in an action by his lessor grounded on the lease, he resists the demand under the grant of a higher interest in the land; or where he acknowledges the fee to be in a stranger; for, having thus solemnly protested against the right of his lessor, he is estopped by the record from claiming an interest under him."[27] "If he (the tenant) affirms the reversion to be in a stranger by accepting his fine, attorning as his tenant, collusive pleading, and the like, such behavior amounts to a forfeiture of his particular estate."[28] So, where a tenant at will accepted a deed in fee to the premises from a third person, put such deed on record, claimed by his plea to be tenant of the freehold, and offered the deed

[22] Emerick v. Tavener, 9 Gratt. (Va.) 220; Jackson v. Mancius, 2 Wend. (N. Y.) 357; Grout v. Townsend, 2 Hill (N. Y.) 554.

[23] Jackson v. Mancius, 2 Wend. (N. Y.) 357.

[24] Civ. Code 1896, § 1038.

[25] Grout v. Townsend, 2 Hill (N. Y.) 554, citing 1 R. S. 738, §§ 143, 145.

[26] McMichael v. Craig, 105 Ala. 382, 388, 16 So. 883, per McClelland, J., citing Woodstock Iron Co. v. Fullenwider, 87 Ala. 586, 6 So. 197, and Gindrat v. Western &c., 96 Ala. 162, 11 So. 372.

[27] Bacon's Abr. tit. Leases and Terms for Years, T. 2.

[28] Coke Litt. 253, quoted in Jackson v. Vincent, 4 Wend. (N. Y.) 633.

at the trial as evidence of title, this was held to work a forfeiture of the estate at will.[29] In one case it was claimed that a life estate was forfeited by acceptance of a deed from a stranger, under the common-law rule that if a tenant for life or for years admitted of record that the fee was in a stranger, he forfeited his estate. To this argument the court replied: "True, it may be said that the acceptance of a deed and putting it on record, under our law, is an act equally conclusive as an admission in a court of record. But as the reasons of the law do not exist here, no case can be said to be within the reason of it, and the only question must be whether it is within the letter. In this case it was not, and there was no forfeiture."[30]

In the entire discussion for forfeiture by adverse claim, it must be remembered that the forfeiture only takes place at the election of the landlord, for it is a well-settled principle that a tenant cannot by buying in a title adverse to his landlord's relieve himself of the obligations of his tenancy and place himself in all respects in the same condition as a disseisor. The only effect is that if he does so and repudiates the tenancy, the landlord has his election to treat the former tenant as a trespasser and to dispossess him.[31]

§ 479. By deed recorded.—It has been held that a deed in fee by a tenant for life or for years, executed and recorded, is a repudiation of the tenancy and forfeits the term. In an early case in Massachusetts it was said: "Our deed recorded is declared by statute to be sufficient to pass the land and estate, without any other act or ceremony in the law; this must mean the estate expressed in the deed when the grantor has the capacity to convey, that is, has seisin; and the common law says he has the right to convey when he is actually seized, though by right or by wrong, claiming a fee; and when tenant for life is actually seized and conveyed in fee, it must be sufficient evidence he claims in fee so that he can thus convey a larger estate than he has, and so divert the remainders and reversions to the injury of their owners. . . ."[32] Such is the law of South Carolina[33] also. A court reaching the opposite conclusion supported its decision by pointing out that "even under the ancient law a forfeiture did not follow a conveyance by deed or by any other mode of divestiture except a technical

[29] Bennock v. Whipple, 12 Me. 346.

[30] Rosseel v. Jarvis, 15 Wis. 571.

[31] Morse v. Byam, 55 Mich. 594, 22 N. W. 54.

[32] Commonwealth v. Welcome, 5 Dane's Abr. 13.

[33] Trustees v. Jennings, 40 S. Car. 168, 18 S. E. 257, 891, 42 Am. St. 854; Trustees &c. v. Meetze, 4 Rich. L. (S. Car.) 50.

feoffment." The court went on to say: "Conveyance by feoffment is unknown to our laws, and this doctrine is upon general principles opposed to that public policy evidenced by all our statutes obtaining in the premises which favors the transfer of all estates in land and denounces entailments and forfeitures."[34] Another argument against the South Carolina cases is that they hold the conveyance causing the forfeiture starts the statute of limitations to running against, the rights of the landlord. But it seems well settled that, even if the tenant forfeits his estate, he does so only at the option of the landlord. If the landlord desires, he may overlook the tortious act of his tenant and assert his rights at the end of the term for years or of the life interest.[35] It is well-settled law that an attornment by a tenant does not, of itself, operate to destroy the possession of the landlord.[36]

§ 480. Payment of rent as an act of disclaimer.—A disclaimer, as the word imports, must be a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself. For a tenant to pay rent to the general landlord and to refuse to pay it to his immediate lessor would not cause a forfeiture where what passed between the parties amounted to nothing more than a mere difference of opinion with reference to the agreement.[37] The mere payment by the tenant to a third person of the rent reserved by his lease does not amount to a disclaimer of the title of the landlord, so as to operate as a forfeiture of the lease. If the tenant pay his rent to a person not entitled to receive it, he pays it in his own wrong, and may afterwards by distress or action be compelled to pay it over again to his landlord.[38] Thus a refusal to pay rent to a devisee under a contested will, accompanied with a declaration that the tenant was ready to pay the rent to any person who was entitled to receive it, is not a disavowal sufficient to dispense with the necessity of a regular notice to quit.[39]

An estate for a fixed number of years, created by deed, will not be forfeited by a simple refusal to pay rent, or any mere words, where there is no unmistakable hostility to the landlord's title with full

[34] McMichael v. Craig, 105 Ala. 382, 16 So. 883.

[35] Moore v. Luce, 29 Pa. St. 260; Jackson v. Mancius, 2 Wend. (N. Y.) 357.

[36] Doe v. Reynolds, 27 Ala. 364; Porter v. Hammond, 3 Me. 188; Willison v. Watkins, 3 Pet. (U. S.) 43; Jackson v. Harsen, 7 Cow. (N. Y.) 323; Jackson v. Harper, 5 Wend. (N. Y.) 246.

[37] Doe v. Cooper, 1 M. & G. 135, 39 E. C. L. 683.

[38] Doe v. Parker, Gow. 180.

[39] Doe v. Pasquali, Peake N. P. (3d ed.) 259.

notice from the tenant of his adverse claim, when no condition or covenant of forfeiture is contained in the deed of lease.[40] However, an absolute denial by a tenant of his liability for rent is evidence of a disavowal of his landlord's title. Such evidence may be submitted to the jury, and the jury may find there was such a disclaimer as would work a forfeiture of the tenant's term.[41] After forfeiting a term by denying his liability for rent, a tenant cannot revive the tenancy by offering to pay the rent and to acknowledge the tenancy.[42]

§ 481. Mere words can never work a forfeiture of an estate for life or for years. This precise question was decided by the court of Queen's Bench in England.[43] The defendant was in possession under an unexpired term for ninety-nine years at an annual rent and determinable on lives. On an application for rent by the agent of the plaintiff, who was entitled to the reversion, the defendant refused to pay it, and asserted that the fee was in himself. The judge at the assizes directed the jury to find for the plaintiff if they were of opinion that the words used by the defendant were a serious claim of the fee. Verdict for the plaintiff. The case was very learnedly argued, and by the unanimous opinion of the court it was held that the plaintiff was not entitled to recover. Lord Denman said he felt the danger of allowing an interest in land to be put an end to by mere words. Patterson, J., said no case had been cited where a lease for a definite term had been forfeited by mere words. They distinguished the case from tenancies at will and from year to year, in which, they said, a denial of tenancy was not a forfeiture, but rather a waiver of notice to quit. The doctrine of this case has received judicial approval in courts of the United States.[44] To commence an adverse holding, the tenant must do something equivalent to a surrender of possession to the landlord and bring home to him knowledge of the adverse claim.[45]

II. *Forfeiture for Breach of Condition.*

§ 482. Forfeitures are also incurred by the breach of express or conventional conditions; for the lessor having the *jus disponendi* may

[40] Gale v. Oil Run &c. Co., 6 W. Va. 200.

[41] Doe v. Cooper, 1 M. & G. 135, 39 E. C. L. 683.

[42] Conner v. Jones, 28 Cal. 59.

[43] Doe v. Wells, 10 A. & E. 427, 37 E. C. L. 237. To same effect see Whiting v. Edmunds, 94 N. Y. 309.

[44] De Lancey v. Ganong, 9 N. Y. 9; Gale v. Oil Run &c. Co., 6 W. Va. 200; Jackson v. Kisselbrack, 10 Johns. (N. Y.) 336.

[45] Whiting v. Edmunds, 94 N. Y. 309.

annex whatever conditions he pleases to his grant, provided they be not illegal, nor repugnant to the grant itself, and upon the breach of those conditions may avoid the lease. Conditions of this sort are generally inserted with a view to secure the payment of the rent, to prevent the commission of waste, or to restrain the alienation of the estate without license from the lessor.[46] If a lease explicitly provides that the landlord my treat it as void upon breach of condition by the tenant, his election to enforce the condition dissolves the relation of landlord and tenant between the parties and determines the tenancy.[47] After the owner, by reason of the lessee's default, and in the assertion of his rights as landlord, has secured an actual and peaceable repossession of the premises, the lease becomes absolutely forfeited, and a mortgage of the leasehold estate, executed by the lessee, falls with it.[48]

A condition has been defined generally as "a qualification or restriction annexed to a conveyance of lands whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or be defeated."[49] The distinguishing feature of a condition, as compared to a conditional limitation, is that a breach of a condition can only be taken advantage of by entry. A breach in the condition of a deed, which is not a limitation, but gives a mere right of reëntry, does not avoid the estate. The estate is terminated solely by the reëntry of the lessor.[50] A provision in a lease that the lessor may terminate the lease at the end of any year by giving sixty days' previous notice "in case he should sell or desire to rebuild," is not a condition, but a limitation, and the term expires by force of a sale and notice, without any further act on the part of the lessor, such as entry.[51] So, where a lease contained not only the usual covenant of reëntry for non-payment of rent, but also an express covenant that in case the rent reserved should be in arrear and unpaid for the space of six months, the lease should be void, it was held that the legal effect of this covenant was to divest the title of the lessee upon the happening of the contingency named.[52]

[46] Bacon's Abr. tit. Leases and Terms for Years, T. 2.

[47] Miller v. Havens, 51 Mich. 482, 16 N. W. 865; De Lancey v. Ganong, 9 N. Y. 9.

[48] Abrahams v. Tappe, 60 Md. 317.

[49] Greenl. Cruise, Dig. tit. 13, ch. 1, § 1, quoted in Bouvier's Law Dict., Rawle's Rev.

[50] Co. Litt. 214b; Comyn's Land & Ten. 104; Spear v. Fuller, 8 N. H. 174; Johnson v. Gurley, 52 Tex. 222; Robey v. Prout, 7 D. C. 81; Den v. McKnight, 11 N. J. L. 385.

[51] Miller v. Levi, 44 N. Y. 489.

[52] Cooke v. Brice, 20 Md. 397.

The right to forfeit vested estates cannot, however, arise by reason of the existence or non-existence of a state of facts not clearly defined. A condition "to use all economy in an enterprise" is too uncertain to be recognized as a ground on which a forfeiture might rest.[53]

§ 483. **Necessity for re-entry.**—In a case arising on the construction of a gas lease there was a covenant to commence operations within nine months or to pay a fixed sum per month till work was commenced. A failure to comply with either one or the other of these conditions was to work an absolute forfeiture of the lease. There was no covenant for reëntry. Upon failure to commence operations and to pay the money in lieu thereof the lessor leased to another person. It was held that the first lease was thus avoided and the second lease was good against it. The execution of the second lease was a sufficient declaration of forfeiture without demand and reëntry. The question involved was whether the common-law method of enforcing a forfeiture by demand and reëntry was applicable to a lease which simply provided for forfeiture for breach of its covenants, but contained no clause of reëntry.[54] After stating the old law to be that a breach of condition terminated a lease without reëntry, the court continues: "Under the law as it had stood, so dead was the lease upon the breach of the condition that the landlord could not recognize it as existing or revive it but by a new lease, but it was dead as to both him and his tenant; but under the modification of the rule wrought by the later decision the lease continued good until the landlord avoided it, but so far as the tenant's rights were concerned it was void, and he could not set it up against the landlord. . . . Thus no reëntry

[53] Benavides v. Hunt, 79 Tex. 383, 15 S. W. 396.

[54] Guffy v. Hukill, 34 W. Va. 49, 11 S. E. 754; Alleghany Oil Co. v. Bradford Oil Co., 21 Hun (N. Y.) 26, affirmed in 86 N. Y. 638. In Roberts v. Davey, 4 B. & Ad. 664, 670, Littledale, J., says: "If it had been a freehold lease of land subject to a condition that it should be void on non-performance of covenants, it would have been necessary for the lessor to avoid it by entry; or if that were impossible, by claim. This instrument is a mere license to dig, and did not pass the land. An actual entry therefore was unnecessary to avoid it; but by analogy . . . the grantor should have given notice of his intention to terminate it." In the same case Park, J., adds: "It is not necessary to decide whether the word void means voidable by entry or voidable by any other act showing the election of the grantor.

Re-entry by lessor is not necessary when he is already in possession. Island Coal Co. v. Combs, 152 Ind. 379, 53 N. E. 452; Maxwell v. Todd, 112 N. Car. 677, 16 S. E. 926.

[55] 2 Minor, Inst. 229, citing 2 Bl. Comm. 155; 2 Thom. Co. Litt. 3, 4, 87, 88, 95–97.

is necessary in case of a lease for years which contains a clause for forfeiture for breach of covenant but no clause of reëntry."[56] Another ground upon which the decision could be rested was that reëntry was impossible because the lessor was already in possession.[57]

However, if a condition, and not a limitation is created, the ordinary reëntry clause raises a necessity for some positive act of the landlord to determine the tenant's estate.[58] An entry by a lessor for lessee's breach of covenants pursuant to a clause for reëntry in the lease is not wrongful, and if the lessee is guilty of the breaches alleged as the basis for the lessor's action, he cannot claim damages for the entry.[59] The entry of a landlord in order to revest possession must not be merely casual, but should be for the purpose of taking possession, and the nature of the entry is to be shown by the acts and declarations of the parties.[60] A waiver of any requirement for reëntry to forfeit a lease may be confined to the landlord's right to bring a statutory process to recover possession. Even then the lessor to be entitled to such process must do some unequivocal act that would signify to the lessee his election to terminate the lease.[61] Where none of the usual steps to declare a forfeiture have been taken, the lease will not be forfeited merely because grounds for forfeiture existed and also an intention to declare a forfeiture. The law does not favor forfeiture and will not imply them from slight circumstances, but they must be formally and clearly declared.[62]

§ 484. How affected by statutes.—By an early English statute,[63] which was reënacted in New York,[64] it was provided that when a right of reëntry by the landlord exists, the service of a declaration in ejectment stands in the place and stead of a demand and reëntry. To authorize the action evidence was required that no sufficient distress could be found upon the premises. Subsequently distress for rent was abolished in New York, and it was provided that if, after a notice of fifteen days, the tenant did not pay the rent, the landlord might reënter. And it was held that this notice of fifteen days stood in the

[56] Guffy v. Hukill, 34 W. Va. 49, 11 S. E. 754, per Brannon, J.

[57] Co. Litt. 316b, 218b; Sheaffer v. Sheaffer, 37 Pa. St. 525; Alleghany Oil Co. v. Bradford Oil Co., 21 Hun (N. Y) 26, affirmed in 86 N. Y. 638.

[58] Bowman v. Foot, 29 Conn. 331.

[59] Wright v. Everett, 87 Iowa 697, 55 N. W. 4.

[60] Holly v. Brown, 14 Conn. 255.

[61] Read v. Tuttle, 35 Conn. 25.

[62] Cheney v. Bonnell, 58 Ill. 268.

[63] 4 Geo. II, ch. 2 to 4, enacted A. D. 1731.

[64] Samson v. Rose, 65 N. Y. 411.

place of the evidence of want of goods to distrain upon. The English statute has also been reënacted in Maryland,[65] and so in that State the service of the declaration in an ejectment suit is a substitute for a demand for rent in every case. The length of the term cannot affect the operation of the statute. A perpetual lease creates the relation of lessor and lessee or landlord and tenant, and the statute in terms applies to every such case. It dispenses with a previous demand of rent and reëntry and substitutes therefor service of a copy of the declaration in ejectment in all cases where the landlord or lessor has right by law to reënter.[66] Express stipulations in a lease regarding demand have been held not to make a demand necessary. In a case arising in England,[67] a lease provided for reëntry in case of the rent being in arrear for a certain time and "being lawfully demanded," and the court, contrary to the opinion of Lord Ellenborough, held that the insertion of these words in the lease did not affect the operation of the statute and that a demand was unnecessary. That case settled the law in England, and there is no substantial difference between the words "being lawfully demanded" and "being first lawfully demanded." In the construction of such an instrument the latter are included in the legal force and operation of the former.[68] Moreover, in England the statute did not extend to cases where there was a sufficient distress upon the premises, and consequently in such cases the lessor must proceed at common law to make an entry.[69] It has been expressly ruled that under the statute of 4 Geo. 2, there must be proof that on some day or period between the time at which the rent fell due and the day of the demise there was not a sufficient distress upon the premises.[70] This same construction has been applied to the statute as reënacted in Maryland.[71]

§ 485. An option to claim an estate for breach of condition is sufficiently expressed by entry or acts equivalent thereto. If the lease does not require notice, the act of taking possession is an exercise of the option and is all the notice required. It would be unreasonable to say a written notice was required when it was not called for by the instrument itself.[72] As has already appeared, a title does

[65] Md. Acts 1872, ch. 346, § 2; Gen. Pub. Laws 1888, Art. 75, § 70, p. 1129.

[66] Campbell v. Shipley, 41 Md. 81, 94.

[67] Doe v. Alexander, 2 M. & S. 525.

[68] Campbell v. Shipley, 41 Md. 81, 94.

[69] Doe v. Lewis, 1 Burr. 614, 620; Doe v. Wandlass, 7 Term R. 113, 117.

[70] Doe v. Fuchau, 15 East 286.

[71] Connor v. Bradley, 1 How. (U. S.) 211.

[72] Metropolitan Land Co. v. Manning, 98 Mo. App. 248, 71 S. W. 696;

not revest immediately upon a breach of condition, for the lessor may waive the forfeiture, in which case the estate continues. So the landlord cannot recover possession of the premises until he has manifested his determination to enforce the forfeiture by entering or making a claim for condition broken.[73] And in Nebraska it has been held that the lessee must be notified of the lessor's intention to declare a forfeiture. It was there ruled that in order to avail himself of the option of declaring a forfeiture it was the duty of the lessor to give the lessee reasonable notice that he would terminate the lease unless the rent was paid or other conditions complied with. If the lessor retook possession without notice and without the lessee's knowledge, he would be liable for such damages as might be sustained by the lessee by reason of his wrongful act.[74]

§ 486. **That a condition in a lease calling for a forfeiture is to be strictly construed against the lessor** is a universal rule recognized by all the authorities. It has been declared that a provision for the forfeiture of a lease will always be construed so as to prevent, rather than aid, the forfeiture.[75] Forfeiture is a harsh remedy, not favored by the law, even though the only loss upon the tenant is being deprived of the balance of the term.[76] Where the subject of the forfeiture is valuable improvements owned by the tenant, forfeiture should be even less favored, and unless compelled by an unbending rule of law, a court of equity would not enforce the forfeiture of property of considerable value belonging to the tenant.[77] So in a case where a lease of a farm on the shares provided that if it was not worked in a proper manner the lessor might enter and take charge of the premises and property thereby rented, it was held that this allowed the lessor on breach to

Clarke v. Brookfield, 81 Mo. 503; Messersmith v. Messersmith, 22 Mo. 369.

[73] Sperry v. Sperry, 8 N. H. 477; Gray v. Blanchard, 8 Pick. (Mass.) 284, 289; Chalker v. Chalker, 1 Conn. 79; Co. Litt. 218a; Shep. Touch. 150.

[74] Cannon v. Wilbur, 30 Neb. 777, 47 N. W. 85.

[75] Sauer v. Meyer, 87 Cal. 34, 25 Pac. 153; Camp v. Scott, 47 Conn. 366, 375; Tate v. Crowson, 6 Ired. L. (N. Car.) 65; Parks v. Hays, 92 Tenn. 161, 22 S. W. 3.

[76] Knight v. Orchard, 92 Mo. App. 466; Sauer v. Meyer, 87 Cal. 34, 25 Pac. 153; Hough v. Brown, 104 Mich. 109, 62 N. W. 143; North & South &c. Co. v. O'Hara, 73 Ill. App. 691; Estabrook v. Hughes, 8 Neb. 496, 1 N. W. 132; Miller v. Havens, 51 Mich. 482, 16 N. W. 865; DeLancey v. Ganong, 9 N. Y. 9; Presbyterian Church v. Pickett, Wright (Ohio) 57; Kentucky &c. Co. v. Commonwealth, 13 Bush (Ky.) 435.

[77] Estabrook v. Hughes, 8 Neb. 496, 1 N. W. 132.

take possession of the stock but not of the growing crops planted by the tenant.[78] A landlord who allows his tenant to expend large sums of money in valuable and lasting improvements, without objection or inquiry as to the intent in regard to violation of covenants, is estopped to assert a forfeiture of the lease because of such improvements where no substantial damage results from the alteration. A covenant in the nature of a restriction or limitation upon the use of property leased will not be enlarged by construction, and any doubts as to its meaning will be resolved in favor of the lessee.[79] But in the face of this general doctrine, a condition that a tenant will forfeit his lease by ceasing to use the demised house as a dwelling has been construed to require his continued residence there.[80] In view of the familiar attitude of courts toward forfeitures, this should be interpreted to mean merely that the house should not be used as a store or as a shop. It has for a very long time been the policy of the law, and courts have felt it their duty in administering the law, as far as possible, to limit the effect of a clause or provision in a lease or statute by which a forfeiture is created.[81] Yet when, by a reasonable construction, it appears that the contracting parties agreed that a forfeiture should take place upon the failure of one of the parties to comply with a material part thereof, courts will decree a forfeiture[82] in case the default or failure is satisfactorily established.[83] When, however, a forfeiture is an end in itself, not a means of enforcing something else, it cannot be relieved against, and is not to be regarded with hostility. If a landlord bargains for a right to end the lease in case of fire the stipulation is to be approached no more adversely than if he had reserved a right to end it by sale, or by the payment of a certain sum of money.[84]

§ 487. **The mere breach of a covenant by the tenant can give the landlord no right of re-entry** unless there be a stipulation in the lease that such breach of covenant shall work a forfeiture or determination of the tenant's interest. No ejectment can be maintained by the land-

[78] Koeleg v. Phelps, 80 Mich. 466, 45 N. W. 350.

[79] Hawes v. Favor, 161 Ill. 440, 43 N. E. 1076.

[80] Marsh v. Bristol, 65 Mich. 378, 384, 32 N. W. 645.

[81] Doe v. Stevens, 3 B. & Ad. 299; Doe v. Hogg, 4 D. & R. 226; Doe v. Godwin, 4 M. & S. 265; Doe v. Bond, 5 B. & C. 855; Miller v. Havens, 51 Mich. 482, 16 N. W. 865; DeLancey v. Ganong, 9 N. Y. 9.

[82] Faylor v. Brice, 7 Ind. App. 551. 34 N. E. 833.

[83] Wilmington &c. Co. v. Allen, 95 Ill.. 288; Consolidated Coal Co. v. Schaefer, 31 Ill. App. 364.

[84] Hunnewell v. Bangs, 161 Mass. 132, 36 N. E. 751.

lord for mere breach of covenant not coupled with a proviso that the term shall end. His only remedy would be an action for breach of covenant.[85] Where there is no right of reëntry reserved in a lease, and no agreement that failure to perform covenants shall operate as a forfeiture, mere breach of covenants, express or implied, does not terminate the relation of landlord and tenant.[86] And if there be doubt as to the true construction of a clause in a lease, it should be held to be a covenant and not a condition.[87] Where there was a stipulation in a lease forbidding assignment without written consent on the part of the lessor, but no express provision for forfeiture in case of breach followed, it was held that the express terms of the lease would not be extended by implication and an assignment would not forfeit the lease. In other parts of the lease there were covenants for breach of which there was an express provision for forfeiture.[88] But a provision that for breach of any of the covenants or agreements in a lease, the lessor might declare the term ended and reënter, gives a mere covenant the force of a condition. Of such a stipulation it was said: "This is not a mere covenant not to assign, but it is a power of reëntry for a breach of covenant, and this . . . has the force of a condition. It may be true that in the construction of deeds courts will incline to interpret the language as a covenant rather than as a condition. But the intention of the parties to the instrument, when clearly ascertained, must control."[89] In the case of a condition broken the right of reëntry by the landlord, if the condition is of such a nature, would ensue; but for a breach of covenant, where no right of reëntry is reserved for such breach, only an action for damages would follow.[90] A printed clause providing that the lease would be forfeited for breach of any of the covenants would be a sufficient basis for forfeiture because of non-payment of taxes, as provided for by another covenant in the lease. It does not alter the result that there is a written provision for forfeiture which would not include the covenant in regard to taxes.[91] Where the proviso in regard to reëntry in case of breach of

[85] Bauer v. Knoble, 51 Minn. 358, 53 N. W. 805; Vanatta v. Brewer, 32 N. J. Eq. 268; Hubner v. Feige, 90 Ill. 208; Johnson v. Gurley, 52 Tex. 222; Ocean Grove &c. Ass'n v. Sanders, 68 N. J. L. 631, 54 Atl. 448; Den v. Post, 25 N. J. L. 285.

[86] Norris v. Harris, 15 Cal. 226; Pickard v. Kleis, 56 Mich. 604, 609, 23 N. W. 329; Presbyterian Church v. Pickett, Wright (Ohio) 59.

[87] Johnson v. Gurley, 52 Tex. 222.

[88] Burnes v. McCubbin, 3 Kan. 221; Den v. Post, 25 N. J. L. 285; Spear v. Fuller, 8 N. H. 174.

[89] Kew v. Trainor, 150 Ill. 150, 37 N. E. 223, per Craig, J.

[90] People v. Gilbert, 64 Ill. App. 203; Philips v. Doe, 3 Ind. 132.

[91] Heiple v. Reinhart, 100 Iowa 525, 68 N. W. 871.

covenant in the lease had been erased from a lease, it was held that what would have been conditions were left mere covenants, relieved of any conditions whatever. Any other construction would do violence to the expressed intention of the parties.[92]

§ 488. A breach of an implied covenant in a lease such as by the commission of waste does not in the absence of an express provision to that effect give the landlord a right to terminate the lease.[93] Moreover, where express and implied covenants exist side by side in a lease, a clause giving the lessor a right to enter and terminate the lease for a breach of the express covenants has been held not to confer a similar right for breach of an implied covenant. The implied agreement must be regarded as a naked covenant, and the right of reëntry in case of default must be held to apply only to breaches of the express promises.[94] In the absence of express covenants as to husbandry in a farming lease, the clause providing for reëntry was held not to apply to the implied covenants of the lease.[95]

But the case seems to be different if the tenancy is at will, for it has been declared to be a well-settled rule that if a tenant at will commits waste, it is a determination of the will and an act of trespass, and that trespass *quare clausum fregit* will lie by the reversioner.[96] An estate at will existing by the statutes of the State of Maine gives to a tenant at will rights for a period, after a written notice to quit, of equal validity with those acquired under a written lease for a like period. Such rights, it has been held, would not be destroyed by the commission of waste by the tenant, and the landlord would be left for redress to his action on the case in the nature of waste.[97]

In leases of mineral lands, where the lessee agrees to pay to the lessor a royalty or rent, which depends on the amount of coal or other product mined, the lessee thereby, in the absence of any provision to the contrary, impliedly obligates himself to begin the development of the coal and the mining thereof within a reasonable time after the execution of the lease. A failure upon the part of the lessee will be held to operate as a forfeiture of his rights.[98]

[92] Hanaw v. Bailey, 83 Mich. 24, 46 N. W. 1039; Langley, v. Ross, 55 Mich. 163, 20 N. W. 886.

[93] Bauer v. Knoble, 51 Minn. 358, 53 N. W. 805.

[94] Hough v. Brown, 104 Mich. 109, 62 N. W. 143.

[95] Somers v. Loose, 127 Mich. 77, 86 N. W. 386.

[96] Daniels v. Pond, 21 Pick. (Mass.) 367; Phillips v. Covert, 7 Johns. (N. Y.) 1; Suffern v. Townsend, 9 Johns. (N. Y.) 35.

[97] Young v. Young, 36 Me. 133.

[98] Island Coal Co. v. Combs, 152 Ind. 379, 53 N. E. 452; Conrad v. Morehead, 89 N. Car. 31; Maxwell v. Todd, 112 N. Car. 677, 16 S. E.

§ 489. Acts of sub-tenant.—A breach by a sub-tenant of the conditions or covenants of the original lease will forfeit such lease.[99] Furthermore a severance of the occupation of demised premises, the rent being paid to the original lessor by the respective sub-tenants, is not a severance of the conditions of the lease, and a breach of the conditions of the lease by one of the occupants works a forfeiture of the whole lease.[100] But a notice by the lessor to one occupying under the lessee, that the lessor will look to him for rent, made when no rent is due and not upon the demised premises, does not terminate the lease on the ground of non-payment of rent.[101]

A statute imposing a forfeiture for illegal use by a tenant was held not to make a lessee liable for the act of his sub-tenant. The illegal use only made void the lease under which the occupant held. It was not intended to vacate the title of the owner or lessor by reason of the acts of the sub-tenant. Such a construction would operate harshly. The effect of it would be to destroy the title of a lessor, however valuable the term, by the acts of his undertenant, of which his lessor had no notice and over which for the time he had no control.[102]

The tenant is liable to suffer a forfeiture, however, if he sub-lets with knowledge that the undertenant intends to put the premises to an illegal use.[103] In the same jurisdiction where the preceding doctrine was adopted it was subsequently said that the claim that a forfeiture must always be to the immediate landlord of him who used the premises for his unlawful trade was a construction which was not warranted by the language of the statute. If adopted it would enable the lessee, by underletting, to deprive the landlord of the benefit of the provisions of the statute.[104] A lessee could not avoid the effect of the illegal user of his sub-tenant by ousting the tenant and thus putting a stop to the illegal use.[105] Nor would the original landlord lose his right to insist upon a forfeiture by seeking to recover the penalty of double rent allowed by the statute.[106]

926; Shenandoah Land &c. Co. v. Hise, 92 Va. 238, 23 S. E. 303; Blue Stone Coal Co. v. Bell, 38 W. Va. 297, 18 S. E. 493.

[99] Wheeler v. Earle, 5 Cush. (Mass.) 31, 51 Am. Dec. 41.

[100] Clarke v. Cummings, 5 Barb. (N. Y.) 339.

[101] Gage v. Smith, 14 Me. 466.

[102] Healy v. Trant, 15 Gray (Mass.) 312; O'Connell v. M'Grath, 14 Allen (Mass.) 289.

[103] Shaw v. McCarty, 59 How. Pr. (N. Y.) 487; People v. McCarty, 62 How. Pr. (N. Y.) 152.

[104] People v. Bennett, 14 Hun (N. Y.) 63.

[105] Shaw v. McCarty, 59 How. Pr. (N. Y.) 487.

[106] People v. Bennett, 14 Hun (N. Y.) 58.

§ 490. The general doctrine that equity will never lend its aid in exacting a penalty applies generally to cases of forfeiture for breach of condition, because a forfeiture is in the nature of a penalty. So the rule has been declared to be that a court of equity will not enforce a forfeiture, but will leave the party claiming it to his legal remedies, such as an action at law to recover possession.[107] On the other hand, chancellors have no compunctions in interfering to prevent a forfeiture, and a court of equity has extended its protection to a defaulting party to prevent a forfeiture after a right to forfeit for breach of condition has been waived.[108] A bill filed to remove a cloud on a title caused by the claims of a lessee under a lease alleged to have been forfeited, and asking that the court ascertain if such forfeiture is complete, and, if so, remove the cloud, is not open to the objection that equity will never enforce a penalty or forfeiture. The bill treated the lease as a void incumbrance, under which the lessee, by his claims, clouded the lessor's title. The court was not asked to declare a forfeiture, but to ascertain whether or not a completed forfeiture existed, and if so to remove the cloud. The bill did not ask the court to do the thing, but to ascertain if it had been done, and if so, to declare its effects upon the title of the lessor's property.[109] Neither does this doctrine apply where a landlord has already entered and declared a forfeiture and is seeking by injunction to prevent a trespass upon his possession. The landlord is not seeking to have a court of equity declare or enforce a forfeiture. That had already been done by making entry and taking possession. He is only seeking now to prevent a recurrence of trespasses made upon the possession he secured after forfeiture, and he is entitled to an injunction on the ground that though a trespasser is solvent, yet when his trespasses are harrassing and continuous, damages recovered in an action at law are not an adequate remedy for them.[110] Equity will not relieve against a forfeiture which is perfect in every respect at law to enjoin an action at law to recover possession of the premises.[111]

§ 491. Under certain circumstances a court of equity may, without violating any settled rules, relieve against a forfeiture.[112] For-

[107] Livingston v. Tompkins, 4 John. Ch. (N. Y.) 415; Linden v. Hepburn, 3 Sandf. (N. Y.) 668; Little Rock &c. Co. v. Shall, 59 Ark. 405, 27 S. W. 562; Justice v. Lowe, 26 Ohio St. 372.

[108] Little Rock &c. Co. v. Shall, 59 Ark. 405, 27 S. W. 562.

[109] Pendill v. Union Mining Co., 64 Mich. 172, 31 N. W. 100.

[110] Metropolitan Land Co. v. Manning, 98 Mo. App. 248, 71 S. W. 696.

[111] Palmer v. Ford, 70 Ill. 369.

[112] Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933; Mactier v. Osborn, 146 Mass. 399, 15 N. E. 641;

feitures which are incurred through inadvertance or mistake, without any bad faith on the part of the lessee, will be relieved against on a showing that no actual damage has been sustained by the lessor.[113] The result of the authorities, supported by sound principles, is that "where there has been a breach of a covenant to pay rent, equity will relieve against a forfeiture, although the breach is wilful on the part of the lessee; and where there has been a breach of a covenant to perform some collateral duty such as to repair or insure, which has been caused by accident or mistake, equity will relieve if the lessor can, by compensation or otherwise, be placed in the same condition as if the breach had not occurred."[114] In all cases where a penalty or forfeiture is designed to secure the payment of a certain sum of money, a court of equity will grant relief upon payment of the money secured, with interest, as in the case of forfeitures for the non-payment of rent.[115] The clause of reëntry as applicable to the covenants for the payments of rent or taxes, or any other sum certain, is in equity treated as a security for the payment of money, and precise compensation can be made for the breach of it and in such case the court will, in the exercise of its equitable powers, relieve from a forfeiture on such terms as may be just.[116] If non-payment of taxes was a mere omission and not an act of wilful bad faith, the lessee could obtain release from the forfeiture by an action in equity setting up the omission to pay and that all payments had been subsequently made.[117] But relief was refused where the failure to pay the taxes was intentional and in bad faith.[118] Equity aids the vigilant and not such as

Sanborn v. Woodman, 5 Cush. (Mass.) 36; Atkins v. Chilson, 11 Metc. (Mass.) 112, 117; Giles v. Austin, 62 N. Y. 486; Noyes v. Anderson, 124 N. Y. 175, 26 N. E. 316; Justice v. Lowe, 26 Ohio St. 372; Hagar v. Buck, 44 Vt. 285; Henry v. Tupper, 29 Vt. 358; Sunday Lake Min. Co. v. Wakefield, 72 Wis. 204, 39 N. W. 136; Hill v. Barclay, 18 Ves. 56, 58; Story Eq. Jur., §§ 1314-1323.

[113] Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933.

[114] Mactier v. Osborn, 146 Mass. 399, 15 N. E. 641, quoted in Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933; Livingston v. Tompkins, 4 Johns. Ch. (N. Y.) 415, 431; Henry v. Tupper, 29 Vt. 358; Sanders v. Pope, 12 Ves. 282 and note.

[115] Atkins v. Chilson, 11 Metc. (Mass.) 112; Johnston v. Hargrove, 81 Va. 118; Little Rock &c. Co. v. Shall, 59 Ark. 405; Baxter v. Lansing, 7 Paige (N. Y.) 350.

[116] Garner v. Hannah, 6 Duer (N. Y.) 262; Baldwin v. Van Vorst, 10 N. J. Eq. 577, 585; Wadman v. Calcraft, 10 Ves. 67; Sanders v. Pope, 12 Ves. 282.

[117] Giles v. Austin, 62 N. Y. 486; Noyes v. Anderson, 124 N. Y. 175, 26 N. E. 316; Messersmith v. Messersmith, 22 Mo. 369.

[118] Metropolitan Land Co. v. Manning, 98 Mo. App. 248, 71 S. W. 696.

sleep upon their rights and requires that he who seeks equity, must do equity; so it follows that a chancery court will not interfere when the breach of condition has been culpable, long persisted in and detrimental.[119] Where other covenants have been broken besides the one for rent for which a right of entry is reserved and no relief can be given by equity for a breach of the others, a forfeiture for breach of the condition concerning rent will not be relieved against as such relief would be of no effect.[120]

§ 492. Only in exceptional cases will equity relieve against a forfeiture caused by a failure to repair or insure. But a default on the part of a lessee to proceed promptly with the work of making improvements was a failure to pay out money for this purpose and was unlike a failure to repair. The lessee's failure was merely an omission to do promptly something which was only useful to the lessors by way of security for the future payment of rent. It was not like a case where the omission caused a present injury or increase of risk to the lessors, as in the case of waste, non-repair, or non-insurance. It was merely a failure to pay out money and was much like an omission to pay taxes. In such a case a court of equity is not required to refuse relief against a forfeiture, but may look into the circumstances, and determine whether on the whole it is just and right that such relief should be granted.[121] In a case of forfeiture for failure to insure, the lessee in good faith intended to have the policies renewed in the same amounts and form. By accident or by mistake of the insurance brokers, they were renewed in a form which did not fairly meet the requirements of the covenant. This was not wilful or voluntary on the lessee's part. It was not an accidental forgetfulness to renew the policies. The property had been fully insured all the time. It was an occurrence not anticipated by the lessee, and not known to him until after the lessor entered to enforce the forfeiture. No misconduct or culpable fault can be attributed to the lessee. The lessors had not in fact been injured by the accident and could have been put *in statu quo*. So it was declared to be against equity and good conscience that the demandant should insist upon a forfeiture of a valuable leasehold estate.[122] The nature of the relief which equity will grant is

[119] Bacon v. Park, 19 Utah 246, 57 Pac. 28.

[120] Sunday Lake Mining Co. v. Wakefield, 72 Wis. 204, 39 N. W. 136; Nokes v. Gibbon, 3 Drew. 681, 693; Bowser v. Colby, 1 Hare 109.

[121] Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933.

[122] Mactier v. Osborn, 146 Mass. 399, 15 N. E. 641.

limited to a relief against the forfeiture. Thus a lease contained a stipulation that the lessee might remove improvements provided he paid rent and kept his agreements, but he failed to do so and the lessor took possession of the improvements. It was held that while equity might interfere for the purpose of preventing a forfeiture, it would not do so for the purpose of allowing the lessee to sue for damages for the acts of the lessor in regard to the improvements.[123]

However the general rule is that equity will not relieve against forfeiture from the breach of covenants where compensation cannot be made.[124] Hence, equity will not in general, and in the absence of special circumstances calling for interference, give relief in cases of forfeiture growing out of breach of covenants for repairing, insuring or doing any specific act, because in such cases it is not known what the measure of damages would be.[125]

§ 493. Emblements.—An entry for condition broken entitles the landlord to crops growing at the time the entry is made. The lessees would have no equitable claims to emblements, as the termination of the estate resulted from their own act in making default. The whole law of emblements is derived from a rule of public policy.[126] But when there has been no cause for forfeiture, mere abandonment of the premises does not prevent the tenant from passing a good title by a sale of growing crops.[127] Where by statute the institution of an action of ejectment was substituted for damand for rent and entry by the landlord, judgment in the action would relate back and the landlord would be entitled to crops growing at the time the ejectment suit was commenced.[128]

Where an assignment of a lease and the sale of a growing crop to a prohibited person caused a breach of condition which forfeited the lease, it was held that title to the growing crop passed to the vendor in spite of a forfeiture and the assignee was entitled to recover from the lessor who had resumed possession, the net value of the wheat after it was threshed.[129]

[123] Stamps v. Cooley, 91 N. Car. 316.

[124] Gregory v. Wilson, 9 Hare 683, 689.

[125] Hukill v. Guffey, 37 W. Va. 425, 464, 15 S. E. 544; Wafer v. Mocato, 9 Mod. 112; Reynolds v. Pitt, 19 Ves. 134, 141; 2 Story Eq. Jur. (13th ed.) 1319-1324.

[126] Samson v. Rose, 65 N. Y. 411; Dayton v. Van Doozer, 39 Mich. 749; Woodcock v. Carlson, 41 Minn. 542, 43 N. W. 479.

[127] Dayton v. Van Doozer, 39 Mich. 749.

[128] Samson v. Rose, 65 N. Y. 411.

[129] Collier v. Cunningham, 2 Ind. App. 254, 28 N. E. 341.

§ 494. A possibility, right of entry, thing in action, cause of suit or title for condition broken could not be granted or assigned over at common law.[130] While this ancient doctrine has been greatly relaxed in modern times, the rule that a mere right of entry for forfeiture cannot be assigned has never been changed.[131] There were two principal reasons why the assignment of things in action were held invalid at common law. One was to avoid maintenance. In early times maintenance was regarded as an evil principally because it would enable the rich and powerful to oppress the poor. This reason has in modern times lost much but not the whole of its force. The other reason is, a principle of law applicable to all assignments, that they are void, unless the assignor has either actually or potentially the thing which he attempts to assign.[132] The right of reëntry is not an estate or interest in land, nor does it imply a reservation of a reversion. It is a mere chose in action. When enforced the grantor is in through the breach of condition and not by the reverter.[133] When a lessee assigns the whole term, the right of reëntry for a breach of a condition subsequent is not reserved or retained. The right of reëntry can only exist as an incident to a reversion.[134] But an assignment of rents does not carry with it a right to reënter for breach of condition. At common law the landlord is the party to enforce a forfeiture for non-payment of rent even though he has assigned over the rents to accrue during the term.[135] Thus in a case where the lessee forfeited his lease under a statute by an illegal use of the premises and the lease reversion was subsequently assigned, it was held that the right to enforce the forfeiture did not pass to the assignee. The forfeiture could only be enforced by the one holding the reversion at the time the act affording a ground for forfeiture was committed.[136] By statute in Illinois the common-law rule is changed and the same right of entry, by action or otherwise, passes to the grantee of the

[130] Bac. Abr. Assignment, A; Com. Dig. Assignment, A; Shep. Touchstone 240; Rice v. Stone, 1 Allen (Mass.) 566.

[131] Trask v. Wheeler, 7 Allen (Mass.) 109.

[132] Rice v. Stone, 1 Allen (Mass.) 566; Jones v. Richardson, 10 Metc. (Mass.) 481.

[133] Craig v. Summers, 47 Minn. 189, 49 N. W. 742; Ohio Iron Co. v. Auburn Iron Co., 64 Minn. 404, 67 N. W. 221; Wright v. Hardy, 76 Miss. 524, 24 So. 697.

[134] Ohio Iron Co. v. Auburn Iron Co., 64 Minn. 404, 67 N. W. 221.

[135] Chamberlin v. Brown, 2 Dougl. (Mich.) 120; Belinski v. Brand, 76 Ill. App. 404; Small v. Clark, 97 Me. 304, 54 Atl. 758; Fenn v. Smart, 12 East 444; Bennett v. Herring, 3 C. B. (N. S.) 370, 91 E. C. L. 370.

[136] Small v. Clark, 97 Me. 304, 54 Atl. 758.

lessor as the lessor himself had.[137] An earlier case distinguishing between the right of reëntry, transferred to the grantee by force of the statute and a reversionary interest, does not hold that such right of reëntry is not transferred by operation of the statute.[138] By a similar statute in New Jersey a grantee of a reversion may take advantage of a right of reëntry in the same manner as the original lessor could have done.[139] While in Kansas it has been held that where a right to enter upon land to sow grain has been reserved by a lessor, such right is assignable unless there is an express provision forbidding assignment.[140]

§ 495. A landlord is not bound to declare a forfeiture for breach of a condition,[141] as he may insist on the tenant's fulfilling his obligations under the lease. A condition for forfeiture is for the benefit of the lessor, not of the lessee. The lessor has the right to elect whether or not he will enforce the forfeiture and if he waives it, the lease still remains in force.[142] "Void," when used in this connection, means voidable at the lessor's election. "Expire and terminate" is also an elliptical phrase, meaning "expire and terminate at the lessor's option."[143] The estate is not wholly void by reason of a breach. Its avoidance is contingent upon the acts of the reversioner.[144] "The tenant cannot insist that his own act amounted to a forfeiture; if he

[137] Thomasson v. Wilson, 146 Ill. 384, 34 N. E. 432; Belinski v. Brand, 76 Ill. App. 404; Rev. Stat., chap. 80, § 14.

[138] Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N. E. 920.

[139] Robinson v. Boys, 61 N. J. L. 179, 38 Atl. 813.

[140] Brewster v. Gracey, 65 Kan. 137, 69 Pac. 199.

[141] Springer v. Chicago &c. Co., 102 Ill. App. 294.

[142] Todd v. Hall, 10 Conn. 544, 560; Brown v. Cavins, 63 Kan. 584, 66 Pac. 639; Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. 196; Alexander v. Touhy, 13 Kan. 64; Proctor v. Keith, 12 B. Mon. (Ky.) 252; Creveling v. West End Iron Co., 51 N. J. L. 34, 16 Atl. 184; Smith v. Miller, 49 N. J. L. 521, 13 Atl. 39; Western Bank v. Kyle, 6 Gill (Md.) 343; Planters' Ins. Co. v. Diggs, 8 Baxt. (Tenn.) 563; Levett v. Bickford, 8 Humph. (Tenn.) 614, 618; Trask v. Wheeler, 7 Allen (Mass.) 109; Rice v. Stone, 1 Allen (Mass.) 566; Walker v. Engler, 30 Mo. 130; Johnson v. Gurley, 52 Tex. 222; Stuyvesant v. Davis, 9 Paige (N. Y.) 427; Clark v. Jones, 1 Denio (N. Y.) 516, 43 Am. Dec. 706; Cochran v. Pew, 159 Pa. St. 184, 28 Atl. 219; Conger v. Transportation Co., 165 Pa. St. 561, 30 Atl. 1038; Roberts v. Bettman, 45 W. Va. 143, 30 S. E. 95; Doe v. Bancks, 4 B. & Ald. 401; Roberts v. Davey, 4 B. & Ad. 664; Doe v. Birch, 1 M. & W. 402.

[143] Jones v. Carter, 15 M. & W. 718; Bowman v. Foot, 29 Conn. 331.

[144] Bowman v. Foot, 29 Conn. 331; Shep. Touch., p. 139, 184.

could . . . the landlord would be defeated by a tenant showing his own default." "In order to derive any benefit from the lease of a mine it was the object of the landlord by introducing the forfeiture clause, to compel his tenant to work it. That, therefore, being the object of the parties in introducing the clause I think it will be fully answered, by holding the lease to be void at the option of the landlord."[145] A default alone does not create a forfeiture but only gives lessor the right to reënter and demand one.[146] The rule that conditions for forfeiture are for the benefit of the lessor alone holds good even though language conveying a contrary impression is used in the lease. Thus under a lease providing that breach of covenants by the lessee "shall work an absolute forfeiture of this grant and lease, and the privileges or easements hereby given shall absolutely cease, determine, and become null and void," it was held that the lessee could not terminate the lease by breach of covenant.[147] A similar result was reached, although the lease declared that the breach of certain covenants on the part of the lessee should render it void, and "not to be revived without the consent of both parties."[148] Thus a condition that if rent is not paid, the lease is to terminate and the lessee is to vacate the premises is for the benefit of the landlord and does not enable the lessee to terminate the lease.[149] An assignment without written consent of the lessor may be a breach both of a covenant and a condition not to assign. After such a breach, the lessor has only the option of forfeiting the lease for breach of condition and he has not the option of declaring the assignment void. An assignment in violation of the covenant is not void and does not avoid the lease but passes the term and the only remedy is an action for breach of covenant.[150] The fact that under the conditions of a lease the execution by the lessee of a certain agreement is a ground for forfeiture does not render the agreement void as between the immediate parties to it, but voidable only at the option of the lessor.[151]

Moreover a landlord cannot enforce a forfeiture against such portion of the demised premises as he desires to retake into his possession and waive it as to the rest of the premises.[152]

[145] Doe v. Bancks, 4 B. & Ald. 401, per Hoboyd and Best.

[146] Alexander v. Touhy, 13 Kan. 64.

[147] Wills v. Manufacturers' &c. Co., 130 Pa. St. 222, 18 Atl. 721.

[148] Phillips v. Vandergrift, 146 Pt. St. 357, 23 Atl. 347.

[149] Morris v. De Wolf, 11 Tex. Civ. App. 701, 33 S. W. 556.

[150] Randol v. Tatum, 98 Cal. 390, 33 Pac. 433.

[151] Willoughby v. Lawrence, 116 Ill. 11, 4 N. E. 356.

[152] Ocean Grove &c. Assn. v. Berthall, 62 N. J. L. 88, 40 Atl. 779.

§ 496. Waiver of ground for forfeiture.—Any act done by a landlord knowing of a cause of forfeiture by his tenant, affirming the existence of the lease and recognizing the lessee as his tenant, is a waiver of such forfeiture.[153] "Slight acts are deemed sufficient for this purpose and any recognition of a tenancy subsisting after the right of entry has accrued and the lessor has notice of the forfeiture, will have the effect of a waiver."[154] Yet it is also true that the mere indulgence or silent acquiescence upon the part of the lessor is not to be construed as a waiver of a breach of the condition of forfeiture.[155] The conducting of negotiations for the adjustment of past difficulties would amount to a waiver of a notice of forfeiture previously given by the landlord and he would be obliged to give another notice.[156]

It is well settled that where the breach of a condition consists of a single act, the forfeiture may be waived by any act which may be construed as an affirmance of the contract.[157] The waiver need not be by affirmative acts, any seeming acquiescence, laches or estoppel will accomplish the same end.[158] The courts have gone even further and held that a covenantee may be estopped from claiming a forfeiture for subsequent breach of condition. This doctrine has been applied whenever the general course of dealing has led the party to believe that strictness in compliance with the terms of the condition would not be required.[159] Yet even after an estoppel, if the covenantee give notice that he intends henceforth to stand upon his legal right, it has been held that he may enforce the terms of the contract strictly from that time on.[160] On the other hand it has been declared that, if one party to a contract intentionally by language or conduct leads the

[153] Williams v. Vanderbilt, 145 Ill. 238, 34 N. E. 476; Planters' Ins. Co. v. Diggs, 8 Baxt. (Tenn.) 563; Levett v. Bickford, 8 Humph. (Tenn.) 614, 618, § 473.

[154] Garnhart v. Finney, 40 Mo. 449; Nagel v. League, 70 Mo. App. 487.

[155] Island Coal Co. v. Combs, 152 Ind. 379, 53 N. E. 452; Lindsey v. Lindsey, 45 Ind. 552, 567; Jackson v. Crysler, 1 Johns. Cas. (N. Y.) 125.

[156] Palmer v. Ford, 70 Ill. 369.

[157] Gist v. Smith, 78 Ky. 367; Alexander v. Touhy, 13 Kan. 64; Rump v. Schwartz, 56 Iowa 611, 10 N. W. 99; Michigan M. Ins. Co. v. Bowes, 42 Mich. 19, 51 N. W. 962; Deyve v. Jamison, 33 Mich. 94; Bechtel v. Cone, 52 Md. 698; Estel v. St. Louis &c. R. Co., 56 Mo. 282; Ireland v. Nichols, 46 N. Y. 413; Collins v. Hasbrouck, 56 N. Y. 157; Murray v. Harway, 56 N. Y. 337; Becker v. Werner, 98 Pa. St. 555.

[158] Barrie v. Smith, 47 Mich. 130, 10 N. W. 168; Vicksburg &c. R. Co. v. Ragsdale, 54 Miss. 200; Allen v. Dent, 4 Lea (Tenn.) 676; Johnson v. Douglass, 73 Mo. 168.

[159] Thropp v. Field, 26 N. J. Eq. 82; Home L. Ins. Co. v. Pierce, 75 Ill. 426; McNeil v. Amey, 2 W. N. C. 65; Hill v. Wand, 47 Kan. 340, 27 Pac. 988.

[160] Times Co. v. Seibrecht, 15 Phila. 235.

obligor to believe that he need not perform promptly, and that no advantage will be taken of the failure, it is equivalent to an express agreement to that effect and is a waiver of the forfeiture.[161] A lessor having, by his words and conduct, caused his lessees to believe that he would not enforce a forfeiture provided for in the lease would be equitably estopped from seeking to avail himself of the forfeiture, although the consent was not given in writing as required by the lease. The old maxim of the common law that an instrument under seal cannot be varied or abrogated by words not under seal[162] is not applicable. There is no question of any variation or abrogation of the sealed instrument but merely a waiver by the lessor of his right to declare a forfeiture thereunder. If the facts show a clear intention on the part of the lessor to waive his right of forfeiture, there is no reason why he should not be held to such waiver. The case is an appropriate one for the application of the doctrine of estoppel.[163] If a lessor, by his acquiescence, induced lessees to believe that strict observance of their covenant to pay rent was not required by him, it is inequitable in him to enforce a forfeiture and the court will not do it.[164] A landlord may waive his right to declare a forfeiture of the lease for non-payment of rent and does so by stating a future date at which the rent must be paid.[165]

When the agency of the landlord is involved in any way in the act which is to work a forfeiture, he ought so to act as to make it appear clearly that he intends to insist upon the forfeiture. Thus a landlord must demand a bond for payment of rent which the tenant has agreed to give or his failure to give it will not forfeit the lease.[166]

Where a landlord waives a breach for which he might forfeit the lease, the effect of the forfeiture is thereby wiped out for all purposes, and the landlord cannot on account of them escape from the obligation of his covenant to renew.[167] The doctrine of waiver only applies where the act or omission of the tenant renders the lease voidable and not where it is declared absolutely void on the happening of the particular event. The distinction is between cases where the landlord may put an end to the lease by an entry for the wrong done and those where the wrong terminates the lease without any act on the part

[161] McCraw v. Old North State Ins. Co., 78 N. Car. 149.

[162] Barnett v. Barnes, 73 Ill. 216; Hume Bros. v. Taylor, 63 Ill. 43; Chapman v. McGrew, 20 Ill. 101.

[163] Moses v. Loomis, 156 Ill. 392, 40 N. E. 952.

[164] Thropp v. Field, 26 N. J. Eq. 82.

[165] Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118.

[166] Tate v. Crowson, 6 Ired. L. (N. Car.) 65.

[167] Garnhart v. Finney, 40 Mo. 449.

of the landlord. In the former case, the landlord may waive the forfeiture by any act which affirms the continuance of the tenancy; but in the latter the lease being *ipso facto* void is incapable of confirmation.[168]

As against a lien claimant upon a leasehold estate which had come into the hands of the lessor, it was claimed that the lease had been forfeited which would bar the lien, but the court held the facts did not justify this conclusion and that the lease had not been forfeited. No notice to quit or to surrender had been given. No demand of possession was made and the leasehold interest was not terminated by any act of the parties amounting to a forfeiture. The lessor acquired the lessee's interest by purchase; he paid the agreed price, took possession of the premises and the accounts between the parties were considered settled. These acts rebut any presumptions that might tend to establish any intention to forfeit the lease.[169]

§ 497. One common mode of effecting a waiver is by the receipt of rent due under the forfeited lease, and the rule in this respect is that the acceptance by the lessor of rent accruing subsequent to the breach of condition with knowledge of the existence of a cause for forfeiture is a waiver thereof.[170] Moreover where a lessor sues for the entire amount of rent, he ratifies and confirms the continued existence of the lease, and waives all previous forfeitures.[171] And distraining for rent after a forfeiture has been held to have the same effect.[172]

[168] Smith v. Saratoga Co. &c. Ins. Co., 3 Hill (N. Y.) 508; Goodright v. Davids, Cowp. 803; Doe v. Rees, 4 Bing. N. C. 384; Doe v. Watts, 7 Term R. 79.

[169] Ellis v. Brisacher, 8 Utah 108, 29 Pac. 879.

[170] Alabama: Dahm v. Barlow, 93 Ala. 120, 9 So. 598; Brooks v. Rogers, 99 Ala. 423, 12 So. 61. California: McGlynn v. Moore, 25 Cal. 384; Silva v. Campbell, 84 Cal. 420, 24 Pac. 316. Illinois: Watson v. Fletcher, 49 Ill. 498. Missouri: Garnhart v. Finney, 40 Mo. 449. Nebraska: Stover v. Hazelbaker, 42 Neb. 393, 60 N. W. 397. New Hampshire: Coon v. Brickett, 2 N. H. 163. New York: Conger v. Duryee, 90 N. Y. 594; Stuyvesant v. Davis, 9 Paige 427. North Carolina: Richburg v. Bartley, Busb. L. 418; Texas, Gulf &c. R. Co. v. Settegast, 79 Tex. 256, 15 S. W. 228. Utah: Young Trust Co. v. Wagener, 13 Utah 236, 44 Pac. 1030. Virginia: McKildoe v. Darracott, 13 Gratt. (Va.) 278. Washington: Pettygrove v. Rothchild, 2 Wash. 6, 26 Pac. 78. Wisconsin: Jolly v. Single, 16 Wis. 280; Gomber v. Hackett, 6 Wis. 323. English: Goodright v. Davids, Cowp. 803; Roe v. Harrison, 2 Term R. 425; Arnsby v. Woodward, 6 B. & C. 519.

[171] Alexander v. Touhy, 13 Kan. 64; Randol v. Tatum, 98 Cal. 390, 33 Pac. 433.

[172] McKildoe v. Darracott, 13 Gratt. (Va.) 278.

It seems also that a mere demand for rent accruing after a forfeiture without suit, is a conclusive waiver of the forfeiture, as such a demand recognizes the lease as still existing.[173]

Upon a question as to the effect of the receipt of rent, knowledge of the facts out of which the forfeiture arises is essential to waiver. Without such knowledge a waiver cannot be said to be established or exist. Waiver can only be found upon knowledge that the condition of the lease was broken. The forfeiture must be known as one of the essential elements of waiver.[174] Waiver is where one in possession of any right, whether conferred by law or by contract, with knowledge of the material facts, does or forbears doing something inconsistent with the right, or of his intention to rely on it; thereupon he is said to have waived it and he is precluded from claiming anything by reason of it afterward. It must always be made with knowledge and intent to waive.[175] The question being one of knowledge and intent, if the evidence is disputed and the acts relied on of an inconclusive nature, the question is for the jury.[176]

The effect of a receipt of rent to waive a forfeiture cannot be qualified by subsequent declarations of the lessor as to his secret intentions. Thus a letter written by the lessor subsequent to the waiver explaining his motives in accepting the rent was properly held not to be admissible in evidence to contradict the waiver.[177]

§ 498. The mere reception of rent accrued before the time for the termination of the tenancy is not a waiver of the notice to quit nor a renewal of the lease; for the lessor has a right to that absolutely, whether the tenancy is determined or not.[178] The current of authority is against the doctrine that by the acceptance of rent which fell due before the alleged determination of the lease, the lessor waived his

[173] Camp v. Scott, 47 Conn. 366, 375; Nagel v. League, 70 Mo. App. 487.

[174] Robinson v. Boys, 61 N. J. L. 179, 38 Atl. 813; Collins v. Hasbrouck, 56 N. Y. 157; Conger v. Duryee, 90 N. Y. 594; Walker v. Engler, 30 Mo. 130; Keeler v. Davis, 5 Duer (N. Y.) 507; Crouch v. Wabash &c. R. Co., 22 Mo. App. 315; Dendy v. Nicholl, 4 C. B. (N. S.) 376, 93 E. C. L. 376; Croft v. Lumley, 5 E. & B. 648, 85 E. C. L. 648.

[175] Bennecke v. Insurance Co., 105 U. S. 355.

[176] Okey v. State Ins. Co., 29 Mo. App. 105; Fitch v. Woodruff &c. Works, 29 Conn. 82; Fox v. Harding, 7 Cush. (Mass.) 516; Traynor v. Johnson, 1 Head (Tenn.) 51; Robinson v. Boys, 61 N. J. L. 179, 38 Atl. 813.

[177] Dahm v. Barlow, 93 Ala. 120, 9 So. 598; Brooks v. Rogers, 99 Ala. 433, 12 So. 61.

[178] Norris v. Morrill, 43 N. H. 213.

right to repossess himself of his estate.[179] So the rule may be stated to be that the receipt by a lessor of rents past due does not operate as a waiver by the lessor of a right of forfeiture reserved by the lease for non-payment of rent subsequently falling due.[180] Furthermore the mere receipt of rent due before forfeiture, after a lease has been forfeited, will not be a waiver of forfeiture.[181] The same rules would apply where the right to forfeit for non-payment of rent was conferred by statute and rent accruing prior to the giving of a notice to quit on that ground had been received after the notice was given.[182]

§ 499. **That lessors are indulgent and accommodating, allowing a default to continue** and the amount of rent due to increase steadily, simply failing to put the tenant out, cannot be regarded as proof of their election to waive the right to declare a forfeiture and take possession, as provided for in the lease. A lessor of real property will not be estopped to claim the right to possession of the premises for non-payment of rent simply because he permits default to be made, and to continue as to such payments. Such acts cannot at any rate be regarded as an election for the future, any more than the acceptance of rent from month to month, and while a tenant is in default in the performance of some of the conditions of a lease, will be held to relieve him of performance in the future.[184] However, the option given to a lessor to declare a forfeiture is to be exercised, if exercised at all, within a reasonable time after learning of the lessee's default; in other words it is possible for a lessor, by neglecting to assert his right at the time of a known default, or within a reasonable time afterward, to waive it. In this particular there is no distinction between leases and other contracts. It is a general rule that if a party becomes entitled to rescind or terminate a contract or claim a forfeiture, by reason of the default of another, he must do it within a reasonable time.[185] Yet a forfeiture was held not to be waived in consequence of a tenant's holding over without receiving notice to quit,

[179] Bowman v. Foot, 29 Conn. 331. But see Coon v. Brickett, 2 N. H. 163.

[180] Silva v. Campbell, 84 Cal. 420, 24 Pac. 316; Bowman v. Foot, 29 Conn. 331; Pendill v. Union Mining Co., 64 Mich. 172, 31 N. W. 100; Phelps v. Illinois &c. R. Co., 63 Ill. 468; Robbins v. Conway, 92 Ill. App. 173.

[181] Jackson v. Allen, 3 Cow. (N. Y.) 220; Stuyvesant v. Davis, 9 Paige (N. Y.) 427; Bleecker v. Smith, 13 Wend. (N. Y.) 530, 533.

[182] Carraher v. Bell, 7 Wash. 81, 34 Pac. 469.

[183] Douglas v. Herms, 53 Minn. 204, 54 N. W. 1112.

[184] Gluck v. Elkan, 36 Minn. 80, 30 N. W. 446.

[185] Catlin v. Wright, 13 Neb. 558, 14 N. W. 530.

for the mere holding over would not entitle the tenant to notice to quit. To amount to a waiver, the holding over must be under such circumstances as to justify the court in finding a new term had been created between the parties.[186]

§ 500. The doctrine of waiver does not apply when the covenant broken is a continuing one. When the failure to comply with a continuing covenant constitutes a breach of condition for which the lease may be forfeited, the receipt of rent subsequently accruing, although operating to cure past breaches, does not dispense with the condition and for future non-compliance the lease may be forfeited.[187] The fact that former breaches of the condition of a lease are waived by the acceptance of rent, and that a former action, in which the forfeiture of the lease was claimed, is dismissed, would not preclude the right of the lessor to maintain an action for subsequent breaches of covenants in the lease, which are continuing in their nature.[188] The waiver of one forfeiture is of course not a waiver of a subsequent forfeiture; and if the act of forfeiture be continuing, a waiver of a right of reëntry for one breach will not preclude a reëntry for a new or continuing breach. Thus a lessor may take advantage of a forfeiture occurring from day to day, as in the case of a neglect to repair or keep a stairway and area open and clean and free from rubbish or the like, notwithstanding a previous receipt of rent.[189] So also where the covenant was that rooms should not be used for certain purposes it was held that there was a breach of this covenant every day during the term that they were so used; and that the lessor was not precluded, by receiving rent subsequent to the commencement of such user, from taking advantage of the forfeiture, provided the user continued after such receipt of rent.[190] Covenants against encumbering fixtures and those against breaking city ordinances have been classed in the same category and held to be continuing in their nature.[191] But a sublease is no more a continuing act of forfeiture than an assignment. The cases are numerous in which forfeitures by sub-letting have been

[186] Calderwood v. Brooks, 28 Cal. 151.

[187] McGlynn v. Moore, 25 Cal. 384; Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027; Gluck v. Elkan, 36 Minn. 80, 30 N. W. 446; Alexander v. Hodges, 41 Mich. 691, 3 N. W. 187; Doe v. Gladwin, 6 A. & E. (N. S.) 953, 51 E. C. L. 953; Doe v. Woodbridge, 9 B. & C. 376, 17 E. C. L. 173.

[188] Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027.

[189] Gluck v. Elkan, 36 Minn. 80, 30 N. W. 446; Doe v. Gladwin, 6 A. & E. (N. S.) 953, 51 E. C. L. 953.

[190] Doe v. Woodbridge, 9 B. & C. 376, 17 E. C. L. 173.

[191] Alexander v. Hodges, 41 Mich. 691, 3 N. W. 187.

held to be waived by the subsequent acceptance of rent, yet there could have been no difficulty in enforcing the forfeitures in these cases if the breaches had been continuing. A license to assign is a dispensation of the whole condition whereas it has been held that a lessor who has a right of reëntry on a breach of a covenant not to underlet, does not, by waiving his entry on one underletting, waive his right to reënter on a subsequent underletting. In the former case the waiver is of the condition itself; in the latter, only of the forfeiture for a particular breach. But in both cases each breach is a single act and not a continuing act of forfeiture.[192]

There is nothing in the nature of a covenant to build by a given time that indicates that a continued failure to perform the covenant will produce a succession of breaches; but, on the contrary, it more nearly resembles in this respect, the covenant not to assign, or for a reëntry in case of the bankruptcy of the lessee, in both of which cases, the breach, if it takes place, is once for all. The proposition that a covenant to build is a continuing covenant is unsupported by reason or authority, and therefore the receipt of rent after notice of the breach was a waiver of the right to enter for the forfeiture.[193]

§ 501. Liability for rents subsequent to a forfeiture.—Under the ordinary provision that a lease should be void at the election of the lessor upon breach of condition, the entry by the lessor for such breach terminates the lease and with it the right to collect future rents.[194] Where, for non-payment of rent, a tenant has been removed from the premises by summary proceedings under the statute, he can claim exemption from liability for rent as such during the remainder of the term. Only the rent accrued up to the determination of the lease can be recovered.[195] After a lessor has availed himself of a privilege to declare a forfeiture for non-payment of rent, the lessee may vacate the premises and not be liable for rent beyond the current month.[196]

A provision in a lease that on breach of condition the lessor may reënter without such reëntry working a forfeiture of the rent to be paid is valid. If not as a stipulation for future rents in a strict sense, it is valid as a stipulation for damages. The rent collected from other tenants by a landlord inures to the benefit of the former lessee though

[192] McKildoe v. Darracott, 13 Grat. (Va.) 278; Doe v. Bliss, 4 Taunt. 735, Archbold 97.

[193] McGlynn v. Moore, 25 Cal. 384.

[194] Grommes v. St. Paul Trust Co., 147 Ill. 634, 35 N. E. 820, affirming 47 Ill. App. 568; Jones v. Carter, 15 M. & W. 718.

[195] Campbell v. Nixon, 2 Ind. App. 463, 28 N. E. 107.

[196] King v. Davies, 2 Kan. App. 634, 42 Pac. 942.

the acceptance of such rent by the landlord is not a surrender of his rights against the original lessee.[197] It is entirely unobjectionable to insert in a lease a provision that after entry by the lessor for breach of condition the obligation of the lessee to pay rent shall continue as before.[198] So, provisions in a lease that upon a reëntry for breach of condition the landlord may relet the premises for the account of the lessee, holding him for any deficiency below the agreed rate, are not uncommon and are uniformly upheld.[199]

III. *Effect of Non-Payment of Rent.*

§ 502. The right to enter for non-payment of rent is not an incident of a lessor's estate at common law, but must be specially reserved in the lease. At common law a refusal or neglect to pay rent does not work a forfeiture of the term, unless the lease contains express conditions of forfeiture in case of the non-payment of rent.[200] This rule is not affected by those statutes making the service of the complaint in an ejectment suit a substitute for demand and entry. These statutes do not assume to give a right of reëntry where such right does not already exist, but merely provide that where the right is already subsisting the commencement of an action shall be equivalent to an actual entry.[201] Non-payment of rent is no cause for the forfeiture of the lease unless it is expressly so provided. The tenant can retain possession until the end of the term, though it be morally certain that the landlord will receive no rent.[202] So failure to make due payment of the royalties reserved in a mining lease will not, in and of itself, work a forfeiture, when the lease does not provide that it shall become void in the event of non-payment.[203] In one case a tenant entered and occupied under a lease, agreeing to make certain improvements in lieu of paying rent, but failed to make the improve-

[197] Grommes v. St. Paul Trust Co., 147 Ill. 634, 35 N. E. 820, affirming 47 Ill. App. 568.

[198] Helms Brewing Co. v. Flannery, 137 Ill. 309, 27 N. E. 286.

[199] Grommes v. St. Paul Trust Co., 147 Ill. 634, 35 N. E. 820, 47 Ill. App. 568; Hall v. Gould, 13 N. Y. 127; Morgan v. Smith, 70 N. Y. 537.

[200] Woodcock v. Carlson, 41 Minn. 542, 43 N. W. 479; Bartlett v. Greenleaf, 11 Gray (Mass.) 98; Hodgkins v. Price, 137 Mass. 13.

[201] Woodcock v. Carlson, 41 Minn. 542, 43 N. W. 479.

[202] Buckner v. Warren, 41 Ark. 532; Chipman v. Emeric, 3 Cal. 273; Wirt v. Philips, 1 Hawaii 61; Beal v. Bass, 86 Me. 325, 28 Atl. 1088; Meroney v. Wright, 81 N. Car. 390.

[203] Wakefield v. Sunday Lake Min. Co., 85 Mich. 605, 49 N. W. 135; Dare v. Boylston, 6 Fed. 493.

ments according to agreement. He did not thereby forfeit his lease without any further act on the part of the lessor, but was entitled to occupy under it, and could only be held liable for damages accruing by reason of his failure to perform. He was not liable for use and occupation.[204]

Forfeiture for non-payment of rent has always been a harsh remedy, liable to produce hardships, and has not been favored by the law. Strict compliance with several important requisites was therefore required.[205]

When a right of entry was made contingent upon there being no sufficient distress for rent, it was held that no right of reëntry accrued until it was shown that there was no sufficient distress upon the premises.[206] But ordinarily, in enforcing a forfeiture for non-payment of rent, it is immaterial whether there is a sufficient distress on the premises to satisfy the claim for rent.[207] Where continued default in the payment of rent for a certain period is a ground for forfeiture, the only method of avoiding the forfeiture is payment or tender of the rent during such period. A tender before the day when the rent is due will be unavailing.[208]

§ 503. **Necessity for demanding rent.**—Even when the right of reëntry is reserved for breach of a covenant to pay rent, the old common-law rule was that, before there would be a forfeiture for non-payment, rent must be demanded in the precise sum due, on the day it is due, at some convenient hour before sunset on that day, on the premises, at the most notorious place thereon, and if there be a dwelling-house, at the front door thereof.[209] The common-law rule was so strict

[204] Raybourn v. Ramsdell, 78 Ill. 622.

[205] Chapman v. Kirby, 49 Ill. 211.

[206] Den v. Craig, 15 N. J. L. 191. Long discussion of early law in regard to rent.

[207] Becker v. Werner, 98 Pa. St. 555.

[208] Illingworth v. Miltenberger, 11 Mo. 80.

[209] **Indiana:** Phillips v. Doe, 3 Ind. 142; Jenkins v. Jenkins, 63 Ind. 415. **California:** Gage v. Bates, 40 Cal. 384. **Kansas:** Chandler v. McGinning, 8 Kan. App. 421, 55 Pac. 103. **Virginia:** Johnston v. Hargrove, 81 Va. 118. **Colorado:** Miller v. Sparks, 4 Colo. 303. **New Hampshire:** Jewett v. Berry, 20 N. H. 36; Jones v. Reed, 15 N. H. 68; McQuesten v. Morgan, 34 N. H. 400. **Tennessee:** Parks v. Hays, 92 Tenn. 161, 22 S. W. 3. **Illinois:** Sexton v. Carley, 47 Ill. App. 316; Williams v. Vanderbilt, 145 Ill. 238, 34 N. E. 476; Chadwick v. Parker, 44 Ill. 326. **Nebraska:** Haynes v. Union Im. Co., 35 Neb. 766, 53 N. W. 979. **Massachusetts:** Chapman v. Harney, 100 Mass. 353. **English:** Doe v. Wandlass, 7 Term R. 113, 117. **Ohio:** Boyd v. Talbert, 12 Ohio 212. **Vermont:** Willard v. Benton, 57 Vt. 286. **United States:** Connor v. Bradley, 1

that the slightest failure to comply with any one of these requirements rendered the demand nugatory.[210] The law fixes with precision the time and place for a demand of rent, and if the demand is not made then and there, the lessee is allowed to infer that the lessor intends to waive his right to insist on a forfeiture of the estate. This rule apprises a tenant of the exact time and place when and where he is to be called on for the rent, and gives him opportunity to be ready to meet the demand and save his estate. When the forfeiture was to take place on default in payment of rent for thirty days, it was held that the demand should be made either on the day the rent was due or on the last day of the thirty-day period. If the lessor might come to the premises on any day, and at any time of the day, for thirty days, or as the condition of some leases are for a year, and make a sufficient demand, the apparent object of the rule which fixes the time and place for a demand of rent would not be answered. The lessee would have no means of knowing when the lessor would come for the rent.[211] It was also essential that a demand be made in fact, though no person be present on the premises to comply with it.[212] But proceedings to dispossess a tenant for non-payment of rent are not invalidated because of demand of the rent with interest; the landlord is entitled to interest, as an incident of the principal, from the time of the default in payment, and is justified in demanding it.[213] Moreover, no particular form of words is necessary in making a demand; a party making it must have intended to make it, and the other party must have understood that a demand was made; all that is necessary is that both parties should understand by what was said and done that a demand was made, and the tenant need not be told what will be the consequences if he does not pay.[214] A convenient time before sunset means immediately preceding it—time enough before to count and pay the money; and the jury cannot be allowed to find that an earlier time is a convenient time; it is a matter of law.[215]

The landlord can, nevertheless, bring an action of use and occupation for his rent before making any demand for it.[216] While a demand

How. 211. **Minnesota:** Byrane v. Rogers, 8 Minn. 281. **New York:** Jackson v. Harrison, 17 Johns. 66; Van Rensselaer v. Jewett, 2 N. Y. 141.

[210] Bacon v. Western Furniture Co., 53 Ind. 229.

[211] McQueston v. Morgan, 34 N. H. 400; Jones v. Reed, 15 N. H. 68.

[212] Chapman v. Kirby, 49 Ill. 211; Byrane v. Rogers, 8 Minn. 281; Connor v. Bradley, 1 How. (U. S.) 211; Adams on Ejectment, 4th ed., 187.

[213] People v. Dudley, 58 N. Y. 323.

[214] Norris v. Morrill, 43 N. H. 213.

[215] Smith v. Whitbeck, 13 Ohio St. 471.

[216] Spaulding v. M'Osker, 7 Metc. (Mass.) 8.

is necessary before a lessor proceeds to enforce a forfeiture, none is required in an action of covenant for rent. The law is well settled that in an action of covenant for rent no demand is necessary.[217]

There was probably no doctrine of the common law that required a landlord to make a demand before forfeiture on breach of a covenant to repair, or insure, or keep insured, or similar agreements. The great strictness required of landlords who sought forfeitures for the non-payment of rent arose from the extraordinary remedy they possessed for the collection of that character of debt, by way of distress. A landlord would, under certain contingencies, find himself embarrassed to decide when, where, and what to demand of his tenant should a demand be a prerequisite to his right to reënter for non-payment of taxes.[218]

A statement by a tenant that he did not acknowledge an alleged assignee, and did not wish to pay rent to him, is not a refusal to pay rent, sufficient to cause a forfeiture, if in fact he did not know the assignee. The tenant did just what any tenant ought to do when called upon to acknowledge the title of a stranger and pay rent to him. If leases could be forfeited by making secret assignments of a lease and demand made by the assignee without making known the fact of assignment, no tenant would ever be safe.[219]

§ 504. An express stipulation in a lease dispensing with the requirement for a demand for rent is valid and entitles the lessor to enforce a forfeiture without making any demand.[220] The lease may provide in express terms that the estate shall be forfeited if the rent is not paid, without any entry and though no legal demand of rent is made; and in such case the agreement of the parties supersedes the general rule of law as to the necessity for a demand.[221] It is a universally recognized principle that the demand for payment of rent required by some statutes and at common law as a condition precedent

[217] M'Murphy v. Minot, 4 N. H. 251; Remsen v. Conklin, 18 Johns. (N. Y.) 447; Coon v. Brickett, 2 N. H. 163; Com. Dig. Rent. D. 4.

[218] Byrane v. Rogers, 8 Minn. 281; Garner v. Hannah, 6 Duer (N. Y.) 262. But see Tate v. Crowson, 6 Ired. L. (N. Car.) 65; Jackson v. Harrison, 17 Johns. (N. Y.) 66.

[219] O'Connor v. Kelly, 41 Cal. 432.

[220] Faylor v. Brice, 7 Ind. App. 551, 34 N. E. 833; Fifty Associates v. Howland, 5 Cush. (Mass.) 214; Lewis v. Hughes, 12 Colo. 208, 20 Pac. 621; Shanfelter v. Horner, 81 Md. 621, 32 Atl. 184; Belinski v. Brand, 76 Ill. App. 404; Sweeney v. Garrett, 2 Disney (Ohio) 601; Byrane v. Rogers, 8 Minn. 281; McQuesten v. Morgan, 34 N. H. 400; Doe v. Masters, 2 B. & C. 490; Goodright v. Cator, Doug. 478.

[221] McQuesten v. Morgan, 34 N. H. 400; Thomas v. Walmer, 18 Ind. App. 112, 46 N. E. 695; Island Coal Co. v. Combs, 152 Ind. 379, 53 N. E. 452.

to reëntry may be waived by the parties for whose protection it is required.[222] A clause in a lease waiving notice, demand for the payment of rent or possession, and agreeing that the fact of the non-payment of the rent should constitute a forcible detainer is valid and effective in an action under the Forcible Detainer Act.[223] With even greater reason a waiver of notice and demand would be effective where the lessor is in quiet possession after the alleged forfeiture.[224] After such a waiver the right of a lessor to enter is not dependent upon his having declared a forfeiture of the lease, but exists, if at all, because of a lawful termination of the lease by some act or omission constituting a breach of condition. So that a lessor would not be guilty of a trespass in making a peaceable entry.[225]

A provision that, if rent shall be in arrear more than ninety days, the tenancy shall be *at once* and *without notice of any kind* determined, was held to render a demand for rent unnecessary. This condition was not subject to the common-law requirements as to demand and entry.[226] It has been held that a provision that lessor may enter "without further demand" means that no demand at all is necessary. It was argued that the word "further" implied that a previous demand had been made; but that would be an absurdity, for one demand would be sufficient, without an agreement that no other demand should be required. The word is not so appropriate as the word "any," but it has the same meaning when so used in a lease, and has been so construed in a similar condition.[227] If the stipulation only waives the demand, the landlord must claim his forfeiture at the time it accrues by reëntry or suit, or he will lose it in the same manner he would have done had a demand been necessary and he failed to make it. The demand is all that is waived; the intention to assert his rights under the forfeiture in every other particular is as necessary as without the stipulation. Furthermore, a waiver of demand *on the day the rent was due* would not relieve the landlord from the duty of making a demand if he wishes to enter at a subsequent date.[228] But where a lease provided

[222] Pendill v. Union Mining Co., 64 Mich. 172, 31 N. W. 100.

[223] Espen v. Hinchliffe, 131 Ill. 468, 23 N. E. 592; Jackson v. Collins, 11 Johns. (N. Y.) 1; Sweeney v. Garrett, 2 Disney (Ohio) 601; Fifty Associates v. Howland, 5 Cush. (Mass.) 214; Eichart v. Bargas, 12 B. Mon. (Ky.) 462.

[224] Island Coal Co. v. Combs, 152 Ind. 379, 53 N. E. 452.

[225] Schaefer v. Silverstein, 46 Ill. App. 608.

[226] Shanfelter v. Horner, 81 Md. 621, 32 Atl. 184; Cooke v. Brice, 20 Md. 397.

[227] Fifty Associates v. Howland, 5 Cush. (Mass.) 214; 1 Bac. Abr. Condition, O, 2.

[228] Byrane v. Rogers, 8 Minn. 281.

that no notice should be necessary, on failure to pay rent, to terminate lease, it was held that demand for rent was unnecessary as well.[229]

A provision in a clause for forfeiture for non-payment of rent requiring ten days' notice to the lessee may be waived by him, and where the lessee agreed to end the lease and surrender the term, his right to notice cannot be insisted upon.[230]

§ 505. Damages from an alleged trespass by a landlord will not consitute such a legal set-off against an unpaid quarter's rent that it will prevent a forfeiture for non-payment of rent.[231] In summary proceedings for non-payment of rent, the failure of the landlord to repair promptly the premises according to his agreement cannot be made the subject of a counter-claim, though it might be in an action for rent.[232] A counter-claim against a landlord for his use of a part of the premises has, however, been held to prevent a forfeiture of the lease for non-payment of rent in advance as stipulated in the lease.[233] An agreement that the cost of repairs should be deducted from the rent operates as payment and prevents a forfeiture. But an unsettled account, which would be good as a set-off against the claim for rent, does not make an entry unlawful, because such an account would not support a plea of payment in an action for the rent. In covenanting to pay rent according to the terms of a lease, the lessee undertakes to pay it in money, but it is competent for the parties to agree to receive and pay any part of it in any other way, and if a lessee does service or furnishes labor or materials for the lessor, under an agreement that the cost thereof should apply in payment of rent, the service, when rendered, or the labor and materials, when furnished, are at once payment of the rent *pro tanto*. If their value is equal to the accrued rent when the lessor enters the leased premises, his entry is unlawful, because the rent has been paid and there has been no breach of covenant by the lessee. If, however, the lessee has an unsettled account against the lessor for services rendered, labor and materials furnished, or goods sold, without any agreement that it should be appplied in payment of the rent, the entry is not unlawful, because such account would not support a plea of payment and satisfaction in

[229] Faylor v. Brice, 7 Ind. App. 551, 34 N. E. 833.

[230] Clator v. Otto, 38 W. Va. 89, 18 S. E. 378.

[231] Willis v. Branch, 94 N. Car. 142; Abrams v. Watson, 59 Ala. 524.

[232] Pearson v. Germond, 31 N. Y. S. 358, 83 Hun (N. Y.) 88; Peterson v. Krenger, 67 Minn. 449, 70 N. W. 567.

[233] Parsons v. Wright, 102 Iowa 473, 71 N. W. 351.

an action for the rent, though it might be availed of by way of set-off, or in proceedings in equity to prevent the lessor from entering and expelling the lessee.[234]

§ 506. **Arizona.**—Whenever any tenant shall neglect or refuse to pay his rent when the same shall be due, and said rent shall be in arrears and unpaid for five days thereafter, . . . the landlord shall have the right by law to reënter and take possession of said leased premises for non-payment of rent, and may, without any formal demand or reëntry, commence an action for the recovery of said premises.[235]

§ 507. **Arkansas.**—Whenever a half-year's rent or more is in arrear from a tenant, the landlord, if he has a subsisting right by law to reënter for the non-payment of said rent, may bring an action to recover the possession of the demised premises. The service of the summons in such action shall be deemed and stand instead of a demand of the rent in arrear, and of a reëntry on the demised premises.[236] A tender of rent due after notice of suit by landlord, but before suit brought, is held sufficient to entitle a tenant to relief from forfeiture, and the landlord could not then recover possession.[237] A reletting of the premises to a tenant after recovering a judgment for possession against him in such a suit, is a satisfaction of the judgment, and an execution on the judgment after the new lease will be enjoined.[238]

§ 508. **California.**—A lessee is guilty of unlawful detainer if he continues in possession of property after default in payment of rent according to the terms of his lease, and after three days' notice in writing requiring its payment or possession of the property. Failure to perform covenants other than for the payment of rent has a similar effect, and in cases where performance has become impossible, three days' demand for performance is unnecessary.[239] But even then notice is necessary before the commencement of an action of forcible detainer. Where the relation of landlord and tenant exists, and it is sought before the expiration of the period fixed in the lease to obtain the possession of the demised premises for a failure to perform any of the

[234] Fillebrown v. Hoar, 124 Mass. 580.

[235] Civil Code 1901, § 2693.

[236] Dig. of St. 1894, §§ 4466, 4468.

[237] Geary v. Parker, 65 Ark. 521, 47 S. W. 238, 53 S. W. 567.

[238] Barney v. Cain, 37 Ark. 127.

[239] Code of Civil Procedure 1903, § 1161.

covenants or conditions therein, a demand is always necessary before an action in the nature of a summary proceeding under the code can be invoked to dispossess the tenant. The only knowledge that the tenant can have of his landlord's purpose to stand upon the strict terms of the lease and to dispossess him for a failure to perform its covenants is through actual notice of that fact by demand for possession. The demand operates both as a notice of the landlord's election to insist on a forfeiture of the lease and as requiring surrender of possession by the tenant.[240]

§ 509. **Colorado.**—It constitutes unlawful detention for a tenant to hold over after any default in payment of rent pursuant to the agreement under which he holds and after the service of three days' written notice in the alternative, requiring the payment of rent or the possession of the premises. No demand for rent on the day on which it becomes due is necessary to work a forfeiture for non-payment of rent. Holding over without permission, contrary to any other condition or covenant of the lease, after three days' notice in writing, is also an unlawful detainer.[241]

§ 510. **Connecticut.**—Whenever by the terms of a parol lease of real estate rent is agreed to be paid at stated periods, and such rent shall be and remain due and unpaid for a period of more than nine days, such lease shall, at the option of the lessor and on notice to the lessee, expire and terminate.[242] The lessor is then entitled to resort to the remedy of summary process to recover possession.[243]

§ 511. **Florida.**—It furnishes a cause for the removal of a tenant that he holds over without permission after default in the payment of rent pursuant to his lease and after three days' notice in writing requiring the payment of such rent or the possession of such premises shall have been served on him. The service shall be by delivery of a true copy, or, if the tenant is absent, by leaving a copy at his last and usual place of residence.[244]

§ 512. **Georgia.**—If the tenant fails to pay the rent due at any time, the landlord may reënter immediately and dispossess the ten-

[240] Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449.

[241] Mills Ann. St. 1891, § 1973, par. 4, 5.

[242] Gen. St. 1902, § 4044.

[243] Gen. St. 1902, § 1078.

[244] Rev. St. 1892, § 1751.

ant.[245] In case a tenant fails to pay rent as it becomes due, and the owner desires possession of the premises, such owner may demand possession, and, if the tenant refuses to deliver it, make an oath of the facts, which will entitle him to a warrant directing an officer to remove the tenant. The tenant may arrest proceedings by making oath that no rent is due and giving bond with sureties to pay costs.[246] Whenever the relation of landlord and tenant exists and rents are due and unpaid, it has been declared that this statutory remedy applies. A question as to the constitutionality of this act has been resolved in the affirmative.[247]

§ 513. Illinois.—The landlord or his agent may, at any time after rent is due, demand payment thereof, and notify the tenant in writing that unless payment is made within a specified time mentioned in such notice, not less than five days after the service thereof, the lease will be terminated. If the tenant shall not within the time mentioned in such notice pay the rent due, the landlord may consider the lease ended, and sue for the possession under the statute in relation to forcible entry and detainer, or maintain ejectment without further notice or demand.[248] The common-law rule that to create the forfeiture for non-payment of rent a demand for payment must be made upon the premises or some part thereof is by necessary implication dispensed with by the Illinois statutes. The former requirement for ten days' notice has been changed, and only five days' notice is required if rent is due and unpaid.[249] Under the Illinois act of 1865, where the lessor demanded his rent and, on failing to get it, gave the statutory ten days' notice to quit, the tenant had ten days in which to pay the rents and avert the forfeiture. A tender of the rent at the specified place prior to the giving of the ten days' notice would have entitled the tenant to continue in possession.[250] According to the statutory provision, payment or tender of the rent in arrears during the ten days after notice is served prevented a forfeiture of the lease.[251] On the other

[245] Code 1895, § 3124.

[246] Code 1895, §§ 4813–4815.

[247] Huff v. Markham, 70 Ga. 284.

[248] Rev. St. 1903, ch. 80, § 8.

[249] Howland v. White, 48 Ill. App. 236; Woodward v. Cone, 73 Ill. 241; Chadwick v. Parker, 44 Ill. 326; Burt v. French, 70 Ill. 254; Williams v. Vanderbilt, 145 Ill. 238, 34 N. E. 476.

[250] Fisher v. Smith, 48 Ill. 184.

[251] Chapman v. Kirby, 49 Ill. 211. Tender. An offer to pay by means of a check is a good tender even though the check is a few dollars too large, unless some objection is made to the check at the time it is offered. Mere inability to make change does not make the tender bad. Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118.

hand, unqualified refusal of lessee to pay his rent, when followed by notice to quit within ten days and no act of tenant signifying his willingness to pay the rent, amounts to a forfeiture.[252] No demand is necessary where the lease is for a definite term and the end of that term has arrived.[253]

If a lessee fails to pay rent and taxes as he has covenanted to do, and thereby creates a cause for forfeiture, the lessor may forfeit the lease, and the holder of a lien on the leasehold estate must pay all arrears of rent before he can acquire the rights of the lessee under the lease.[254]

§ 514. Indiana.—If a tenant refuse or neglect to pay rent when due, ten days' notice to quit shall determine the lease, when not otherwise provided therein or agreed to by the parties, unless such rent be paid at the expiration of such ten days.[255] This statutory mode of determining a lease does not preclude a resort to a forfeiture according to common-law methods, and in that case rent must be demanded on the premises just before sunset on the day when due.[256] In the absence of special agreement, rent under a tenancy from year to year is not due till the end of the year;[257] but where there is an agreement for the earlier payment of rent, a tenancy from year to year may be terminated, like any other, by a failure to pay rent after ten days' notice.[258] The only proper and legal mode of serving a notice of this kind is by delivering the notice to the tenant, or, if he cannot be found, by delivering it to some person of proper age and discretion on the premises. A demand made by reading a paper to the tenant is not a demand made in writing. It is but an oral demand.[259]

§ 515. Iowa.—A summary remedy for forcible entry and detainer is allowable for the non-payment of rent when due. But before action can be brought on this ground, three days' notice to quit must be given to the defendant in writing.[260]

§ 516. Kansas.—If a tenant for a period of three months or longer neglect to pay rent when due, ten days' notice in writing to quit shall

[252] Fisher v. Smith, 48 Ill. 184.
[253] Chadwick v. Parker, 44 Ill. 326.
[254] Crandall v. Sorg, 99 Ill. App. 22; Jones on Liens, § 1273.
[255] Burns' Ann. St. 1901, § 7092.
[256] Jenkins v. Jenkins, 63 Ind. 415; Bacon v. Western &c. Co., 53 Ind. 229.
[257] Indianapolis Co. v. First Nat. Bank, 134 Ind. 127, 33 N. E. 679; Cowan v. Henika, 19 Ind. App. 40, 48 N. E. 809.
[258] Leary v. Meier, 78 Ind. 393.
[259] Jenkins v. Jenkins, 63 Ind. 415.
[260] Code 1897, §§ 4208, 4209.

determine the lease, unless such rent be paid before the expiration of said ten days. If a tenant for a period of less than three months shall neglect or refuse to pay rent when due, five days' notice in writing to quit shall determine the lease, unless such rent be paid before the expiration of said five days.[261] If the lease is in full force when the notice is given, the tenant has ten full days thereafter in which to pay the rent and to continue the lease in force. So, any action, prior to the expiration of such period, instituting suit to recover possession is premature, and the suit cannot be sustained.[262] Where a landlord allowed his tenant to remain in possession for two years without paying the agreed rent before serving a notice to quit on him, it was held that the action of unlawful detainer was not barred by such possession.[263]

§ 517. **Massachusetts.**—Upon the refusal or neglect to pay the rent due according to the terms of a written lease, fourteen days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease, unless the tenant, four days, at least, before the return day of the writ, in an action brought by the landlord to recover possession of the premises, pays or tenders to the landlord or his attorney all rent then due, with interest thereon, and with all costs of suit. In all cases of neglect or refusal to pay the rent due from a tenant at will, fourteen days' notice to quit shall be sufficient to determine the tenancy.[264] The object of these statutes is to give to a landlord the benefit of the summary process for the recovery of possession of his estate if his tenant under a written lease neglects to pay the rent. They do not provide that the tenant's estate shall be absolutely forfeited, either by a failure to pay rent or by the lapse of fourteen days after a written notice to quit is given him. It is certain that the forfeiture does not become absolute until the fourteen days have run out. Until then the tenant has the right to pay or tender the rent and reinstate himself in his rights. The process cannot be brought until fourteen days' notice to quit has been given. Until then, the forfeiture is at most conditional, and may be purged and saved by the payment or tender of the rent due. It cannot be necessary that the tenant should wait until such process is commenced before making his tender. The words of the statute, unless the tenant "four days at least before the return day of the writ" pays or tenders his rent, imply that the tender may be made after notice to quit. According to the spirit

[261] Gen. St. 1899, §§ 3722, 3723.

[262] Douglass v. Parker, 32 Kan. 593, 5 Pac. 178.

[263] Moran v. Moran, 54 Kan. 270, 38 Pac. 268.

[264] Rev. Laws 1902, ch. 129, §§ 11, 12.

and the letter of the statute, a tender by a tenant made within fourteen days after a notice to quit is given him will save a forfeiture of his estate.

In order to save the forfeiture, it is not necessary for the tenant to tender the unpaid taxes, although the lessor has paid them to prevent the sale of the estate for taxes. By the provisions of the statute, a forfeiture is saved if the tenant pays or tenders the rent due, with interest thereon, and all costs of suit. The parties did not contemplate that the taxes were to be a part of the rent. The covenant to pay taxes is a separate, independent covenant, and is put upon the same footing as the covenant to repair.[265]

A lessee at will is bound to pay his rent at the rent day without demand; his failure to do so is a neglect to pay the rent due, and this gives the lessor a right to terminate the tenancy at will by fourteen days' notice, without any demand for rent on the day. The receipt of the money due for rent after such notice given does not necessarily operate as a waiver of that right if the landlord at the time of receiving such rent gives notice that he does not thereby intend to waive his right to terminate the lease or revoke his notice.[266]

§ 518. **Michigan.**—In all cases of neglect or refusal to pay rent on a lease at will or otherwise, seven days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease.[267] After a tenancy has been terminated by the giving of notice, and the landlord has obtained peaceable possession of the premises, he is not liable to an action for damages unless more force is used than is necessary to repel the effort of the tenant to regain possession. Where there has not been a forcible entry, the statute does not forbid retaining possession by force, unless the possession is unlawful and against the rights of the person kept out.[268]

§ 519. **Minnesota.**—Where a landlord has a subsisting right to reënter for non-payment of rent, an action brought to recover the possession is equivalent to a demand of the rent and a reëntry into possession. For six months after the deciding of such action the lessee has the privilege of redeeming the lease from the forfeiture by performing the covenants or paying the rent with interest.[269] Where any person holds

[265] Hodgkins v. Price, 137 Mass. 13.
[266] Kimball v. Rowland, 6 Gray (Mass.) 224.
[267] Comp. Laws 1897, § 9257.
[268] Smith v. Detroit &c. Asso., 115 Mich. 340, 73 N. W. 395.
[269] Statutes 1894, § 5865.

lands contrary to the conditions or covenants in the lease, or after any rent becomes due under the terms of the agreement, the landlord may make complaint to a justice of the peace, as in the case of a forcible detainer.[270] Where the action is for restitution on the ground of non-payment of rent, no notice to quit is necessary.[271] The statute gives the right to restitution against a tenant holding over after default in the payment of rent, whether the lease contains a reëntry clause or not. It is immaterial whether the lease gives a right of reëntry or not for the non-payment of rent when the action is not brought under the provisions of § 5865, but under § 6118, which gives the action for restitution in such cases independent of any contract for reëntry.[272] The section making the bringing of an action equivalent to demand and entry applies only where the right of entry for breach of condition is expressly reserved. The other section has gone further than the common law, and has given the landlord the right, in any case where the tenant holds over "after any rent becomes due, according to the terms of such lease or agreement," to bring an action to recover possession of the premises. But while extending this remedy to the landlord, it nowhere provides that the commencement of such an action shall be equivalent to an entry or work a forfeiture of the lease. On the contrary, the provisions of the statute are wholly inconsistent with any such theory, and all point to the manifest legislative intent that, for the unlawful withholding of the possession during the pendency of the action, the lessor's sole remedy is the rental value of the premises.[273] If the tenant holds over after the rent becomes due by the terms of the lease, the right of action is complete. Nothing more and no other thing is required by the statute.[274] Therefore, in proceedings under this statute by a landlord against his tenant to recover possession of premises for non-payment of rent, no previous demand of the rent is required.[275]

§ 520. **Mississippi.**—A tenant at will or at sufferance or for a term of years may be removed from the premises by any justice of the peace after default in the payment of rent pursuant to the agreement under which such premises are held, and when satisfaction of the rent

[270] Statutes 1894, § 6118.

[271] Seeger v. Smith, 74 Minn. 279, 77 N. W. 3; Radley v. O'Leary, 36 Minn. 173, 30 N. W. 457.

[272] Seeger v. Smith, 74 Minn. 279, 77 N. W. 3; Suchaneck v. Smith, 45 Minn. 26, 47 N. W. 397.

[273] Woodcock v. Carlson, 41 Minn. 542, 43 N. W. 479.

[274] Caley v. Rogers, 72 Minn. 100, 75 N. W. 114.

[275] Spooner v. French, 22 Minn. 37.

cannot be obtained by distress of goods, and three days' notice in writing, requiring the payment of the rent or the possession of the premises, has been served on the tenant.[276]

§ 521. **Missouri.**—Whenever a half-year's rent or more is in arrear from a tenant, the landlord, if he has a subsisting right by law to reënter for the non-payment of such rent, may bring an action to recover the possession of the demised premises. The service of the summons in such action shall be deemed and stand instead of a demand of the rent in arrear and of a reëntry on the demised premises.[277] If default is made in the payment of rent at the times agreed upon by the parties, it is lawful for the landlord to dispossess the tenant and all sub-tenants in the form of action provided by law.[278] Any demand of rent shall be good when made at any time after the rent demanded is due according to the terms of the agreement, whether by written lease or otherwise.[279] Furthermore, according to Missouri law, a lessee may pay his rent and thus avoid a forfeiture at any time before the lessor has taken the proper proceedings to declare the lease void, even though such payment is subsequent to the period when non-payment of rent was to have forfeited the lease.[280]

§ 522. **Nebraska.**—Section [6544][281] 1020 of the civil code provides that proceedings under the article for the forcible detention of real estate may be had in all cases against tenants holding over their terms. Section [6545] 1021 provides in effect that the failure to pay rent shall terminate a tenancy, and that a tenant shall be deemed to be holding over his term whenever he has failed, neglected or refused to pay the rent or any part thereof when the same was due, etc. By section [6546] 1022 it is provided that "It shall be the duty of the party desiring to commence an action under this chapter to notify the adverse party to leave the premises for the possession of which the action is about to be brought, which notice shall be served at least three days before commencing the action," etc. No other notice is required. The intention of the legislature was that the fact of failure or refusal to pay rent should bring the tenant within the provisions of section 1020, and that in that case but one notice was necessary—the notice to quit. The question as to the non-payment of rent is one of fact for

[276] Ann. Code 1892, § 2547.
[277] Rev. St. 1899, §§ 4116, 4118.
[278] Rev. St. 1899, § 4130.
[279] Rev. St. 1899, § 4136.
[280] Lewis v. City of St. Louis, 69 Mo. 595.
[281] Numerals in brackets refer to the section numbers in Comp. St. 1899.

the determination of the jury.[282] It is quite immaterial that the lease contains no stipulation of forfeiture or right of the landlord to reënter in case of non-payment of the rent reserved. Contracts of lease must be construed with reference to the provisions of the statute.[283]

§ 523. New Hampshire.—If a tenant at will neglects or refuses to pay the rent due and in arrear, upon demand, seven days' notice to quit shall be sufficient to terminate the tenancy. If a lessee violates the condition of a written lease, notice to quit at the end of seven days shall be equivalent to an entry for condition broken.[284] This seven days' notice to quit need not assign a reason for terminating the relation of landlord and tenant. The statute, in defining the cases in which seven days' notice to quit shall authorize the landlord to proceed in the manner which it points out, does not require that the notice should indicate to the tenant upon which particular one the landlord proposes to found his claim to possession.[285] However, to take advantage of the seven days' notice to quit provided for by statute in case of a right of reëntry for breach of a covenant to pay rent, a demand for rent must be made, and it must be for the precise amount due. The common law on the subject of tenancies has been adopted in New Hampshire, except as it has been modified by statute. Under it the demand must be of the precise amount of rent due, and this requirement has not been modified or changed by the statute.[286]

§ 524. New Jersey.—Any tenant may be removed by a justice of the peace in the manner elsewhere prescribed by statute, in case he holds over after any default in the payment of rent pursuant to the agreement under which he holds, when satisfaction for such rent cannot be obtained by distress, and a demand of such rent shall have been made, by three days' notice in writing, requiring the payment of such rent or the possession of the premises.[287] Any one of a number of joint tenants or tenants in common, named as landlords in a lease, is authorized to make demand in writing for the payment of rent, and sign and give the three days' notice required by the statute.[288] The

[282] Hendrickson v. Beeson, 21 Neb. 61; Pollock v. Whipple, 33 Neb. 752, 51 N. W. 130.

[283] Pollock v. Whipple, 33 Neb. 752, 51 N. W. 130.

[284] Pub. St. ch. 246, §§ 3, 4.

[285] Russell v. Allard, 18 N. H. 222.

[286] Nowell v. Wentworth, 58 N. H. 319; Jones v. Reed, 15 N. H. 68; McQuesten v. Morgan, 34 N. H. 400; Coon v. Brickett, 2 N. H. 163.

[287] Gen. St. 1895, p. 1922, § 30.

[288] Mullone v. Klein, 55 N. J. L. 479, 27 Atl. 902.

termination of a lease by a landlord's election on the breach of a condition is not an expiration of the term under this section.[289]

§ 525. **New York.**—When six months rent or more is in arrear upon a lease of real property, and the lessor has a subsisting right by law to reënter for the failure to pay the rent, he may maintain an action to recover the property granted or demised, without any demand of the rent in arrear, or reëntry on the property.[290] Where a right of reëntry is reserved to a lessor in default of a sufficiency of goods and chattels whereon to distrain for the rent due, the reëntry may be made, or an action to recover the property demised may be maintained, by the lessor at any time after default in the payment of the rent, provided the plaintiff, at least fifteen days before the action is commenced, serves a written notice of his intention to reënter.[291] The rights of a landlord to recover possession under the two sections of the code thus briefly summarized overlap, the right to avail of one not excluding a resort to the other. Where a right of reëntry is reserved to a lessor in default of a sufficiency of goods and chattels whereon to distrain for the satisfaction of any rent due, such entry may be made at any time after default in the payment of such rent, provided fifteen days' notice be given. Obviously, this does not describe the cases in which the right of reëntry is reserved and given on default of payment without any regard to the question whether there are goods and chattels on the premises.[292] It is evident that unless a lease provides a right of reëntry for some reason other than a default of sufficient distress, ejectment cannot be maintained until proper notice has been served. But it may appear upon an examination of a lease that the right to reënter does not depend solely upon this ground, but that if any of the covenants or conditions in the lease are broken, then a right of reëntry is conferred upon the lessor and his successor in title. In other words, if a tenant covenants to pay the rent and agrees that for breach of this covenant the landlord may reënter, the stipulation for a right to reënter on this ground is entirely independent of a stipulation giving that right in case of a failure of distress. The code provisions take effect in the alternative, so that if six months' rent was in arrear the landlord would have a subsisting right by law to reënter, which would authorize a recovery of the property, under the section first stated, without any demand.[293]

[289] Wakeman v. Johnson, 3 N. J. L. J. 84.

[290] Code Civ. Pro., § 1504.

[291] Code Civ. Pro., § 1505.

[292] Hosford v. Ballard, 39 N. Y. 147, 152; Van Rensselaer v. Dennison, 35 N. Y. 393; Cruger v. McLaury, 41 N. Y. 219.

[293] Martin v. Rector, 118 N. Y. 476, 23 N. E. 893.

§ 526. **North Carolina.**—Whenever any half-year's rent or more shall be in arrear and the landlord has a subsisting right of reëntry for the non-payment of such rent, he may bring an action for the recovery of the demised premises, and the service of the summons therein shall be deemed equivalent to a demand of the rent in arrear and a reëntry upon the demised premises.[294] A tenant may be removed from the premises occupied by him in the form of action prescribed by statute in case he has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.[295] If the tenant before judgment shall pay or tender the rent due and the costs of the action, all further proceeding in such action shall cease.[296]

The notice by a lessor to terminate a lease for non-payment of rent, and of his intention to take possession within thirty days, is not an offer which may be accepted by the tenant and thus made irrevocable, but the lessor may withdraw it and sue for the rent.[297]

§ 527. **North Dakota.**—Whenever the right of reëntry is given to a grantor or lessor in any grant or lease, or otherwise, such reëntry may be made at any time after the right has accrued, upon three days' previous written notice of intention to reënter, served on the tenant or some person of discretion residing on the premises, or, if no such person can be found, posted on the premises. An action for the possession of real property leased with a right of reëntry may be maintained at any time after the right to reënter has accrued, without any notice.[298]

§ 528. **Oregon.**—Where a landlord has a subsisting right to reënter for a tenant's failure to pay rent, he may bring an action to recover possession of the property and such action is equivalent to a demand of the rent, and a reëntry upon the property. Until judgment the tenant can avoid the forfeiture by paying rent with interest and costs and performing other agreements.[299]

§ 529. **Oklahoma.**—In this territory the statutory provisions are similar to those of Kansas.

§ 530. **Pennsylvania.**—For a lessee's refusal to pay rent according to the terms of the contract and in the absence of a sufficient dis-

[294] Code 1883, § 1745.
[295] Code 1883, § 1766.
[296] Code 1883, § 1773.
[297] Goldsboro Storage and Warehouse Co. v. Duke, 116 N. Car. 202, 21 S. E. 178.
[298] Code 1895, §§ 3347, 3350.
[299] Ann. Codes and Statutes 1902, § 338.

tress upon the premises, the lessor may notify the lessee to quit after fifteen days in summer, or after thirty days in winter. For failure to leave at the end of the period specified, complaint may be made to an alderman or justice. Prior to the execution of a writ of possession, the tenant may redeem by paying the rent in arrear and costs.[300] The statutory notice to quit must be accompanied by a demand for the amount of the rent claimed and must be served on a party residing on the premises.[301] The justice, to whom complaint is made, can only acquire jurisdiction by waiting the statutory period for notice, and cannot acquire it under a clause in the lease substituting five days' notice for that required by the statute.[302]

§ 531. **Rhode Island.**—If in any case of letting whether by writing or parol, the stipulated rent, or any part of the same, be due and in arrear for fifteen days, whether demanded or not, the landlord or reversioner may reënter and repossess himself of the lands, buildings or parts of buildings let, or recover possession of the same from the tenant, or any person holding under him discharged from the lease.[303] When the landlord avails himself of this provision in the statute to get rid of a defaulting tenant, no notice to quit is necessary even though the holding be a tenancy at sufferance which would ordinarily require notice to quit equal to half the length of periods on which rent is payable.[304]

§ 532. **South Carolina.**—Where a tenant in arrears for a full year shall desert and leave uncultivated the demised premises, the landlord may apply to magistrates to post a notice in writing on the premises, stating what day (at a distance of fourteen days at least) they will return to make a second view thereof. Unless some person appears at that day in behalf of the tenant and pays the rent in arrear, the magistrates may put the landlord in possession and the lease will be thenceforth void.[305]

§ 533. **Vermont.**—In actions of ejectment for non-payment of rent, the plaintiff shall not be required to prove a demand of the rent in arrear, or a stipulation for reëntry on non-payment of rent, or a re-

[300] Brightly's Purd. Dig., p. 1167, § 25.

[301] Clark v. Everly, 8 W. & S. (Pa.) 226.

[302] McCloud v. Jaggers, 3 Phila. (Pa.) 304; Hopkins v. McClelland, 8 Phila. (Pa.) 302.

[303] Gen. Laws 1896, ch. 269, § 7.

[304] Providence Co. Sav. Bank v. Phalen, 12 R. I. 495.

[305] Civil Code 1902, §§ 2418, 2419.

ëntry on the premises; but shall recover judgment as if the rent in arrear had been demanded and reëntry made. Until final judgment the defendant in such action may pay into court the rent in arrear with interest and the costs of suit and have the action dismissed.[306] An action would lie under this statute without any demand for rent although the lease in terms gives the right of entry only after demand of the rent and default in payment thereof for twenty-eight days.[307] But the right of redemption allowed by the statute until a final judgment in the suit cannot be cut off by a conveyance in fee by the lessor after the tenant's default. At least this cannot be done unless the lessor complies with the common-law requirements as to demand and reëntry.[308]

§ 534. **Virginia.**—A provision in a lease that a lessor may reënter for non-payment of rent or for breach of covenants shall have the effect of an agreement for a general right of reëntry for breach of any covenants in the lease, authorizing the lessor to repossess and enjoy as of his former estate.[309] This statute was not designed to alter the rules of the common law in respect to the forfeiture of estates for non-payment of rent, but to authorize a concise and abbreviated form of leases and other conveyances.[310] A person having a right of reëntry for non-payment of rent or breach of other condition, may serve a declaration in ejectment on the tenant in possession which service shall be in lieu of a demand or reëntry. On proof of the right to reënter and that there was no sufficient distress upon the premises, he shall recover judgment and have execution for such lands.[311] By this statute the common-law formalities of a demand are dispensed with, by providing that an action may be brought as a substitute for such demand in cases where sufficient distress can be found upon the premises. This statute applies, however, only to the action of ejectment, service of a declaration in which it provides shall be in lieu of a demand and reëntry, and then further provides that upon proof to the court, by affidavit in case of judgment by default, or upon proof

[306] Statutes 1894, § 1499.

[307] Jamaica v. Hart, 52 Vt. 549; Maidstone v. Stevens, 7 Vt. 487.

[308] Willard v. Benton, 57 Vt. 286. Notice to a lessee to quit premises for non-payment of rent, acted upon by the lessee by quitting and by the lessor by taking possession constitutes a surrender which will release the lessee from all further liability to pay rent, even though at the time of the notice to lessee to quit he had paid all the rent and was under no obligation to do so. Patchin v. Dickerman, 31 Vt. 666.

[309] Code 1904, § 2457.

[310] Johnston v. Hargrove, 81 Va. 118.

[311] Code 1904, § 2796.

on the trial that the rent claimed was due, and no sufficient distress was upon the premises . . . and that the plaintiff had power thereupon to reënter, he shall recover judgment. When the proceedings is not an action of ejectment, this statute may be laid out of view. In that case, if it appears that no demand for the rent has been made by the plaintiff, the unavoidable conclusion is that such an action is not maintainable on the principles of the common law, which requires a demand for rent to work a forfeiture.[312] For twelve months after execution executed, the tenant has a right to redeem from the forfeiture by payment of the rent in arrear with interest and costs.[313]

§ **535. West Virginia.**—If any tenant leaves his rent in arrear and unpaid and deserts the premises without sufficient goods subject to distress to satisfy the rent, the lessor may post a notice requiring the tenant to pay the rent within one month. If rent is not paid within that time, the lessor becomes entitled to possession of the premises, and may enter thereon.[314] Any person having a right of reëntry by reason of rent being in arrear or by reason of the breach of any covenant or condition, may serve a declaration in ejectment on the tenant which service shall be in lieu of a demand and reëntry. On proof that the rent claimed was due, and no sufficient distress was upon the premises, or that the covenant or condition was broken before the service of the declaration and that the plaintiff had power thereupon to reënter, he shall recover judgment, and have execution for such lands.[315] This section has been construed to mean that in an action of ejectment to recover premises by reason of forfeiture of a lease, no reëntry is necessary; but that in an action of unlawful entry and detainer a different rule prevails for the reason that that action is not covered by the statute. At common law it is necessary for a party to enter upon an estate in order to work a forfeiture. It cannot be effected by bringing an action for the recovery of possession.[316] For a year after execution executed in the ejectment suit, the tenant may redeem by paying all arrears of rent with interest and the costs of suit.[317]

§ **536. Wisconsin.**—In all cases of neglect or refusal to pay the rent due on a lease at will fourteen days' notice to remove, given by

[312] Johnston v. Hargrove, 81 Va. 118; citing Doe v. Wandlass, 7 Term R. 113, 117.

[313] Code 1904, § 2797.

[314] Code 1899, ch. 93, § 6.

[315] Code 1899, ch. 93, § 16.

[316] Bowyer v. Seymour, 13 W. Va. 12, 25; Martin v. Ohio River R. Co., 37 W. Va. 349, 16 S. E. 589.

[317] Code 1899, ch. 93, § 17.

the landlord shall be sufficient to determine the lease. At the expiration of the time required after the service of such a notice, the landlord may reënter, or maintain an action for the recovery of possession.[318]

§ 537. **Wyoming.**—After a tenant's failure to pay rent for three days after it becomes due, a landlord is entitled to commence proceedings under the Forcible Entry and Detainer Act. The landlord must notify the tenant to leave the premises, for the possession of which the action is about to be brought, and this notice must be served at least three days before the bringing of the action. The pendency of this action is not a bar to an action of ejectment.[319]

IV. *Surrender.*

§ 538. **"A surrender is a yielding up of an estate for life or years, to him who hath the immediate estate in reversion or remainder,** wherein the estate for life or years, may drown by mutual agreement."[320] Even according to the old technical law any form of words whereby the intent and agreement of the parties appeared, was sufficient to work a surrender; and the law directed the operation of the words accordingly without the precise or formal mention of the word surrender in the conveyance. Before the statute of frauds, a term for years, whether by deed or parol, might have been surrendered entirely by parol.[321] But now by the statute of frauds and perjuries, it is provided that no leases, estates or interests, either of freehold or terms for years shall be surrendered, unless it be by deed, or note in writing signed by the party who makes such surrender or some other lawfully authorized thereunto, or by an act and operation of law; so that surrenders in law, or implied surrenders, remain as they did at common law, if the lease which is to draw on such surrender, be in writing pursuant to that statute.[322] Therefore a mere agreement to surrender a lease is inoperative unless by instrument in

[318] Statutes 1898, §§ 2183, 2184.

[319] Rev. St. 1899, §§ 4486, 4487, 4499.

[320] Bacon's Abr. Leases and Terms for Years, S; 7 Inst. 337b; Welcome v. Hess, 90 Cal. 507, 27 Pac. 369; Dayton v. Craik, 26 Minn. 133, 1 N. W. 813; Gwyn v. Wellborn, 1 Dev. & B. (N. Car.) 313.

[321] Gwyn v. Wellborn, 1 Dev. & B. (N. Car.) 313, 318. In 1815 North Carolina had no statute of frauds and hence such a parol surrender was good at that time.

[322] Bacon's Abr., tit. Leases and Terms for Years, S; Welcome v. Hess, 90 Cal. 507, 27 Pac. 369; Kittle v. St. John, 7 Neb. 73.

writing based on sufficient consideration or accompanied by the act of transferring possession.[323] A license to surrender where there is no consideration given for such permission may be revoked by the landlord at any time before it is acted upon.[324] However, a written agreement by a tenant to surrender in consideration of the payment of a certain sum is valid and after the tenant has performed his part of the agreement he can compel the payment of the money.[325] Express surrenders, although executory, are of course valid when witnessed by an instrument which complies with the requirements of the statute of frauds. Thus in one case a leased coal mine was injured by fire and the lessee was unable to continue operations. He executed a written surrender but continued in possession under a parol agreement until a new tenant could be found. After the written surrender of the lease it was in law if not in equity cancelled; and all the lessee's legal rights were terminated. Any parol agreement regarding a new lease would be void by the statute of frauds.[326] Even though a lease be under seal, it may be changed or abrogated entirely by a subsequent writing not under seal or by a surrender by operation of law.[327] It results from the doctrine of surrender by operation of law that an oral agreement for a surrender, acted on by a transfer of possession is valid to put an end to a leasehold estate in spite of the requirements of the statute of frauds; for instance where the landlord and tenant have, by mutual agreement, consented that the term shall end, and the possession is changed in consequence, whether the landlord reenters by himself or by a new tenant, that constitutes a surrender by operation of law.[328] The rule of law, as settled by the cases, has been declared to be that any acts which are equivalent to an agreement on the part of a tenant to abandon and on the part of the landlord to resume possession of demised premises amount to a surrender by operation of law.[329] It necessarily follows that where, by an agreement between the lessor and lessee, the lessee abandons his possession and the lessor resumes possession of the premises, there is a surrender by operation of law.[330]

[323] National &c. Asso. v. Brewer, 41 Ill. App. 223.

[324] Dunning v. Mauzy, 49 Ill. 368.

[325] Bogert v. Dean, 1 Daly (N. Y.) 259.

[326] Stewart v. Mumford, 91 Ill. 58.

[327] Prior v. Kiso, 81 Mo. 241.

[328] Phené v. Popplewell, 12 C. B. (N. S.) 334, 340, 104 E. C. L. 334.

[329] Talbot v. Whipple, 14 Allen (Mass.) 177; Grimman v. Legge, 8 B. & C. 324, 2 Man. & R. 436; Dodd v. Acklom, 6 M. & G. 672, 46 E. C. L. 672, 7 Scott N. R. 415; Nickells v. Atherstone, 10 A. & E. (N. S.) 944, 59 E. C. L. 944.

[330] Amory v. Kannoffsky, 117 Mass. 351.

Although the words of the statute be general, making no exception in favor of the parol surrender of short term leases, it seems that an estate which could be created by parol could also be surrendered in the same manner. The mere possibility of creating the estate without a writing is all that is necessary, and it does not affect the validity of the parol surrender that the estate was in fact granted by a written instrument.[331]

In one case it was contended that a recital in the second lease of a surrender of the first was a note in writing within the statute of frauds; but the court were clearly of opinion that the fact of a previous surrender must be specially found, which fact the recital by no means imported.[332] Since this statute, a lease for years cannot be surrendered by cancelling the indenture without writing, because the intent of the statute was to take away the manner they formerly had of transferring interests in land by signs, symbols and words only.[333]

The circumstance that a lease provides a special mode for ending the term, as by giving notice in writing three months previously, does not prevent the parties from effecting a surrender by operation of law just as if no agreement of such sort existed.[334]

§ 539. A surrender may be effected by express words or it may be implied from the conduct of the parties.[335] The term "surrender by operation of law" is properly applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing and which would not be valid if his particular estate continued to exist. Such surrender is the act of the law, and takes place independently of, and even in spite of, the intentions of the parties. The acts *in pais*, which bind parties by way of estoppel, are acts of notoriety, not less formal and solemn than the execution of a deed; as, for instance, livery, entry, acceptance of an estate, and the like.[336] The lessee cannot surrender premises leased to him before the expiration of the term, so as to absolve himself from paying rent without the consent of the lessor, and the abandonment of the premises with notice will not exonerate the lessee from

[331] Kiester v. Miller, 25 Pa. St. 481; McKinney v. Reader, 7 Watts (Pa.) 123; Greider's Appeal, 5 Pa. St. 422.

[332] Roe v. Archbishop of York, 6 East 86, 101.

[333] Bacon's Abr., tit. Leases and Terms for Years, S.

[334] Hutcheson v. Jones, 79 Mo. 496.

[335] Dayton v. Craik, 26 Minn. 133, 1 N. W. 813; Welcome v. Hess, 90 Cal. 507, 27 Pac. 369.

[336] Lyon v. Reed, 13 M. & W. 285: Stern v. Thayer, 56 Minn. 93, 67 N. W. 329; Smith v. Pendergast, 26 Minn. 318, 3 N. W. 978.

paying rent unless the lessor assents.[837] A surrender cannot be effected by the act of only one party; the concurrence, in some way, of both lessor and lessee is necessary in order to accomplish a surrender. Hence, whatever the lessee may have done, if it is undisputed that the lessor refused to accept the surrender, the estate is not ended.[838] Where a lessee who is bound by a valid lease refuses to occupy and abandons the premises, he does not thereby put any duty upon the lessor to reduce damages by letting the premises to another tenant.[839] The landlord is not under obligation to relet them, but may suffer them to remain vacant and recover the entire rent for the balance of the term from the lessee.[840]

An entire abandonment of the demised premises by a tenant exposing them to risk of loss gives the lessor a right to declare the lease at an end, and the lessee cannot return and claim to continue under the lease.[841] But the mere failure to reside on premises, where some acts of repairing were done, and there was a sufficient reason for the lessee's not planting crops, has been held not to amount to such an abandonment of a leased farm as to entitle the lessor to consider the term at an end.[842]

§ 540. **Executed agreement.**—A parol license to quit will not of itself operate as a surrender of the tenant's interest.[843] But where the tenant gives up possession in pursuance of such a license, and the landlord accepts it, the license, coupled with the fact of the change of possession, operates as a surrender by act and operation of law, and the landlord cannot recover any rent which becomes due after his acceptance of the possession.[844] It is well settled American law that an

[837] Stobie v. Dills, 62 Ill. 432; Aberdeen Coal &c. Co. v. Evansville, 14 Ind. App. 621, 43 N. E. 316. *Conditional agreement.* Where a landlord agrees to release his tenant from liability for rent for the balance of the term, provided another tenant is obtained in his stead, there is no surrender when no other tenant is obtained to take the premises. Churchill v. Gronewig, 81 Iowa 449, 46 N. W. 1063.

[838] Lewis v. Fish, 40 Ill. App. 372; Jones v. Rushmore, 67 N. J. L. 157, 50 Atl. 587; Meeker v. Spalsbury, 66 N. J. L. 60, 48 Atl. 1026.

[839] Becar v. Flues, 64 N. Y. 518; Aberdeen Coal &c. Co. v. Evansville, 14 Ind. App. 621, 43 N. E. 316.

[840] Merrill v. Willis, 51 Neb. 162, 72 N. W. 734.

[841] Worrall v. Wilson, 101 Iowa 475, 70 N. W. 619.

[842] Hough v. Brown, 104 Mich. 109, 62 N. W. 143.

[843] National &c. Asso. v. Brewer, 41 Ill. App. 223; Dunning v. Mauzy, 49 Ill. 368.

[844] Grimman v. Legge, 8 B. & C. 324, per Bayley, J.; Whitehead v. Clifford, 5 Taunt. 518; Brown v. Burtinshaw, 7 D. & R. 603; Walls v. Atcheson, 11 Moore 379; Phené v. Popplewell, 12 C. B. (N. S.) 334,

agreement for the tenant to abandon possession and for the landlord to resume his occupancy, when acted upon by the parties, amounts in law to a surrender of the term.[345] As long as such an agreement is executory, the landlord's offer to accept a surrender may be revoked and the tenant would continue bound for the full term.[346] Where a landlord agrees to a surrender of the premises by his lessee and to accept another tenant in his place, and the new tenant goes into possession, those facts constitute a transfer of possession to the landlord and hence a surrender by operation of law.[347] Thus the acceptance of keys by a landlord, who at once moved into the house and advertised it for sale, constituted a surrender by operation of law.[348] Upon a written assignment of a lease, the original lessor and lessee entered into a parol agreement to the effect that the lessor would discharge the lessee from all further liability and look only to the assignee. Acting upon this agreement, the landlord recognized the assignee as tenant and accepted rent from him. The admission of such evidence was not objectionable as varying a written instrument by parol, for this was separate and distinct from the agreement in writing and constituted a surrender by operation of law.[349] Moreover, an agreement between the landlord and a tenant in possession for the sale of the premises has been held to amount to a surrender of an existing lease. Between the time when the agreement was made and the time when it was to be executed the landlord must be deemed to be in possession.[350]

A parol agreement to release, followed by a delivery of keys to lessor, putting up "To Let" signs by him and attempts to lease to third parties, amounts to a surrender by operation of law.[351] But the parol

104 E. C. L. 334. See also, Hesseltine v. Seavey, 16 Me. 212; Hall v. Burgess, 5 B. & C. 332.

[345] Hanham v. Sherman, 114 Mass. 19; Carson v. Arvantes, 10 Colo. App. 382, 50 Pac. 1080; Dills v. Stobie, 81 Ill. 202; Evans v. McKanna, 89 Iowa 362, 56 N. W. 527; Churchill v. Lammers, 60 Mo. App. 244; Buffalo Co. Nat. Bank v. Hanson, 34 Neb. 455, 51 N. W. 1035; Wheeler v. Walden, 17 Neb. 122, 22 N. W. 346; Elliott v. Aiken, 45 N. H. 30; Miller v. Dennis, 68 N. J. L. 320, 53 Atl. 394; Lamar v. McNamee, 10 Gill & J. (Md.) 116; Williams v. Jones, 1 Bush (Ky.) 621.

[346] Dunning v. Mauzy, 49 Ill. 368.

[347] Donahoe v. Rich, 2 Ind. App. 540, 28 N. E. 1001.

[348] Kiernan v. Germain, 61 Miss. 498.

[349] Levering v. Langley, 8 Minn. 107.

[350] Denison v. Wertz, 7 S. & R. (Pa.) 372. A condition of a lease that the surrender thereto should satisfy all damages between the parties applies to future rents and not to rents already accrued. Edmonds v. Mounsey, 15 Ind. App. 399, 44 N. E. 196.

[351] Foster v. Fleishans, 69 Mich. 543, 37 N. W. 549.

agreement is not effectual to terminate a lease till it has been acted upon by the transfer of possession to the landlord.[352]

§ 541. **Cancellation and destruction of lease.**—The requirements of the statute of frauds as to what constitutes a valid surrender in fact are such that they exclude a cancellation or destruction of the document. "Since this statute," says Bacon in his abridgment, "a lease for years cannot be surrendered by cancelling the indenture, without writing, because the intent of the statute was to take away the manner they formerly had of transferring interests in lands by signs, symbols, and words only." The same authority also states the reason for this to be that "such deed or indenture being not of the essence of the lease, the destruction or cancelling thereof shall not destroy or defeat the lease or interest of the lessee, because his actual entry into the land, and continuance of the visible possession and occupation thereof, give sufficient sanction and notoriety to the contract."[353] When this question came before the court of King's Bench[354] Lord Ellenborough said that the court never entertained any doubt about it, "for, as it is enacted by the statute of frauds that no lease of any lands or houses shall be surrendered unless by deed or *note in writing*, signed by the party or his agent thereunto lawfully authorized by writing, or by act and operation of law, the act of cancellation, which can in no allowable sense of the words be considered as either a deed or a note in writing, cannot, since that statute, be a surrender." The doctrine has been subsequently affirmed by the Court of Exchequer.[355] In accordance with the English authorities it is almost universally held in the United States that where a conveyance of land operates by way of transmutation of possession, the mere cancellation or redelivery of the deed, by mutual consent or otherwise, while it may destroy the covenants on either side therein contained, will not of itself revest the estate in the grantor, and this though the deed may never have been recorded.[356]

[352] National &c. Asso. v. Brewer, 41 Ill. App. 223; Elliott v. Aiken, 45 N. H. 30.

[353] Bacon Abr. Tit. Leases and Terms for Years, §§ S. and T.

[354] Roe v. Archbishop of York, 6 East 86.

[355] Ward v. Lumley, 5 H. & N. 87.

[356] Alabama: Mallory v. Stodder, 6 Ala. 801; King v. Crocheron, 14 Ala. 822. Connecticut: Botsford v. Morehouse, 4 Conn. 550; Gilbert v. Bulkley, 5 Conn. 262. Georgia: Jordan v. Pollock, 14 Ga. 145. Illinois: Brewer v. National &c. Asso., 166 Ill. 221, 46 N. E. 752, affirming 64 Ill. App. 161. Indiana: Connelly v. Doe, 8 Blackf. 320. Massachusetts: Hatch v. Hatch, 9 Mass. 307; Holbrook v. Tirrell, 9 Pick. 105; Chessman v. Whittemore, 23 Pick. 231. Missouri: Tibeau v. Tibeau, 19 Mo.

§ 542. A common method of effecting a surrender of a term for years by operation of law is by the substitution of a new lease. "For the principle is well settled that if a lessee accept and enter under a lease from his lessor to commence before the expiration of the first, the acceptance of the new lease, as it admits the ability of the lessor to make such new lease, operates in law as a surrender of the first."[357] The execution and acceptance by both parties of a lease intended as a substitute for a former lease which had been destroyed must be held as amounting in law to a surrender of the former lease and of all rights growing out of a parol agreement collateral to the first lease.[358]

A written lease was given of certain property, but possession was not taken under it. Subsequently the parties entered into a different parol agreement for a lease and possession was transferred in pursuance thereof. This operated as a surrender of the first lease, and complainant was entitled to have it cancelled.[359] In a Missouri case the execution by the lessor of a short lease to a third person was held not to be a surrender of an outstanding lease. The lessee had agreed that the lessor should execute the short lease for the purpose of satisfying a debt due to such third party from the lessee, and it was agreed that after the termination of the short lease the lessee should resume his possession under the original long one. This was not a surrender of the original lease, because such an effect would be contrary to the intention of the parties.[360]

The surrender of a lease by the owner of an equity of redemption in a leasehold estate and his acceptance of another one in its place can have no effect against the mortgagee, or any tenant holding under title from him. The second lease and the reservation of rent in it would be inoperative to bind the successive assignees of the original leasehold, if the mortgagee did not assent to the surrender. Either the mortgagee or the purchaser at a sale under the mortgage could ratify and approve the arrangement, and where the new lease was simply to rectify an error in boundary, there

78; Lawrence v. Lawrence, 24 Mo. 269. **Mississippi:** Whitton v. Smith, Freem. 231. **New York:** Jackson v. Anderson, 4 Wend. 474; Jackson v. Page, 4 Wend. 585; Schutt v. Large, 6 Barb. 373; Raynor v. Wilson, 6 Hill 469; Rowan v. Lytle, 11 Wend. 617. **Pennsylvania:** Wiley v. Christ, 4 Watts 196, 199. **Virginia:** Graysons v. Richards, 10 Leigh 57; Jones v. Neale, 2 Patt. & H. 339. **Wisconsin:** Parker v. Kane, 4 Wis. 1.

[357] Coleman v. Mabberly, 3 T. B. Mon. (Ky.) 220, per Baylie, C. J.

[358] Hoag v. Carpenter, 18 Ill. App. 555; Enyeart v. Davis, 17 Neb. 228, 22 N. W. 449.

[359] Switzer v. Gardner, 41 Mich. 164, 2 N. W. 191.

[360] Thomas v. Zumbalen, 43 Mo. 471.

could be no more positive and unequivocal manner of ratification than by taking and enjoying the benefits conferred by it.[361]

§ 543. The doctrine of Thomas v. Cook,[362] as laid down by the court of King's Bench, is that it constitutes a surrender by operation of law for a landlord to accept rent directly from an undertenant who has been put in possession by the lessee and then subsequently to distrain the undertenant's goods for rent in arrear. The court reason that "if a lease be granted to an individual and there be a subsequent demise of the premises by parol to the same person, that will amount to a surrender of the lease. Then the circumstance of the lessee having first put in another person as undertenant, and having afterwards assented to a second demise by the landlord to that person, will amount to a virtual surrender of his interest by act and operation of law." The rule laid down by this decision has been followed both in England[363] and in this country,[364] and it would probably be held generally that a new lease to a stranger, with the assent of the lessee, would be as effectual to work a surrender by operation of law as a new lease to the original lessee. The execution of a new lease by the landlord to a third party, with the consent of the tenant, and actual occupation under such lease constitutes a surrender of a former one by operation of law. An actual and continued change of possession by the mutual consent of the parties will operate as a surrender by operation of law.[365] A new lease by parol to a third party who enters into possession in the place of the former lessee, who held under an instrument in writing, was held to constitute a surrender by operation of law.[366] The execution of a second lease to another person with the assent of all parties has been held

[361] Judik v. Crane, 81 Md. 610, 32 Atl. 276.

[362] Thomas v. Cook, 2 Stark. 360, 2 B. & Ald. 119.

[363] Nickells v. Atherstone, 10 A. & E. (N. S.) 944, 59 E. C. L. 944; Woodcock v. Nuth, 8 Bing. 170, 21 E. C. L. 492; Davison v. Gent, 1 H. & N. 744.

[364] Bowen v. Haskell, 53 Minn. 480, 55 N. W. 629; Amory v. Kannoffsky, 117 Mass. 351; Coe v. Hobby, 72 N. Y. 141, 145; Bedford v. Terhune, 30 N. Y. 453, 463; Smith v. Kerr, 108 N. Y. 36, 15 N. E. 70; Underhill v. Collins, 132 N. Y. 271, 30 N. E. 576; Beall v. White, 94 U. S. 382, 389; Logan v. Anderson, 2 Dougl. (Mich.) 101; Hoerdt v. Hahne, 91 Ill. App. 514; Palmer v. Myers, 79 Ill. App. 409; Hesseltine v. Seavey, 16 Me. 212; Lamar v. McNamee, 10 Gill & J. (Md.) 116; Randall v. Rich, 11 Mass. 494.

[365] Williams v. Vanderbilt, 145 Ill. 238, 34 N. E. 476; Stobie v. Dills, 62 Ill. 432; Morgan v. McCollister, 110 Ala. 319, 20 So. 54.

[366] Koenig v. Miller Bros. &c. Co., 38 Mo. App. 182; Wallace v. Kennelly, 47 N. J. L. 242.

to operate as a surrender of a prior one, even though the original lessees remain in possession as sub-tenants under the second lessee.[367] In one case a new lease was made to different parties and the old lessee held over under an agreement between new and old lessees whereby the latter were to remain in possession and pay the rent reserved under the new lease directly to the lessors. The acceptance of the rent by the lessor under this agreement did not amount to a surrender of the new lease, nor did it discharge the new lessee from his covenant to pay rent.[368]

The agreement to release the original lessee and accept other tenants in their stead need not necessarily be expressed. It may be inferred from the conduct of the parties. Rendering a bill to another occupant of the premises for rent and accepting payment from him is a sufficient basis for inferring a release of the original lessee.[369] Thus in a tenancy from year to year, a surrender by operation of law takes place when by consent of both parties another person becomes tenant of the premises and the landlord collects rent from him.[370] But it has been held that the agent of the landlord to rent premises may become the agent of the tenant to sub-let them without causing a surrender of the term.[371] In another case it was held that the receipt by the lessor of rent from an undertenant of part of the premises is no evidence of consent to an abandonment by the lessee for want of repairs.[372]

§ 544. The foregoing doctrine has been restricted in its application by a subsequent English case.[373] In the decision referred to there there was an outstanding sub-lease at the time a second lease was made by the original lessor to a third person, which was claimed to effect a surrender by operation of law of the original lease. So the subject-matter of the alleged surrender was a reversion consequent upon a term for years. The court held that even if it felt bound by the rule of Thomas v. Cook, where there was an open and notorious shifting of the actual possession, it did not follow that they would adopt the same doctrine where reversions or incorporeal hereditaments are disposed of, which pass only by deed. In the case under consideration there was not a surrender by operation of law. The court further ex-

[367] Donkersley v. Levy, 38 Mich. 54.

[368] Field v. Herrick, 101 Ill. 110.

[369] Fry v. Patridge, 73 Ill. 51.

[370] Clemens v. Broomfield, 19 Mo. 118; citing Bees v. Williams, 2 C. M. & R. 581; Hall v. Burgess, 5 B. & C. 332; Matthews v. Sawell, 8 Taunt. 270.

[371] Hirsch v. Oliver, 91 Ga. 554, 18 S. E. 354.

[372] Slacum v. Brown, 5 Cranch C. C. 315, 22 Fed. Cas. No. 12934.

[373] Lyon v. Reed, 13 M. & W. 285.

presses an opinion that the case of Thomas v. Cook was an innovation and was not borne out by the principles of the ancient law. That law was that the consent of the tenant for life to the remainderman making a feoffment to a stranger did not amount to a surrender of the estate for life.[374] To constitute a surrender by operation of law, overt acts of both parties inconsistent with the continuance of the term are essential. Thus the interest of one of two joint lessees in the demised premises is not surrendered to the lessor by operation of law by a sale of it to the co-lessee, accompanied with a parol agreement between the lessor and the latter that the lessor will thereafter look to the co-lessee for the performance of the covenants of the lease.[375]

§ **545. Change in terms.**—Where the parties to a lease agree to a reduction of rent, and the smaller sum is paid and accepted, this has been held to operate as a surrender of the former term and a new letting at a lower rate.[376] The intention of the parties is the test, and the question arises whether a reduction in rent is such a material change in the terms of the holding as to show a surrender of the former term. However, it is certainly true that every modification in a contract of lease does not constitute a new lease and operate as a surrender. To make it a surrender by operation of law the second lease must be in all its essentials a complete and operative lease, because no implication arises, unless one perfect lease is substituted by another and the existence of the last is inconsistent with that of the first.[377] A parol lease to a tenant in possession may take effect as a surrender of an existing written lease to the same person.[378] Where a tenant holds over from year to year after expiration of a lease under seal, a parol agreement regarding the amount of rent and the time of payment and payment of rent under such agreement constitute a new lease and the terms of the old lease are no longer binding.[379]

§ **546. Leases in futuro.**—"Lessee for years to begin presently cannot, till entry or waiver of the possession by the lessor, merge or drown the same by any express surrender, because till entry there is no re-

[374] Swift v. Heath, Carthew 110; Viner's Abr., "Surrender," F. 3 and 4; Brooke Abr. tit. Surrender, pl. 48.

[375] Felker v. Richardson, 67 N. H. 509, 32 Atl. 830.

[376] Ossowski v. Wiesner, 101 Wis. 238, 77 N. W. 184; Dills v. Stobie, 81 Ill. 202.

[377] Hurtt v. Woodland, 24 Md. 393.

[378] Ryan v. Kirchberg, 17 Ill. App. 132.

[379] Goldsbrough v. Gable, 36 Ill. App. 363.

version wherein the possession may drown."[880] It is also well settled that an agreement by a tenant to surrender in the future does not give the landlord a right to enforce the agreement by summary proceedings. He must resort to his action for damages.[881] In Illinois the cancellation of a lease prior to the time when the term was to commence was nevertheless held to be a valid surrender. The court point out that the requirement for a deed or note in writing was omitted in the Illinois statute of frauds, and add: "It is true the cancellation in this case was accompanied by no surrender of the premises for the very excellent reason that the [parties] had never been in possession. . . . The lease was the only tangible thing in their possession which they could surrender, and we see no reason why such surrender, if made with the intention of terminating or cancelling the tenancy, provided such intention was assented to and participated in by the lessors, was not valid as a surrender of the term."[882]

§ 547. **Where a tenant leaves the land and abandons the possession,** and afterwards reënters, but adversely to his former landlord, the effect is an interruption of the possession of the landlord not only of the place where the reëntry is made, but as to the whole tract, except so far as the landlord retains possession by other means.[883] Where a tenant vacates the leased premises and abandons them, he forfeits all his rights under the lease, and cannot maintain an action against the landlord for entering upon them.[884] If a tenant renting for crop rent abandons the farm, the crops revert to the landlord and the tenant cannot sell the crops to his prejudice.[885] But when a tenant abandons his crop and fails to perform the terms of his lease, the landlord may gather it and take out of it and retain against the tenant's mortgagee of the crop the expense of preserving it from waste and preparing it for market, as well as the rent.[886] By reëntering, cultivating and gathering the crop after an abandonment of the tenant the landlord terminates the lease. It is not to the mere use and occupation of the lands that the landlord succeeds upon reëntering. All growing crops pass to him as incident to his restoration to the possession and to the

[880] Bacon's Abr., tit. Leases and Terms for Years, § S.

[881] Fish v. Thompson, 129 Mich. 313, 88 N. W. 896.

[882] Beidler v. Fish, 14 Ill. App. 29.

[883] Myers v. Sanders, 7 Dana (Ky.) 506, 527.

[884] Haller v. Squire, 91 Iowa 10, 58 N. W. 921.

[885] Maclary v. Turner, 1 Marvel (Del.) 24.

[886] Fry v. Ford, 38 Ark. 246. See Sanders v. Ellington, 77 N. Car. 255, and Carpenter v. Jones, 63 Ill. 517.

termination of the tenancy. No right or interest in them remains to the tenant.[387] On principles of obvious justice it is held that, if a tenant, before the expiration of the term, abandons the premises he has leased or rented, the landlord is not bound to let them remain vacant, but may reënter and occupy himself, or may lease to another.[388] Ordinarily where a tenant dies pending a lease, the unexpired term continues to be the property of his estate, which is liable for the agreed rent,[389] but there is a distinction whereby a contract governing a single year title to all crops is to remain in the landlord till the rent and advances are paid, and the tenant dies before the cultivation of the crop is finished. As the crop belonged to the landlord, if it was reasonably necessary under all the circumstances for him to enter to preserve his rights, he could do so lawfully.[390]

Where mines, which had been leased for a term of twenty-five years, were not worked at all and no rent had been paid for eight years and the lessees were not in possession, it was held that the lessors were justified in treating the lease as abandoned and in executing a new lease to other parties, which could not be annulled.[391] But different considerations must be taken into account where a lump sum has been paid as the consideration for granting the lease. In that case failure for fifteen or eighteen years to develop mining property was not conclusive proof of abandonment, especially if there is some evidence that the parties intended to develop the property as soon as they were able.[392]

§ 548. **The delivery of the key by the tenant and keeping it by the landlord are not sufficient to show a surrender** of the premises by the tenant and an acceptance by the landlord, unless that appears to be the intention of both parties.[393] In an English case[394] the tenant, upon the bankruptcy of his landlord, sent the key to the office of his official assignee, where it was left with his clerk, and immediately left possession of the premises, and no further communication took place.

[387] Shahan v. Herzberg, 73 Ala. 59; Wheat v. Watson, 57 Ala. 581.

[388] Schuisler v. Ames, 16 Ala. 73; Wheat v. Watson, 57 Ala. 581.

[389] Hutchings v. Commercial Bank, 91 Va. 68, 20 S. E. 950.

[390] Riddle v. Hodge, 83 Ga. 173, 9 S. E. 786.

[391] Porter v. Noyes, 47 Mich. 55, 10 N. W. 77.

[392] Breyfogle v. Wood, 15 Ky. L. R. 782.

[393] Thomas v. Sanford &c. Co., 71 Me. 548; Withers v. Larrabee, 48 Me. 570; Livermore v. Eddy, 33 Mo. 547; Martin v. Stearns, 52 Iowa 345, 3 N. W. 92; Blake v. Dick, 15 Mont. 236, 18 Pac. 1072; Auer v. Penn, 99 Pa. St. 370; Thomas v. Nelson, 69 N. Y. 118; Griffith v. Hodges, 1 C. & P. 419; Newton v. Speare &c. Co., 19 R. I. 546, 37 Atl. 11.

[394] Cannan v. Hartley, 9 M. G. & S. 634, 67 E. C. L. 634.

This was held not to amount to a surrender by act of law. "I am of opinion," says Wilde, C. J., in the case referred to, "that there was no evidence of a surrender and acceptance which could have been properly left to the jury." "But it is said," remarks Maule, J., "that the conduct of the official assignee in not returning the key amounts to an acceptance of it. I do not think the official assignee was bound to seek out the tenant for the purpose of rendering back the key." The taking of a key would be no more than entering and shutting a door of the premises would be.[395] So it was held if a tenant quits the premises during the term, and the landlord accepts the key, stating that he receives the key but not the premises, it is not an acceptance of the surrender.[396] Where the lessor, on accepting the key to leased premises from the lessee, takes it on the express condition that the lessee shall continue liable for the rent unless the premises are subsequently leased, this does not constitute a surrender by operation of law.[397] Merely sending a key of premises to the owner is not such a surrender and acceptance of the premises as will discharge the tenant from liability for rent.[398] It is not from the return, but from the return and acceptance of the key, that by operation of law a surrender of the lease may be presumed.[399] The landlord's failure to return keys which have been sent to him by a tenant who is vacating the leased premises does not effect a surrender by operation of law.[400] The court remarked in one case: "We are by no means prepared to concede that an abandonment of the premises by the tenant, and a delivery to and acceptance of the keys by the landlord, would alone necessarily amount to a surrender."[401] The mere act of the landlord and his wife in picking up the key of the demised premises from the doorstep of his house, where the tenant had thrown it, and keeping it, does not show an acceptance of the tenant's abandonment. Whether landlord's acceptance of keys and resumption of possession amounts to a surrender of a lease depends on the intention of the parties. The landlord has a right to accept the keys and take possession of the premises to protect them from waste. The law does not necessarily infer a surrender from such acts.[402] The

[395] Walker v. Furbush, 11 Cush. (Mass.) 366.

[396] Townsend v. Albers, 3 E. D. Smith (N. Y.) 460.

[397] Nelson v. Thompson, 23 Minn. 508.

[398] Newton v. Speare &c. Co., 19 R. I. 546, 37 Atl. 11; Buck v. Lewis, 46 Mo. App. 227.

[399] Bacon v. Brown, 9 Conn. 334, 339; Spies v. Voss, 16 Daly (N. Y.) 171.

[400] Thomas v. Nelson, 69 N. Y. 118.

[401] Lucy v. Wilkins, 33 Minn. 441, 23 N. W. 861, per Mitchell, J.; Diehl v. Lee (Pa.), 9 Atl. 865.

[402] Ladd v. Smith, 6 Ore. 316.

landlord may even proceed to make repairs on the abandoned premises if he does not occupy or use them.[403] But the nature of the repairs may show that the landlord intended to accept the surrender. As where the landlord made repairs for his own benefit and not merely to prevent injury to the premises.[404] And it has been held that an entry by the landlord to make repairs after the tenant has abandoned the premises is an election to treat the abandonment as a surrender.[405]

§ 549. After an unauthorized abandonment by a tenant, the landlord may by taking proper precautions relet to another without creating a surrender by operation of law, but he is not bound to do so. In a recent case it was said: "The rule sanctioned by the decided weight of authority, if, indeed, there can be said to be a diversity of opinion on the subject, is that the landlord may in such case, at his election, relet the premises upon the abandonment thereof by the tenant, in which case the measure of his damage will be the agreed rental less the amount realized on account of such reletting; or he may permit the premises to remain vacant until the end of the term and recover his rent in accordance with the terms of the lease."[406] Although the landlord may relet for the benefit of the lessee and on his account, without releasing him from his undertakings,[407] such acts if unexplained would amount to a surrender by operation of law, as in a case where the lessor accepted the surrender.[408] Too much importance should not be attached to a delivery of the keys to the landlord and his attempt to relet the premises. The legal effect of these acts depends largely on the intent with which the keys were delivered and for what purpose they were accepted. The landlord's words at the time he

[403] Livermore v. Eddy, 33 Mo. 547.

[404] Elgutter v. Drishans, 44 Neb. 378, 63 N. W. 19.

[405] MacKellar v. Sigler, 47 How. Pr. (N. Y.) 20.

[406] Merrill v. Willis, 51 Neb. 162, 164, 70 N. W. 914, per Post, C. J.; citing Hayward v. Ramge, 33 Neb. 836, 51 N. W. 229; Schuisler v. Ames, 16 Ala. 73; Tully v. Dunn, 42 Ala. 262; Rice v. Dudley, 65 Ala. 68; Ledoux v. Jones, 20 La. Ann. 539; Milling v. Becker, 96 Pa. St. 182; Randall v. Thompson, 1 Tex. App. Civ. Cas., § 1102; Rispiui v. Porta, 89 Cal. 464; Underhill v. Collins, 132 N. Y. 269, 30 N. E. 576; Bowen v. Clark, 22 Ore. 566, 30 Pac. 430; Meyer v. Smith, 33 Ark. 627; State v. McClay, 1 Har. (Del.) 520; Breuckmann v. Twibill, 89 Pa. St. 58; Humiston v. Wheeler, 70 Ill. App. 349; Auer v. Penn, 99 Pa. St. 370; Bourdereaux v. Walker, 78 Ill. App. 63.

[407] Brown v. Cairns, 63 Kan. 584, 66 Pac. 639; Bowen v. Clarke, 22 Ore. 566, 30 Pac. 430; Stewart v. Sprague, 71 Mich. 50, 38 N. W. 673; Biggs v. Stueller, 93 Md. 100, 48 Atl. 727; Gaines v. McAdam, 79 Ill. App. 201; Scott v. Beecher, 91 Mich. 590, 52 N. W. 20.

[408] Witman v. Watry, 31 Wis. 638.

accepted the keys are good evidence on this subject.[409] There is no surrender where landlord refuses to accept the keys except on condition that he is to find another tenant, if possible, and hold the lessee responsible for any deficiency in the rent.[410] "If at the time when the keys were returned to him the landlord notified the tenant that he received them under protest, would re-rent and hold him for rent, and the defendant assented to such renting, the presumption which might otherwise arise that there was an acceptance of the property would not be reasonable; and if under such circumstances he rented the property it would be plain that he would do so for the lessee's interest and not with the intent of accepting a surrender. But if the landlord, without such assent on the part of the tenant, does an act, such as taking possession and reletting the premises, which is utterly inconsistent with the relation of landlord and tenant, then a surrender is implied."[411] The mere attempt of the agent of the landlord to relet premises after an abandonment by the tenant would not constitute a surrender by operation of law.[412] Taking possession, repairing and advertising the house for rent are all acts which may be in the interest and for the benefit of the tenant, and do not necessarily discharge him from his covenant to pay rent.[413] In Texas it has been held that where a landlord relets premises for the benefit of a former tenant, he recovers the amount lost by the change of tenants not as rent but as damages for the injury done him by the tenant in abandoning the premises.[414]

An agreement between a lessor and lessee that the former should take possession of the premises and relet them for the benefit of the lessee was held not to discharge sureties who had bound themselves for the payment of the agreed rent. This was no more than a consent that the lessor might relet, even though the lessee delivered over his keys to the lessor.[415]

§ 550. It is essential that the landlord notify his tenant that his responsibility for the deficiency in rent will continue. So, where the tenant on leaving recognized the lease and offered to surrender, and the landlord entered and relet without notice to the former lessee, this

[409] Bowen v. Clarke, 22 Ore. 566, 30 Pac. 430.

[410] Stewart v. Sprague, 71 Mich. 50, 38 N. W. 673.

[411] Biggs v. Stueler, 93 Md. 100, 48 Atl. 727, per Page, J., citing Kinsey v. Minnick, 43 Md. 112.

[412] Gaines v. McAdam, 79 Ill. App. 201.

[413] Breuckmann v. Twibill, 89 Pa. St. 58.

[414] Randall v. Thompson, 1 Tex. App. Civ. Cas., § 1102.

[415] Morgan v. Smith, 70 N. Y. 537.

operated as a surrender by operation of law.[416] It is to be presumed that the landlord has given up all hope to hold the tenant for the balance of rent when he enters into possession and deals with the property as an owner.[417] So where a tenant voluntarily vacated the premises before the expiration of the term and delivered the keys to the landlord at the latter's request, who retained them and during the term advertised the premises for rent, an implied surrender arose by operation of law.[418] Reletting premises for a longer term than the original demise, without notifying lessees that it is done on their account, has been held to show an acceptance of a surrender by operation of law.[419] In case there is nothing to indicate a purpose on the part of the landlord in resuming possession to hold the tenant liable for rent or to lease to others on account of the tenant, he merely accepts the abandonment as a surrender of the leasehold interests and thereby puts an end to the contract.[420] An action for rents to accrue after an abandonment sufficiently indicates an intention on the part of the landlord not to accept a surrender.[421]

In one jurisdiction the distinction has been drawn between a case where the landlord and tenant had a conversation in which the landlord refused to accept a surrender and told the tenant he would relet the premises for his benefit[422] and a case where the landlord wrote the tenant to that effect.[423] In the former case there was no surrender, while in the latter there was. The failure of the tenant to answer the letters did not show his acquiescence to the proposal of the landlord. The court say: "It is clear, both on principle and authority, that we have no right to indulge in the assumption that the letters above referred to have the force and effect of verbal statements. . . ."

§ 551. Consent of tenant implied.—Strictly speaking, where a tenant abandons the premises leased, before the expiration of the term, the landlord is at liberty to pursue either of two courses. He may suffer the premises to remain vacant and sue on the contract of renting, or he may enter and determine the contract, claiming the rent due up to the time of abandonment. The landlord cannot take

[416] Williamson v. Crossett, 62 Ark. 393, 36 S. W. 27.

[417] Palmer v. Meyers, 79 Ill. App. 409.

[418] Ledsinger v. Burke, 113 Ga. 74, 38 S. E. 313.

[419] Welcome v. Hess, 90 Cal. 507, 27 Pac. 369.

[420] Armour &c. Co. v. Des Moines Pork Co., 116 Iowa 723, 89 N. W. 196.

[421] Martin v. Stearns, 52 Iowa 345, 3 N. W. 92.

[422] Underhill v. Collins, 132 N. Y. 270, 30 N. E. 576.

[423] Gray v. Kaufman &c. Co., 162 N. Y. 388, 56 N. E. 903, reversing 16 App. Div. 631.

possession of the premises and insist, at the same time, that the contract of renting is in force without the consent, express or implied, of the tenant. For the landlord to enter the leased premises in his own right during the term would constitute an eviction and suspend the tenant's liability for rent. But the landlord may enter as the agent of tenant, and such a presumption is in conformity with the policy of the law to prevent loss and reduce the damage recoverable for breach of contract. Slight acts will justify an inference of the tenant's assent.[424]

§ 552. **Rights of sub-tenants.**—It is generally true that the surrender of his lease by a tenant will not divest his sub-tenants of their rights.[425] Where a tenant under a lease containing no restriction upon sub-letting sub-lets a portion of the premises, and subsequently, without the knowledge or assent of the sub-tenant, surrenders his term to the owner, such surrender and the consequent merger of the greater and lesser interest terminate the original lease and the term created thereby, as between the original parties to the lease and surrender. But the interest and the terms of the sub-tenant continue as if no surrender had been made.[426]

§ 553. **The question whether negotiations and circumstances amounted to a surrender** by operation of law is properly one to be decided by the jury.[427] A surrender may be inferred from acts showing an agreement between the parties to that effect.[428] There is a

[424] Rice v. Dudley, 65 Ala. 68; Crommelin v. Thiess, 31 Ala. 412; Schuisler v. Ames, 16 Ala. 73. The comment of the court is interesting in an early case of a releting by the landlord after the tenant's abandonment; Chief Justice Parker said: "For the true intention of the parties to the transaction may be well enforced by admitting that the contract was in force even after the delivery of the key; and that *Rich* then consented to become the agent of *Randall* in procuring a new tenant, and to be responsible for the rent as he undoubtedly ought to be under these circumstances, having put the new tenant in without consulting *Randall*. Indeed, it is to be presumed that the rent has been paid by Mrs. *Cooper*, as that fact is not negatived by the report. If *Rich* is not to be considered as the agent of *Randall* in putting Mrs. Cooper into the premises, that act may well be considered as an ouster of Randall; and so the lease would be discharged from that time. Randall v. Rich, 11 Mass. 494, 496.

[425] McKenzie v. City of Lexington, 4 Dana (Ky.) 129. See § 429.

[426] Eten v. Luyster, 60 N. Y. 252. See § 659.

[427] Youell v. Kridler, 105 Mich. 344, 63 N. W. 439; Dobbin v. McDonald, 60 Minn. 380, 62 N. W. 437.

[428] Huling v. Roll, 43 Mo. App. 234; Churchill v. Lammers, 60 Mo. App. 244.

distinction, however, between surrenders during and those at the end of a term. In the surrender of the residue of an existing term by operation of law no acts of the parties will amount to a surrender unless the landlord's assent to a surrender is clearly inferable therefrom. But at the expiration of a term any act on the part of the tenant clearly indicative that he has finally vacated the premises is sufficient.[429] Leaving a key to demised premises with the landlord has been said to be a continuing offer on the part of the tenants; and as soon as the landlord did an act which would have constituted him a trespasser if he had not exercised the option thus given to him, that afforded ground for the inference that he assented to the tenancy being put an end to. His taking the key and showing the premises with a view to letting them would also be evidence of an election on his part to assent to the proposal of the tenants.[430] An oral agreement, contemporaneous with the making of a lease, to the effect that the lessee might surrender the premises at any time, may be shown as throwing light on the acts of the lessor when the lessee does leave during the term.[431] The jury were held to be justified in finding that a tenant had surrendered his interest in a lease when he knew of a sale of the premises and, after a demand that he move, he gave up control of the property and offered to do work around the place in consideration of the use of the dwelling house.[432] The burden of showing a surrender of a lease by operation of law by some act implying an agreement by both parties to consider the lease surrendered rests upon the party asserting it.[433]

V. *Restoration of Possession to Landlord.*

§ 554. Duty of tenant to yield up possession.—It is a common provision in leases for a lessee to covenant to surrender possession at the end of the term. Such an undertaking is valid, and for breach of it the lessor would have an action for damages, but the duty of the lessee does not rest alone on such an agreement. On the expiration of the term a lessee's rights in the premises cease and he is bound to vacate them and yield up possession to the owner of the fee without binding himself expressly to do so.[434] Furthermore a lessee may bind

[429] Mitchell v. Blossom, 24 Mo. App. 48.

[430] Phené v. Popplewell, 12 C. B. (N. S.) 334, 104 E. C. L. 334.

[431] McGlynn v. Brock, 111 Mass. 219.

[432] Hart v. Pratt, 19 Wash. 560, 53 Pac. 711.

[433] Churchill v. Lammers, 60 Mo. App. 244.

[434] A covenant by the landlord to renew the lease does not give the

himself by an agreement to so vacate premises before the end of his term. On a sale of premises at auction, the purchaser bought in reliance on a tenant's agreement to deliver up possession by a certain date, and the court held that this agreement was supported by a valid consideration and that an action on the case could be maintained against the tenant for failure to keep his agreement.[435] The duty of a tenant to yield up possession is clearly laid down by Lord Kenyon: "When a lease is expired the tenant's responsibility is not at an end, for if the premises are in the possession of an undertenant the landlord may refuse to accept the possession and hold the original lessee liable, for the lessor is entitled to receive the absolute possession at the end of the term. But it may be proved that the lessor has accepted the undertenant as his tenant."[436] Where a tenant has sub-let the whole or any part of the leased premises, and the sub-tenant is in possession at the termination of the original lease, the tenant must remove him, otherwise he will not be in a situation to render that complete possession to which the landlord is entitled; and unless the entire possession is surrendered the responsibility of the tenant for rent will continue, although it may have been impossible for him, in consequence of the obstinacy or ill will of the sub-tenant, and his refusal to quit, to give the landlord full possession.[437] When a lessee puts another into possession of demised premises who holds over, it is considered in law as the holding over of the lessee.[438] So if a lessee does an act of ownership, as where he attempts to collect rent from his undertenant after the end of the term, he is liable to the original landlord for rent during the period of the undertenant's holding over.[439] Obviously a lessee cannot say to his landlord: "Though I kept you out of possession, I did so not by holding myself, but by surrendering the premises before my term expired to another, through whom I held over." The vacation of the premises by the termor must be unequivocal, and the exact means by which he accomplishes his holding over is immaterial. If against the landlord's consent, the premises are, through the action of the tenant, kept out of the land-

tenant the right at law to retain possession of the premises after the expiration of the original term. The tenant only has a remedy in equity or in an action on the covenant. Finney v. Cist, 34 Mo. 303.

[435] Moore v. Davis, 49 N. H. 45.

[436] Harding v. Crethorn, 1 Esp. 57.

[437] Campau v. Mitchell, 103 Mich. 617, 61 N. W. 890; Dimock v. Van Bergen, 12 Allen (Mass.) 551; Bless v. Jenkins, 129 Mo. 647, 31 S. W. 938; Brewer v. Knapp, 1 Pick. (Mass.) 332; Lubetkin v. Elias &c. Co., 21 Abb. N. C. (N. Y.) 304.

[438] Brewer v. Knapp, 1 Pick. (Mass.) 332; Dimock v. Van Bergen, 12 Allen (Mass.) 551.

[439] Ibbs v. Richardson, 9 A. & E. 849; Waring v. King, 8 M. & W. 571.

lord's possession, it constitutes a holding over and subjects the tenant to any penalty imposed by the lease.[440] But it has been decided that the mere fact that a tenant remains in possession after the expiration of his lease cannot be construed into a refusal to deliver possession, so as to bring the case within the statutory provision imposing a penalty of double rent for a *refusal* to deliver possession when the term expires. There must be some evidence of a demand and refusal to restore the possession of the premises after the termination of the lease to make the lessee liable to the penalty.[441] On the close of the term it is not the duty of the lessee to leave the demised house unoccupied without demand or expressed readiness for possession by the lessors, nor would such dereliction be proper. There is, therefore, no breach of a covenant to return in retaining possession afterwards, as the tenant does so with the presumed consent of the landlord; and consequently a petition, in not averring the fact of demand or manifested readiness to receive possession, fails to show a good cause of action for an alleged breach of a covenant to return.[442]

§ 555. It often happens that a tenant who intends to quit at the end of his term is not able to complete his arrangements promptly, and desires to remain a short time after the term has expired. It is often convenient for the landlord to permit him to do so, provided he acquires no rights thereby and can be turned out without notice. A covenant for the payment of rent during such holding over prevents all dispute in respect to that matter and the landlord may forbear to exercise his rights without losing them.[443] A mere continuance in possession after the expiration of a lease makes a party a tenant at sufferance, but if a new contract is shown, either express or inferable from the dealings of the parties, the estate becomes one at will, and a new contract may be inferred from an agreement for a new lease.[444] A tenant remaining in possession pending a treaty for a new lease cannot be treated as a trespasser,[445] nor can he be held as a tenant for another year.[446] On the other hand, a tenant holding over after

[440] Kerr v. Simmons, 8 Mo. App. 431.

[441] Shepperd v. Thompson, 2 Bush (Ky.) 176; Thompson v. Marsh, 4 Bush (Ky.) 423.

[442] Kyle v. Proctor, 7 Bush (Ky.) 493, per Robertson, J.

[443] Edwards v. Hale, 9 Allen (Mass.) 462.

[444] Emmons v. Scudder, 115 Mass. 367; Edwards v. Hale, 9 Allen (Mass.) 462; Kendall v. Moore, 30 Me. 327; Amsden v. Atwood, 67 Vt. 289, 31 Atl. 448.

[445] Drake v. Wilhelm, 109 N. Car. 97, 13 S. E. 891; Schilling v. Klein, 41 Ill. App. 209; Hollingsworth v. Stennett, 2 Esp. 717.

[446] Drake v. Wilhelm, 109 N. Car. 97, 13 S. E. 891.

the expiration of his term does not become a tenant at will without the assent of his landlord.[447] However, where a possession commenced rightfully, and with the consent of the owner, nothing is to be presumed to make it adverse. Mere holding over, after the term ended, is not evidence of an adverse possession, and the possessor will be regarded as a tenant at will of the landlord unless he can show that since the expiration of the lease he has held forcibly or has acquired a title paramount to that under which possession was originally taken.[448] So far as tenants, by any act of their own, leave premises in an untenantable condition, they are liable to the extent of the injury in a special action adapted to the facts of the case; but the leaving of bulky articles, such as a cargo of ashes on a wharf, does not constitute a continued use and occupation of the premises so as to amount to a waiver of a notice to terminate the estate;[449] and the leaving of ashes, brickbats and rubbish by a tenant on quitting demised premises has been held to be no breach of his agreement peaceably to yield up the premises in good tenantable repair.[450]

In the absence of a different rule, created by statute or by express contract, where a tenant holds over after the expiration of a written lease, the law implies that he holds over subject to the terms of the previous lease so far as they are applicable to a periodic holding.[451] The rights and duties of the parties are controlled by the contract under which the entry was made.[452] A notice to a tenant that he must pay an increased rent if he holds over is usually held to be accepted by the tenant's continuance in possession.[453] If a tenant has not surrendered premises or been evicted by paramount title, but remains in occupation after the termination of his lease, his tenancy must be regarded as continuing, and he is liable for rent and is estopped to deny the title of his landlord.[454] Where a tenant holds over with the tacit consent of his landlord a tenancy from year to year is created; the tenant is liable for rent at the rate reserved in the lease and the landlord cannot evict him during the middle of the

[447] Kellogg v. Groves, 53 Iowa 395, 5 N. W. 517.

[448] Gwynn v. Jones, 2 Gill & J. (Md.) 173.

[449] Wilson v. Prescott, 62 Me. 115.

[450] Thorndike v. Burrage, 111 Mass. 531.

[451] Haeussler v. Holman &c. Co., 49 Mo. App. 631; Harry v. Harry, 127 Ind. 91, 26 N. E. 562; Miller v. Ridgely, 19 Ill. App. 306; § 201, *supra*.

[452] Harry v. Harry, 127 Ind. 91, 26 N. E. 562.

[453] Despard v. Walbridge, 15 N. Y. 374, § 213, *supra*. See Lantman v. Miller, 158 Ind. 382, 63 N. E. 761.

[454] Towne v. Butterfield, 97 Mass. 105; Longfellow v. Longfellow, 54 Me. 240; Love v. Law, 57 Miss. 596; Bonney v. Foss, 62 Me. 248.

year.[455] The tenant can be held for a full year's rent by reason of his holding over in spite of his previous notice that the premises were not wanted for another year,[456] and this, too, although the rent reserved was payable in monthly instalments.[457] But if a tenant vacates promptly, his mere failure to return the keys of the leased house for a few days, does not furnish a foundation for an inference of an implied renting for another month.[458] However, an attempted surrender of keys is unavailing where the tenant uses a portion of the premises to store goods on and loads goods on the premises; under such circumstances the landlord has an election to treat the lessee as tenant for another year.[459]

The possession of vacant premises could not exist after a notice that they had been vacated, except through some positive acts equivalent to a reëntry or the exclusion of any other possession. Leaving a log boom along a water front, which could be removed by any one, would be no more significant as an act of possession than leaving a fence on land which was unfenced when a lease commenced. Passing logs into the boom cannot be considered as possessory. They differ in no respect from driving a loaded wagon upon a vacant lot to discharge its load upon an adjoining enclosure.[460] The tenancy was not continued for another term where the tenant by his landlord's consent left certain articles of property in the house;[461] or where a small quantity of coal was left in bins;[462] or where improvements were left on premises pending a settlement of their value by appraisal. Without any provision as to paying for improvements, the tenant would be entitled to a reasonable time for removing them after the expiration of the lease. Under provisions as to settling the amount to be paid, if the tenant was not in fault for delay in trying to agree, he would be entitled to a reasonable time for removal after there was a disagreement.[463] After the termination of a tenancy, however, the tenant is not justified in refusing to deliver up possession because the

[455] Usher v. Moss, 50 Miss. 208; Love v. Law, 57 Miss. 596.

[456] Smith v. Bell, 44 Minn. 524, 47 N. W. 263.

[457] Intfen v. Foster, 8 Kan. App. 336, 56 Pac. 1125; Smith v. Bell, 44 Minn. 524, 47 N. W. 263.

[458] Neumeister v. Palmer, 8 Mo. App. 491; Waring v. King, 8 M. & W. 571, 574.

[459] Cavanaugh v. Clinch, 88 Ga. 610, 15 S. E. 673.

[460] Thomas v. Frost, 29 Mich. 336.

[461] Blackwood v. Tanner, 54 Minn. 349, 56 N. W. 45.

[462] Steen v. Scheel, 46 Neb. 252, 64 N. W. 957.

[463] Vorse v. Des Moines &c. Co., 104 Iowa 541, 73 N. W. 1064; Smith v. Park, 31 Minn. 70, 16 N. W. 490; Sullivan v. Carberry, 67 Me. 531.

landlord is indebted to him for improvements.[464] Where a lease provided for appraisal of improvements within thirty days of its expiration and that they should be a lien on the premises till the amount determined should be paid, it was held that the lessee was not entitled to remain in possession till the appraisal was completed or any time at all after the end of the term.[465] Although a tenant is entitled to remove improvements, no injustice is done in requiring him to surrender the possession of the premises on the expiration of the lease, subject to his right of ingress and egress to remove improvements.[466] But where a lessee agreed on being paid for improvements to yield up the demised premises, an agreement may be implied that he should retain possession till payment was made, although the terms may have expired.[467] But if a tenant holds a mortgage on the demised premises which falls due at the expiration of the term of the lease, the lessee may continue to hold possession as mortgagee even though he has covenanted in his lease to deliver up possession at the end of the term.[468]

The consent of a landlord to his tenant's holding over is a defense to an action for damage for loss of another tenant caused by such holding over.[469]

§ 556. As the law stood before modified by statute, a wide scope of action was allowed to an owner in using force to recover possession of his property. Thus, Lord Bacon lays it down that "At common law, if a man had a right of reëntry in him, he was permitted to enter with force and arms, and to detain his possession by force, where his entry was lawful."[470] But this right must be exercised under certain limitations,[471] and there can be no doubt that an unlawful entry with force was an offense at common law for which an indictment would lie, provided the indictment charged the defendants with having used such force as constituted a breach of the public peace.[472] At any

[464] Speers v. Flack, 34 Mo. 101; Allison v. Thompson, 1 Litt. (Ky.) 31; Elliott v. Round Mountain Coal & Iron Co., 108 Ala. 640, 18 So. 689.

[465] Bresler v. Darmstaetter, 57 Mich. 311, 23 N. W. 825.

[466] Caperton v. Stege, 91 Ky. 351, 15 S. W. 870, 16 S. W. 84.

[467] Van Rensselaer v. Penniman, 6 Wend. (N. Y.) 569.

[468] Shields v. Lozear, 34 N. J. L. 496.

[469] Sloat v. Rountree, 87 Ga. 470, 13 S. E. 637.

[470] Bacon Abr. Tit. Forcible Entry and Detainer.

[471] Bract. 162, 163.

[472] Rex v. Bathhurst, Say. 225; Rex v. Storr, 3 Burr. 1698; Rex v. Bake, 3 Burr. 1731. In volume four, section 148, of his Commentaries, Blackstone says of the common-law right of forcible entry: "But this being found very prejudicial to the

rate, the law, as it stood, created a great inconvenience by encouraging the mischief of forcible entry and giving an opportunity to powerful men, under the pretense of feigned titles, forcibly to eject their weaker neighbors. This inconvenience led to the passing of a series of acts forbidding entry with a strong hand and the retaining of possession, peaceably acquired, by force, and providing for criminal responsibilities for disobedience to these provisions. An indictment for forcible entry may still be maintained at common law, though the statutes give other remedies to the party aggrieved, provided the indictment charge the defendants with having used such force as constitutes a public breach of the peace. "But there is no doubt," says Lord Kenyon, "but that the offense of forcible entry is indictable at common law, though the statutes give other remedies to the party grieved, restitution and damages; and therefore in an indictment on the statutes it is necessary to state the interest of the prosecutor; but I do not know that it has ever been decided that it is necessary to allege a greater degree of force in an indictment at common law for a forcible entry than in an indictment on the statutes. . . . It is alleged that twelve persons with force and arms and with a strong hand violently entered into a certain mill and lands and houses and expelled the prosecutor; whether or not these facts will be proved is another question; but if they be proved as laid, God forbid that it should not be an indictable offense!"[473]

By the principles of the common law, some degree of force is allowed in expelling an intruder into a man's lands or tenements, who refuses to quit, although he has no right to the possession. The owner is not justified to use such a degree of force, as would tend to a breach of the peace, but he is allowed to use such force as would sustain a plea of justification of *molliter manus imposuit*.[474] A landlord, having the right of immediate possession, may take it without legal process if he can do so peaceably; but he has no right forcibly to remove his tenant's goods or commit an assault on him in so doing. If he does he is liable criminally.[475]

public peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods, even of doing themselves justice, and much more if they had no justice in their claim. So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence, and with unusual weapons."

[473] Rex v. Wilson, 8 Term R. 357.

[474] Fifty Associates v. Howland, 5 Cush. (Mass.) 214; Spencer v. Commercial Co., 30 Wash. 520, 71 Pac. 53.

[475] Commonwealth v. Haley, 4 Allen (Mass.) 318.

It is the object of the statutes relative to forcible entry and detainer not only to prevent and punish the forcible entry of those having no right of entry, but also of those who, having a right of entry given by law, make entry "with strong hand," or "with multitude of people." The right to the possession of the premises is not in issue in an action for forcible entry and unlawful detainer. If it be found that at the time of the alleged forcible entry the plaintiff had the actual and peaceable possession and the defendants unlawfully detained the premises, the plaintiff is entitle to recover rents and profits during the time of the unlawful detainer.[476]

A tenant peaceably in possession, who uses no force and threatens none, but refuses to leave until obliged to by law, is not guilty of a forcible detainer of the leased premises.[477] But it has been held that a landlord may by force eject a tenant who, after the termination of his tenancy, retains possession of the tenement, and that, in such a case, the only question of importance as to the tenancy is whether it has or has not in fact terminated. The tenant's good faith, or belief in a right to retain possession is immaterial. There is no distinction between an undoubted trespasser and one who holds possession under a color and reasonable claim of right, which changes the legal aspect of the case. The tenant is either a trespasser or he is not. If he is, neither his belief that he is not nor the fact that he holds "under a color and reasonable claim of right" is of any importance. If this were not so, it would be in the power of any one in the wrongful possession of real estate who believes his possession to be rightful, to compel the person who is legally entitled to possession to resort to an action at law to recover it, thus nullifying the right of the owner to expel the trespasser.[478]

§ 557. A forcible entry, within the meaning of the forcible entry and detainer act, is one accompanied with some circumstance of force or violence to the person, or one accomplished in a riotous or tumultuous manner endangering the public peace. An entry which has no other force than that implied in every trespass is not within the statute.[479] The word "force" as here used, means "actual force" as

[476] Roff v. Duane, 27 Cal. 565, 570.

[477] Appleton v. Buskirk, 67 Mich. 407, 34 N. W. 708.

[478] Allen v. Kelly, 17 R. I. 731, 24 Atl. 776.

[479] Smith v. Reeder, 21 Ore. 541, 28 Pac. 890; Dunning v. Finson, 46 Me. 546, 550; Willard v. Warren, 17 Wend. (N. Y.) 257; Foster v. Kelsey, 36 Vt. 199, 201, 84 Am. D. 676; Evill v. Conwell, 2 Blackf. (Ind.) 133, 18 Am. D. 138; Smith v. Detroit &c. Ass'n, 115 Mich. 340, 73 N. W. 395.

contradistinguished from "implied force." Any entry requires force, in the literal sense of the term, but that could not have been meant by the statute, for it would involve an absurdity. Nor does it mean that force which the law implies where a peaceable entry is made by one having no right to enter. The conclusion may therefore be drawn that the force which the statute inhibits is actual force.[480] The statute was not intended to apply to a mere trespass, however wrongful. The entry or detainer must be riotous, or personal violence must be used, or in some way threatened, or the conduct of the parties guilty of the entry or detainer must be such as in some way to inspire terror or alarm in the persons evicted or kept out. In other words, the force contemplated by the statute is not merely the force used against or upon the property, but force, used or threatened, against persons as a means or for the purpose of expelling or keeping out the prior possessor.[481] There must be at least apparent violence, or some unusual weapons, or the parties attended with an unusual number of people; some menaces, or other acts giving reasonable cause to fear that the party making the forcible entry will do some bodily hurt to those in possession if they do not give up the same.[482] If there is no more force used than is implied in every trespass, with nothing to excite fear of personal violence, the case is not within the statute; and therefore the forcing open an outer door of a dwelling house, in a peaceable manner, is not of itself sufficient to constitute a forcible entry within the meaning of the statute.[483]

§ 558. Civil liability of landlord regaining possession by force. It may be stated as a general rule that though an entry by force might subject a landlord to penalties for a breach of the law criminally, it confers no right of action on the tenant thus holding without any right of possession.[484] The distinction between the civil rights

[480] Fort Dearborn Lodge v. Klein, 115 Ill. 177, 191, 3 N. E. 272, 56 Am. R. 133.

[481] Shaw v. Hoffman, 25 Mich. 162.

[482] Commonwealth v. Shattuck, 4 Cush. (Mass.) 141, 145.

[483] Smith v. Reeder, 21 Ore. 541, 28 Pac. 890; Frazier v. Hanlon, 5 Cal. 156; Commonwealth v. Dudley, 10 Mass. 403; Gray v. Finch, 23 Conn. 495; Hendrickson v. Hendrickson, 12 N. J. L. 202.

[484] Meader v. Stone, 7 Metc. (Mass.) 147; Stearns v. Sampson, 59 Me. 568; Pendill v. Union Min. Co., 64 Mich. 172, 31 N. W. 100; Smith v. Detroit Loan & Bldg. Ass'n, 115 Mich. 340, 73 N. W. 395; Jackson v. Farmer, 9 Wend. (N. Y.) 201; Hyatt v. Wood, 4 Johns. (N. Y.) 150; Ives v. Ives, 13 Johns. (N. Y.) 235; Freeman v. Wilson, 16 R. I. 524; Mussey v. Scott, 32 Vt. 82; Vinson v. Flynn, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186; Miner v. Stevens, 1 Cush. (Mass.) 482, 485; Low v.

of a person forcibly turned out of the possession of land, and the penal sanctions by which he is protected from being forcibly dispossessed, are drawn in a marked way in the cases in the old books relating to the statutes of forcible entry. Although by those statutes all forcible entries were prohibited, even by those who had title to enter, yet the party dispossessed could maintain no action on the statutes.[485] If an action of trespass had been brought, the landlord could have justified under a plea of *liberum tenementum*. For entering with a strong hand to dispossess the tenant by force, the landlord may be indicted for a forcible entry, but there can be no doubt of his right to enter at the expiration of the term. There is not the slightest pretence for considering him as a trespasser.[486] It would put an end to the enjoyment of property to hold that trespass *quare clausum fregit* could be maintained against the owner, with right of possession, who merely takes possession of what is his own.[487] The party entitled to the possession of leased premises has a right to take it in any manner not constituting a breach of the peace, and it never was the design of the legislature to take away this right by the statute relative to forcible detainer.[488] After a landlord, entitled to reënter for condition broken, has taken possession peaceably in the absence of his tenants from the premises, he has the right to protect his possession by force, if necessary, as well against his former tenants as against any one else proposing to take possession without right. A clearer case of a landlord's right to use force can scarcely be stated than where a legal possession has been gained, and force is only employed to defend it.[489] It seems to be fully settled by the weight of judicial authority that, when a tenancy has been legally

Elwell, 121 Mass. 309; Fuhr v. Dean, 26 Mo. 116, 69 Am. Dec. 484; Overdeer v. Lewis, 1 W. & S. (Pa.) 90; Johnson v. Hannahan, 1 Strob. (S. Car.) 313; Tribble v. Frame, 7 J. J. Marsh. (Ky.) 599; Walton v. File, 1 Dev. & B. L. (N. Car.) 567; Beecher v. Parmele, 9 Vt. 352; Yale v. Seely, 15 Vt. 221; Hodgeden v. Hubbard, 18 Vt. 504.

[485] Newton v. Harland, 1 M. & G. 644, 39 E. C. L. 952; Pike & Hassen's Case, 3 Leon. 134, 143; Co. Lit. 576.

[486] Taunton v. Costar, 7 Term R. 427; Harvey v. Brydges, 14 M. & W. 437.

[487] Mueller v. Kuhn, 46 Ill. App. 496; Hoots v. Graham, 23 Ill. 81; Qstatag v. Taylor, 44 Ill. App. 469; Frazier v. Caruthers, 44 Ill. App. 61; Eichengreen v. Appel, 44 Ill. App. 19; Brooke v. O'Boyle, 27 Ill. App. 384; Fort Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272.

[488] Pendill v. Union Min. Co., 64 Mich. 172, 31 N. W. 100.

[489] Winn v. State, 55 Ark. 360, 18 S. W. 375; Towell v. Etter, 69 Ark. 34, 59 S. W. 1096, 63 S. W. 53; Mussey v. Scott, 32 Vt. 82. See also, Sharp v. Kinsman, 18 S. Car. 108.

determined, the landlord may enter peaceably upon the premises; thus entering he may remove the tenant therefrom, using such force as would sustain a plea of *molliter manus imposuit;* if the tenant, after a sufficient opportunity, neglects to remove his goods, the landlord may do so, using care in their removal and depositing them in a near and convenient place.[490]

Where the statutory remedy for forcible ejection from land is a civil action of forcible entry and detainer, there is no other remedy but what is afforded by those acts, and the evicted party cannot bring trespass.[491] The landlord's title and right to possession are a complete justification for his entry upon the land, and the tenant as against him has no right of occupation whatever. Having obtained possession by an act of which the tenant has no right to complain, he cannot be liable to an action for the incidental act of expulsion to which he is obliged to resort because of the tenant's unlawful resistance.[492]

A lessor, though out of possession, may enter under the protection of a statute relative to liens to give or post an original notice that his interest is not bound by the lien. Such an entry is not an unlawful invasion of the rights of the tenant or a trespass. No wrong or injury is inflicted on the tenant or his property. The landlord enters by necessity, and under the authority of law to protect his interest in the reversion. In such case no action lies.[493]

§ 559. Trespass for assault and battery against landlord.—A landlord, who having peaceably entered after the termination of the tenancy, proceeds, against the tenant's opposition, to take out the windows of the house, or to forcibly eject the tenant, is not liable to an action for an assault, if he uses no more force than is necessary for the purpose.[494] Furthermore, American cases of the greatest weight support the opinion that a person who has ceased to be a tenant, or to have any lawful occupancy has no greater right of action when

[490] Stearns v. Sampson, 59 Me. 568; Cunningham v. Horton, 57 Me. 420; Allen v. Bicknell, 36 Me. 436; Curtis v. Galvin, 1 Allen (Mass.) 215; Mugford v. Richardson, 6 Allen (Mass.) 76; Smith v. Reeder, 21 Ore. 541, 28 Pac. 890.

[491] Vinson v. Flynn, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186; Krevet v. Meyer, 24 Mo. 107; Fuhr v. Dean, 26 Mo. 116; People v. Leonard, 11 Johns. (N. Y.) 504, 509.

[492] Smith v. Reeder, 21 Ore. 541, 28 Pac. 890, 15 L. R. A. 172.

[493] Congdon v. Cook, 55 Minn. 1, 56 N. W. 253; Brown v. Beatty, 34 Miss. 227, 69 Am. R. 389.

[494] Mugford v. Richardson, 6 Allen (Mass.) 76; Winter v. Stevens, 9 Allen (Mass.) 526; Stone v. Lahey, 133 Mass. 426.

the force exerted against his person is contemporaneous with the landlord's forcible entry upon the premises.[495]

On the other hand, there is a line of cases requiring the entry of the landlord must be a peaceable one and unaccompanied by force or violence.[496] Furthermore, the rule allowing forcible retention of a possession gained by peaceable entry has no application where the rights of the parties are in litigation and dispute. A landlord entitled to possession has no right in defiance of the law, and in contempt of the court in which his proceedings to obtain possession are pending, to take the matter into his own hands and by force and violence eject the tenant.[497]

If a landlord is entitled by law to the possession of premises, he has a right to enter peaceably into the possession thereof, and the tenants have no right to remove him by force. If in doing so they make an assault on him that is unlawful, he has a right to resist such assault by force sufficient to repel it, and, if using no more force than is necessary to repel the assault, he is not liable to the tenants in an action for assault and battery.[498]

Formerly in Massachusetts there were some general dicta to the effect that trespass for an assault would lie against a landlord for an assault committed in the course of making a forcible entry.[499] But since then the general doctrine that expulsion was mere aggravation in trespass *quare clausum* and answered by plea of title has been declared,[500] and the right to expel with necessary force has been affirmed.[501] Clearly therefore no civil action is maintainable in Massachusetts by inference from the general prohibition of the statute against forcible entries.

[495] Eames v. Prentice, 8 Cush. (Mass.) 337; Curtis v. Galvin, 1 Allen (Mass.) 215; Low v. Elwell, 121 Mass. 309; Jackson v. Farmer, 9 Wend. (N. Y.) 201; Overdeer v. Lewis, 1 W. & S. (Pa.) 90; Kellam v. Janson, 17 Pa. St. 467; Stearns v. Sampson, 59 Me. 568; Sterling v. Warden, 51 N. H. 217.

[496] Fredericksen v. Singer Mfg. Co., 38 Minn. 356, 37 N. W. 453; Mercil v. Broulette, 66 Minn. 416, 69 N. W. 218; Lobdell v. Keene, 85 Minn. 90, 88 N. W. 426.

[497] Lobdell v. Keene, 85 Minn. 90, 88 N. W. 426; Bristor v. Burr, 120 N. Y. 427, 24 N. E. 937.

[498] Gillespie v. Beecher, 85 Mich. 347, 48 N. W. 561; Ayres v. Birtch, 35 Mich. 501; Lobdell v. Keene, 85 Minn. 90, 88 N. W. 426.

[499] Sampson v. Henry, 11 Pick (Mass.) 379; Commonwealth v. Haley, 4 Allen (Mass.) 318.

[500] Merriam v. Willis, 10 Allen (Mass.) 118.

[501] Pratt v. Farrar, 10 Allen (Mass.) 519, 521; Morrill v. De la Granja, 99 Mass. 383.

§ 560. Where a tenant is legally entitled to possession and the landlord forcibly enters on him, such entry is an interference with the tenant's right to possession for which he is clearly entitled to maintain an action of trespass.[502] A landlord commits a trespass by breaking open a building upon the demised premises during the term of the lease and removing goods even though he has bought the goods.[503] A right of entry upon leased premises, by the landlord for one purpose will not justify the performance of such acts for another purpose; nor will the consent of the tenant to an entry for a short time, for necessary repairs, justify extensive alterations requiring the removal of the tenant.[504] A mere trespasser cannot recover damages against a landlord who removes an obstruction he has wrongfully placed upon the real estate of the landlord, simply because it was the tenant who should have removed the obstruction. If the landlord chooses to protect the tenant in his possession, a mere trespasser cannot complain. Whether the landlord entered rightfully upon the tenant's possession is a question between the landlord and the tenant with which others are not concerned.[505]

§ 561. The rule allowing the use of force to recover possession of real estate, which makes the landlord a law unto himself, is not conducive to good business principles or to good order, and for that reason is not looked upon with favor in all quarters. Where state statutes provide a speedy, adequate and orderly method for a landlord to obtain possession of his property upon failure of the tenant to pay rent, or upon failure to perform any other condition or covenant contained in the lease, such statutes have been held to provide an exclusive remedy, nothwithstanding an agreement permitting possession to be taken by force.[506] The Colorado statute takes away the right that existed at common law to make entry by force, although the right to possession may exist. Yet a license reserved in the lease to make such an entry does not contravene the statute, and under such a provision the landlord may enter and remove a tenant upon condition broken, if he use no unnecessary force to accomplish his purpose.[507] In Connecticut the law was declared to be that a posses-

[502] Green v. Hammock, 13 Ky. L. R. 145.

[503] Shores v. Brooks, 81 Ga. 468, 8 S. E. 429.

[504] Dwyer v. Carroll, 86 Cal. 298, 24 Pac. 1015; Shiffer v. Broadhead, 126 Pa. St. 260, 17 Atl. 592.

[505] Ebersol v. Trainor, 81 Ill. App. 645.

[506] Spencer v. Commercial Co., 30 Wash. 520, 71 Pac. 53; McClellan v. Gaston, 18 Wash. 472, 51 Pac. 1062.

[507] Goshen v. People, 22 Colo. 270, 44 Pac. 503.

sion, commenced under a tenancy, cannot be put an end to in fact by forcibly removing the tenant without process.[508] It has been held in that state that a plea of *liberum tenementum* was not a good plea in an action of trespass for a forcible entry by a landlord.[509] As such act is directly prohibited, the act itself is made unlawful, even if it were not already so at common law, and it therefore follows that a landlord under such circumstances, though he has a right of entry, must in order to reinvest himself with the lawful possession of the premises, held over by his tenant, exercise his right of reëntry peaceably, and that he cannot found a legal right to remove the tenant upon the illegal act of a forcible possession.[510] Furthermore there is no distinction between a forcible retaking possession of premises where a party is resisted and resistance is overcome by superior force, and a quiet, peaceable reëntry. Unless a party has a right to retain possession by force and strong hand when he has once acquired it peaceably in the temporary absence of another party, the right would be valueless. It could hardly be called a right, if he must leave as peaceably as he entered, upon the return and demand of the other party. If the landlord has the right to retain possession by force a conflict would immediately ensue in which the superior force would prevail, and it matters not whether that conflict arises in the first instance, or after one of the contestants has got into possession by stealth, in the temporary absence of the other. The statute of forcible entry and detainer is against the right of the landlord to regain possession by force.[511]

In Illinois the court considered the English authority equally balanced on this question and the American cases conflicting, and, relying on a Vermont case, which has subsequently been overruled, held that an action for damages could be maintained against a landlord for forcible entry.[512] The Illinois court is consistent, and considers that any violent entry, even after the tenant has abandoned the premises, is equally within the prohibition of the statute and subjects the landlord to an action of trespass. Although it is true that courts will not lend their aid to enforce a contract to accomplish something prohibited by law, an agreement authorizing an entry on certain premises, without liability as a trespasser in case force should be re-

[508] Larkin v. Avery, 23 Conn. 304.

[509] Bliss v. Bange, 6 Conn. 78.

[510] Larkin v. Avery, 23 Conn. 304, 310.

[511] Mason v. Hawes, 52 Conn. 12.

[512] Dustin v. Cowdry, 23 Vt. 631, overruled by Mussey v. Scott, 32 Vt. 82. Page v. DePuy, 40 Ill. 506; Reeder v. Purdy, 41 Ill. 279; Dearlove v. Herrington, 70 Ill. 251; Briggs v. Roth, 28 Ill. App. 313.

quired to obtain possession, is not an agreement to do an unlawful act. A party acting under such an agreement would still be liable criminally for breach of the peace, but he would not be liable in a civil action for assault and battery.[514] In such case the fact that the landlord had instituted an action of forcible detainer against his tenant would not operate to deprive him of his right to make entry under the agreement in the lease.[515] For a mere unlawful entry by a landlord upon leased premises after the expiration of the tenancy, unaccompanied by a trespass to the person or to personal property, only nominal damages can be recovered, because the tenant has no longer a legal right to possession.[516] But it is, nevertheless, a trespass for an owner to enter upon premises in the actual possession of an occupier, although such occupier is a tenant wrongfully holding over.[517] A tenant, returning after a temporary absence, has a right to force an entrance against his landlord, who has taken possession in the meantime.[518]

§ 562. Forcible entry and detainer distinguished from summary process.—In many states the remedy of a person on whom there has been a forcible entry and of a landlord whose tenant refuses to yield up possession is embodied in the same act. But they are, nevertheless, distinct remedies applying to different classes of persons. Thus, in Massachusetts the action of forcible entry and detainer has, by statute, been so extended that there are two cases in which the right to possession may be tried in it. The relation of landlord and tenant is such that it was deemed advisable to give to a landlord a summary process by which to eject a tenant after the determination of the tenant's estate; and so, for a long series of years, it has been the law of this Commonwealth that this writ might be used for the purpose of restoring to his possession a landlord whose tenant is holding his estate after his right to hold it has ceased. Although this writ is used, and the process is frequently called a process of forcible entry and detainer, yet it is not strictly a process of forcible entry and detainer, but it is given as a remedy to a landlord whose tenant holds without right, whether by force or not; but in such case it is always limited to the case of a tenant, for, the tenancy having been proved, the title of the landlord could not be brought in question, and the

[514] Ambrose v. Root, 11 Ill. 497; Fabri v. Bryan, 80 Ill. 182.

[515] Fabri v. Bryan, 80 Ill. 182.

[516] Kurrus v. Seibert, 11 Ill. App. 319; Reeder v. Purdy, 41 Ill. 279.

[517] Wright v. Mahoney, 61 Ill. App. 125.

[518] Chapman v. Cawrey, 50 Ill. 512.

only issue which could be tried is whether the rights of the tenant under his lease had expired. In case of forcible entry on one in peaceable possession, unless the entry or detainer is accompanied by an actual breach of the peace, the course of legislation has made the process substantially a civil proceeding, and has prescribed the form of writ or complaint and declaration which any private party may sue out before the proper justice; and by incorporating into the statute the right to recover by the same process lands unlawfully held by a tenant against his landlord, the statute, as a statute of forcible entry and detainer, simply seems encumbered with some anomaly.[519]

§ 562a. **Statutes relative to actions of summary process** for the recovery of possession by a landlord confer new rights and prescribe a remedy by a course of proceeding unknown to the common law. They confer a special power over a subject, and prescribe a specific mode for its exercise. The law is well settled that in such case the mode prescribed, especially as respects jurisdiction, must be strictly pursued, whether the tribunal upon which the power is conferred be of superior or inferior jurisdiction.[520]

The object of such acts has been declared to be to afford a summary relief, and avoid the expense and delay attendant upon the prosecution of an action of ejectment. They are designed as statutes for relief, not to create new causes of action. The evident intention is to give this summary relief in those cases where for breach of such stipulations the action of ejectment would lie. This throws every case upon the ground where the matter rests at common law, the statute having simply the effect of affording a speedy and summary restitution of the premises in cases where the party would otherwise be under the necessity of resorting to an action of ejectment. Any other construction would be manifestly unjust and inequitable, for if such proceedings could be maintained for the breach of any and every stipulation in a lease, the lessee might be deprived of the premises for the non-performance of an unimportant stipulation in the lease.[521] Where a tenant, acting within his lawful rights, admitted another as his sub-tenant to hold until his lease should expire, the sub-tenant's obtaining of possession is peaceable and lawful, and his refusal to surrender after proper demand made, brings the case

[519] Hodgkins v. Price, 132 Mass. 196.

[520] Haywood v. Collins, 60 Ill. 328; Burns v. Nash, 23 Ill. App. 552; Cooper v. Sunderland, 3 Iowa 114; Cohen v. Barrett, 5 Cal. 195; Stafford v. Ingersol, 3 Hill (N. Y.) 38; Renwick v. Morris, 73 Hill (N. Y.) 575.

[521] Hadley v. Havens, 24 Vt. 520.

squarely within the conditions of unlawful detainer as defined by the Arkansas code, so that the landlord would be entitled to maintain summary process to recover possession.[522] The name by which this summary process is commonly known is an action for unlawful detainer.

§ 563. The action of unlawful detainer can be maintained only where the relation of landlord and tenant subsists between the parties to the action, and hence it becomes material to determine whether parties stand in that relation to each other.[523] While it is not necessary to show an express demise or letting of lands to sustain the action, the facts must show, impliedly at least, that the defendant occupies as tenant of the plaintiff, and this must be something more than a mere *quasi* tenancy. It is sometimes said that one who is in possession of lands under a contract for a sale is a tenant at will to the owner. This is true in a restricted sense only. He is a tenant at will just as a mortgagor after condition broken is a tenant at will of the mortgagee. He may be deprived of the possession if it can be done peaceably, or may be evicted in an action of ejectment. The mortgagor is not a tenant within the meaning of the unlawful detainer act, however.[524] The conventional relation of landlord and tenant means the relation created by convention or agreement between the parties.[525] The cases are numerous in which a summary remedy has been refused because the contract or circumstances under which the owner of premises permitted another to take possession of them contemplated some condition or consideration apart from rent, or a tenancy at the mere sufferance or will of the owner.[526] Yet a grantee of the landlord could maintain an action of summary process to recover possession from a tenant of the latter, and under a code provision giving this right to "a person to whom real property is transferred or devised" it was held that a lessee for a term of years from a land owner could maintain the process against a former tenant from month

[522] Winkler v. Massengill, 66 Ark. 145, 49 S. W. 494.

[523] Mason v. Delancy, 44 Ark. 444; Buel v. Buel, 76 Wis. 413, 45 N. W. 324; Matthews v. Matthews, 49 Hun (N. Y.) 346; Roach v. Cosine, 9 Wend. (N. Y.) 227; Greer v. Wilbar, 72 N. Car. 592; Johnson v. Hauser, 82 N. Car. 375.

[524] Mason v. Delancy, 44 Ark. 444; Necklace v. West, 33 Ark. 682; Evertson v. Sutton, 5 Wend. (N. Y.) 281.

[525] Benjamin v. Benjamin, 5 N. Y. 383.

[526] Dolittle v. Eddy, 7 Barb. (N. Y.) 74; People v. Annis, 45 Barb. (N. Y.) 304; Haywood v. Miller, 3 Hill (N. Y.) 90; Russell v. Russell, 32 How Pr. (N. Y.) 400; Williams v. Bigelow, 11 How. Pr. (N. Y.) 83; Sims v. Humphrey, 4 Denio (N. Y.) 185.

to month, even without attornment.[527] The title to real estate cannot, however, be litigated in this form of action.[528] Many statutes conferring jurisdiction upon justices of the peace to try actions of forcible entry and detainer expressly inhibit all inquiry into the merits of the title; and decisions are uniform to this effect that title is not within the issue involved in this action. The thing that is involved is such right of possession between the parties to the record as may be worked out and adjudged aside and apart from all considerations of title. The action is maintainable by any one entitled to the immediate possession against any one unlawfully withholding possession where the relation of landlord and tenant exists between the parties.[529] This form of proceeding has been declared by courts in another state to be possessory only, and not to involve title.[530] Obviously, it can be brought only in the cases specified in the statute,[531] and therefore it will not lie against one who has entered under a lease valid for one year and holds under a contract enforceable in equity against the plaintiff as a lease for a longer period.[532] In Georgia the remedy for recovery of land from a tenant holding over is available in favor of a vendee of the original landlord.[533] In California it may be brought by the executor of a deceased lessor.[534] Formerly in Missouri, where the person having the legal right to possession had never himself been in possession, he could not maintain an action of forcible entry and detainer, or of unlawful detainer, but was put to his ejectment.[535] But this rule has been changed by a statute giving heirs, devisees, grantees and assigns the same remedies to which the ancestor, devisor, grantor or assignor was before entitled to.[536]

It would, however, be no answer or legal defense to a proceeding instituted by a landlord to obtain restitution of the possession of premises that he had made a contract of lease of them to another to commence on the day following the expiration of the former term.

[527] McDonald v. Hanlon, 79 Cal. 442, 21 Pac. 861.

[528] Hoffman v. Clark, 63 Mich. 175, 29 N. W. 695.

[529] Nicrosi v. Phillipi, 91 Ala. 229, 8 So. 561; Welden v. Schlosser, 74 Ala. 355; Houston v. Farris, 71 Ala. 570.

[530] Spears v. McKay, Walker (Miss.) 265; Lorring v. Willis, 4 How. (Miss.) 383.

[531] McCorkle v. Yarrell, 55 Miss. 576.

[532] Lobdell v. Mason, 71 Miss. 937, 15 So. 44.

[533] Morrow v. Sawyer, 82 Ga. 226, 8 S. E. 51.

[534] Knowles v. Murphy, 107 Cal. 107, 40 Pac. 111. See, Reay v. Cotter, 29 Cal. 168.

[535] L'Hussier v. Zallee, 24 Mo. 13; McCartney v. Alderson, 45 Mo. 35.

[536] Kelly v. Clancy, 15 Mo. App. 519.

Under this contract the landlord would be bound to give possession of the premises, and would therefore be entitled to maintain proceedings under the code to oust the tenant wrongfully holding over.[537]

According to the general doctrine which precludes a lessee from denying his lessor's title, the existence of the relation of landlord and tenant eliminates all dispute as to title, and even in a jurisdiction where an exception is made to the general doctrine, such exception was held not to apply in an action of unlawful detainer, and the lessee in that action was not allowed to dispute his landlord's title.[538]

§ 564. Statutory penalty for holding over.—Punishment for a tenant who wrongfully holds over was provided by the Statute of 4 George II, ch. 28, which was a remedial statute with a penalty attached, to be given to the party grieved.[539] By this statute the penalty which the landlord is entitled to recover by action of debt, is double the yearly value of the lands, tenements or hereditaments so detained, for so long time as the same are detained. It is the double value, not the double rent, which is recoverable, for in some cases double rent would be of no value at all.[540] It is clearly the yearly value which is to be ascertained, and double that is what the statute allows to be recovered.[541] But under the language of the English acts the penalty or forfeiture ceases whenever the possession is restored to the landlord and the courts have so determined.[542] In Alabama the wording of the statute is different, the precise language being that the tenant so holding over "is liable for double the amount of the annual rent agreed to be paid under such contract." It is not "so long as the tenant continues to hold over," or "so long as the lessor is kept out of possession," or "at the rate of double the agreed rent," and it must be supposed that this difference in wording was intentional, so that no room is left for interpretation. The clause in the statute which secures to the landlord the right to recover "such other special damage as may be thereby sustained" seems to be framed with special reference to a loss of other tenants caused by such delay. So the only answer to the argument of hardship on the tenant is to say that the court must deal with the statute as it is.[543]

[537] Gelston v. Sigmund, 27 Md. 345.

[538] Knowles v. Murphy, 107 Cal. 107, 40 Pac. 111.

[539] Wilkinson v. Colley, 5 Burr. 2694; Cross v. McClenahan, 54 Md. 21.

[540] Alex. Brit. St. 711.

[541] Timmins v. Rowlinson, 3 Burr. 1603.

[542] Cobb v. Stokes, 8 East 358; Lloyd v. Rosbee, 2 Camp. 453.

[543] Ullman v. Herzberg, 91 Ala. 458, 8 So. 408.

Resort cannot be made to equity, because the statute provides a remedy by which the penalty may be recovered. That remedy is "by action of debt," and it is the only mode provided by which the party aggrieved may get the benefit of its provisions. Special remedies, and more particularly extraordinary ones, and of a penal nature, must be specially and strictly pursued. Action of debt being the form of action prescribed for the recovery of the penalty, the facts necessary to the recovery must be established in that way. In invoking the aid of a court of equity to enforce the penalty given by the statute, a party would be going to a tribunal that never enforces a penalty and often relieves against one.[544]

Consent by a landlord to his tenant's holding over for a short period would not be a waiver of his right to exact the statutory penalty if the tenant subsequently refused to leave when requested.[545] A penal provision of this nature in a lease will not be extended by construction, and if the premises consist of several parcels to be surrendered at different times, the penalty will not attach till the time for the surrender of the last parcel.[546]

A clause in a lease providing for a redelivery of the premises, and obligating the lessees to pay the lessor double rent for all such time as they shall hold over the premises after the expiration of the term, does not deprive the lessor of his option to retake the premises at the expiration of the lease. But if the lessor fails to do so, or to make a new agreement with the lessees, it deprives him of the power to do more than recover double rent for the time he permits the lessees to hold over after the expiration of the lease.[547] Such a provision for double rent may be waived by the payment and acceptance of rent on the old terms.[548]

§ **565. A bill in equity is not the appropriate remedy to obtain possession of premises from a tenant holding over** nor to try the title to premises which such a tenant sets up to maintain his possession. In an ordinary case of a tenant holding over after the expiration of his lease, where no reason is shown why the complainant cannot at once avail himself of the summary remedy given by statute to oust the defendant and to obtain restitution of the premises, or why he

[544] Cross v. McClenahan, 54 Md. 21.

[545] Ullman v. Herzberg, 91 Ala. 458, 8 So. 408.

[546] Klingle v. Ritter, 54 Ill. 140.

[547] Green v. Kroeger, 67 Mo. App. 621.

[548] Deaver v. Randall, 5 Mo. App. 297; Wilgus v. Lewis, 8 Mo. App. 336.

cannot resort to an action of ejectment, equity will not interfere.[549] Such a bill cannot be maintained on the ground of removing a cloud upon the title, for the reason that it states no title or pretended title which would be apparently good at law without evidence *aliunde*. Where a bill states nothing but a naked pretense of title, there is no ground for applying to a court of equity to get rid of it because of apprehended injury.[550] The remedy at law to evict a tenant holding over is complete, and there is no occasion to resort to a court of equity.[551] Furthermore, in such a proceeding the court cannot look to the equities of the parties, but must enforce their strict legal rights. The legal rights of parties as defined by the written lease and contract may be asserted, but any rights growing out of an estoppel *in pais*, which in equity would arrest the assertion of the legal right, must be presented in another form. A court of equity may enjoin the further prosecution of a suit of forcible entry and detainer till the rights of the parties are fully settled in equity, and the equitable estoppel is then made effective in a court of law.[552]

§ 566. **Form of judgment in summary process.**—In a proceeding under the Delaware statute to recover possession of demised premises after the end of the term, a verdict for the plaintiff, and that he is entitled to the possession of the premises, and that there be a stay of execution for ten days, is not in accordance with the statute. The statute is mandatory, and prescribes in terms what the judgment shall be—that is, that the plaintiff shall have judgment for the possession of his premises and for his costs.[553] Where a landlord gets judgment for possession against a tenant, and pending an appeal by the tenant the term claimed by him expires and he vacates the premises, the landlord is entitled to a judgment for damage, even though he no longer requires a judgment for restoration of possession. On the facts as they were at the time the action was instituted, the complainant was entitled not only to a judgment of restitution, but also to damages and costs. His claim to these was an equitable one on the facts of the case, and nothing was done by him since which detracted from his

[549] Torrent v. Muskegon &c. Co., 22 Mich. 354; Huff v. Markham, 71 Ga. 555.

[550] Ward v. Dewey, 16 N. Y. 519, 522; Crooke v. Andrews, 40 N. Y. 547; Palmer v. Rich, 12 Mich. 414; Seofield v. City of Lansing, 17 Mich. 437.

[551] Daniels v. Edwards, 72 Ga. 196.

[552] St. Louis &c. Yards v. Wiggins Ferry Co., 102 Ill. 514; Illinois &c. R. Co. v. Baltimore &c. R. Co., 23 Ill. App. 531.

[553] Crow v. Cann, 2 Pennew. (Del.) 208.

equities in any particular. The appeal should be tried and determined on its merits. The landlord, if he recovers, will not require process to restore him to possession, but his right to recover his damages and costs is unaffected by that circumstance.[554] Where a landlord can recover no damages on the summary process under the statute by which he regains possession, and it is provided by such statute that judgment recovered on that process shall not be a bar to an action for a trespass on the premises thereby recovered, the landlord has the same remedy which was formerly open to a demandant after a recovery in a writ of entry, namely, an action of trespass for mesne profits.[555] An exception in a statute in regard to the right of a tenant to retain possession pending an appeal provided that if the action was brought upon a written lease executed by both parties against a tenant holding over after the expiration of said lease, restitution of the premises should be forthwith. This was held by the Minnesota court to mean expiration in the natural course, and not to apply to a case where the lease expired because of a breach of a covenant not to sublet. After expiration by lapse of time, the written lease could afford no pretext to the tenant for remaining in possession, while he might have a good defense against the alleged breach of covenants.[556]

The right and only right of a *cestui que trust* of a lessee would be through his trustee. He would have no direct claim as tenant upon the landlord, and the landlord would have none against him. He would not be responsible under the lease to deliver up the premises to the lessor at its expiration, but at that time all his rights under it through his trustee would cease, and if he remained it would be only as a tenant at sufferance. So a judgment against the trustee would be a judgment against the *cestui*, and would authorize the officer to remove any whose rights were dependent upon the trustee.[557]

VI. *Emblements.*

§ 567. The term emblements is used to designate not only certain products of the soil, but also the right of a tenant to take and carry away such products after his tenancy has ended. The vegetable chattels called "emblements" are the corn and other growth of the earth

[554] Peters v. Fisher, 50 Mich. 331, 15 N. W. 496. See, Hebron Church v. Adams, 121 Mass. 257.

[555] Sargent v. Smith, 12 Gray (Mass.) 426; Raymond v. Andrews, 6 Cush. (Mass.) 265.

[556] State v. Burr, 29 Minn. 432, 13 N. W. 676.

[557] Danforth v. Stratton, 77 Me. 200.

which are produced annually, not spontaneously, but by labor and industry, and thence are called *"fructus industriales."*[558] The term also denotes the right of a tenant to take and carry away, after his tenancy has ended, such annual products of the land as have resulted from his own care and labor.[559] Emblements are the away-going crop; in other words, the crop which is upon the ground and unreaped when the tenant goes away, his lease having determined; and the right to emblements is the right in the tenant to take away the away-going crop, and for that purpose to come upon the land and do all necessary things thereon. It is the common practice for the crop to be termed the away-going crop and the tenant the off-going tenant.[560] No right in respect to emblements arises until the seed is sown, and there is no principle of law by which a tenant could recover the cost of preparing the ground for the reception of the seed.[561] The lessors of a farm adjoining a river have no right to the driftwood which the lessee hauls upon the farm from the river. The contiguity of the farm to the river gives the lessors no right to the drift which floats upon its surface. The real owner of the wood alone could disturb the lawful possession of him who has acquired it. To the driftwood which came down upon the waters of the river the lessors had no title, and when it was recovered by the tenant, through his own labor, they could enforce no claim thereto against him. The avails of his labors beyond what he was to do for them would be legally his own.[562] Crude turpentine, which has formed on the body of the tree, and is usually known as "scrape," is personal property and belongs to the person who has lawfully produced it by cultivation. It is annual product of labor and industry, and although it adheres to the body of the tree, it is not a part of the realty. The turpentine crop may be properly classed with *fructus industriales,* for it is not the spontaneous product of the trees, but requires annual labor and cultivation. Upon a similar principle, hops which spring from old roots have long been regarded as emblements.[563]

"The whole doctrine of emblements," declares the Georgia court in a well-considered case, "was based upon two reasons: (1) upon natural justice and equity; (2) upon grounds of public policy. The substantial merit of the first reason assigned is apparent; how public policy

[558] Reiff v. Reiff, 64 Pa. St. 134.
[559] Black's Law. Dict.
[560] Clark v. Banks, 6 Houst. (Del.) 584.
[561] Price v. Pickett, 21 Ala. 741.
[562] Dyer v. Haley, 29 Me. 277.
[563] State v. Moore, 11 Ired. L. (N. Car.) 70; Lewis v. McNatt, 65 N. Car. 63.

was subserved by an application of the doctrine is explained by Blackstone when he says: 'The encouragement of husbandry, . . . being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it.' "[564] Where the reason of the doctrine fails, it has no application, as where a tenant terminates his estate through his own default or misconduct. In such case the law was suffered to apply in all its vigor, whereby a growing crop, until actually severed from the soil, was regarded as a part of the land itself, and passed accordingly. Before the introduction into the law of the doctrine of emblements, the tenant had no right to the usufruct of the land a single day beyond his term, nor to any profits thereof not arising strictly within the period of his right of occupancy. The doctrine of emblements is based and proceeds solely on the idea that the tenant is justly entitled to gather his crops, even though his term has expired, and without regard to the question whether such crops are to be considered as in the nature of personalty or realty.[565]

However, there is a recognized line of cases holding that annual crops which are the product of industry and care, sown by the owner of the soil, are, while growing and immature, personal property.[566] It has been declared that annual crops are regarded, in many respects, as personal property, liable, indeed, to become part of the realty, if the tenant voluntarily abandons or forfeits possession of the premises.[567]

§ 568. During the continuance of his holding a tenant's right to emblements is undoubted. In the absence of an agreement between the parties to a lease of agricultural land vesting the title to the hay produced thereon in the lessor, the law vests it in the lessee.[568] The kind of hay known as "timothy" is an annual crop, and may therefore be sold as personal property;[569] and if a lease be made of land while such a crop is growing on it, the crop passes to the lessee in the absence of a reservation of it to the lessor.[570] Yet it has been held in New

[564] Bagley v. Columbus &c. R. Co., 98 Ga. 626, 25 S. E. 638, citing 2 Bl. Comm. 122.

[565] Bagley v. Columbus &c. R. Co., 98 Ga. 626, 25 S. E. 638; Kerr on Real Prop., §§ 50–51. See, Preston v. Ryan, 45 Mich. 174, 7 N. W. 819.

[566] Mabry v. Harp, 53 Kan. 398, 36 Pac. 743; Polley v. Johnson, 52 Kan. 478, 35 Pac. 8; Caldwell v. Custard, 7 Kan. 303.

[567] Carpenter v. Jones, 63 Ill. 517.

[568] Briggs v. Austin, 129 N. Y. 208, 29 N. E. 4; Felch v. Harriman, 64 N. H. 472, 13 Atl. 418, holding the same in regard to appellee.

[569] Garth v. Caldwell, 72 Mo. 622, 627.

[570] Hosli v. Yokel, 57 Mo. App. 622; Tuttle v. Langley, 68 N. H. 464, 39 Atl. 488.

Hampshire that a tenant, where there is no positive agreement dispensing with the engagement to cultivate his farm in a husbandlike manner, is bound to spend the hay and other like produce upon it as the means of preserving and continuing its capacity of production.[571] By a condition that hay raised upon a leased farm should be consumed on the farm, the tenant's interest in it may be so limited that he cannot convey to a mortgagee a right to remove it and consume it elsewhere. So if a mortgagee under such circumstances acquired any right by his mortgage, it was a right to consume the hay on the farm, which he abandoned when he refused to exercise it.[572] Under the Iowa code a mere field cropper for a share of the crop has no right to turn cattle upon the land after the crop is harvested, and in no case has he a right to pasture the land after the first of December.[573]

A lease of premises with the right of immediate possession and entire enjoyment of the issues and profits would carry with it the emblements unless they were reserved in the lease. So the words in the lease, "and the said lessee is to have and own all crops that are now put in or growing on said premises," would add nothing to the rights of the lessee under the lease.[574] This must necessarily result from the rules of law that the tenant is vested with all the rights incident of possession, and the use and enjoyment of all the privileges appurtenant to the leased premises, and may maintain an action against any person who disturbs his possession or trespasses on the premises, even though it be the landlord. The latter has no right to enter, during the term, to repair or remove crops, unless he has stipulated in the lease for such right. No one would contend that a crop of grass, growing upon the premises when the lease was executed, does not pass to the lessee, who may lawfully pasture his cattle upon it or harvest it for his own use. The fact that the crop is wheat instead of grass cannot change the rule.[575] But in the sale of real estate in fee or for years, the growing crops may be considered by the parties as personal property, and so separated, in contemplation of law, as not to pass by the deed or lease. Parol evidence may be introduced to show that the crop growing on the land at the time when the lease was made was treated and considered as personalty, and not intended to be conveyed by the lease.[576]

[571] Moulton v. Robinson, 27 N. H. 550, 561.

[572] Jewell v. Woodman, 59 N. H. 520.

[573] Kyte v. Keller, 76 Iowa 34, 39 N. W. 928; Tantlinger v. Sullivan, 80 Iowa 218, 45 N. W. 765.

[574] Edwards v. Perkins, 7 Ore. 149.

[575] Emery v. Fugina, 68 Wis. 505, 32 N. W. 236; Hisey v. Troutman, 84 Ind. 115; Baker v. Jordan, 3 Ohio St. 438; Youmans v. Caldwell, 4 Ohio St. 71.

[576] Baker v. Jordan, 3 Ohio St. 438, Youmans v. Caldwell, 4 Ohio St. 71.

§ 569. The doctrine of emblements is founded entirely on the uncertainty of the termination of the tenant's estate. Where that is certain, there exists no title to emblements. It is the tenant's own folly to sow when he knows that his term will expire before he can reap.[577] This result can only be altered by the custom of the country, or by express agreement between the parties.[578] But a custom, to be valid, must be as old as the common law; according to one theory, it must be immemorial. If a particular custom be proved to be immemorial, it necessarily excludes the general custom or common law, for two opposite and inconsistent customs cannot have immemorially existed. In the settlement of the United States the colonists brought with them the common law or general customs of England, but none of the particular customs. The common law became the rule of the whole country, and gave the rule to every part of it, and by that law the off-going tenant was not entitled to the way-going crop. Any practice or usage, however general, introduced into this country since its settlement, and in opposition to the common law, can have no force on the ground of custom, because it lacks the essential ingredient of a good custom—it is not immemorial. It is clear that it could not have existed at any time, even as a recent custom, until after the settlement of the country, and after the common law had attached to every part of it. And nobody will contend that a recent usage or practice, however general, will change the common law.[579]

In Delaware, certain English authorities have been recognized, and it has been declared by the courts of that state that there has always been a custom, with respect to agricultural holdings, that the tenant, if he sowed in the fall a crop of grain which required for its ripening a period greater than the unexpired time of the lease, should have the right to enter upon the land when it matured and harvest it. The ground upon which it was sowed was treated as being still in the rightful possession of the tenant, so much so that an action of trespass would lie for him against any one who entered upon it.[580] In Pennsylvania, also, a tenant may support an action of trespass *quare clausum fregit* against his landlord for an injury done to his way-going crop,

[577] Dircks v. Brant, 56 Md. 500; Harris v. Carson, 7 Leigh (Va.) 632; Mason v. Moyers, 2 Rob. (Va.) 606; Howell v. Schenck, 24 N. J. L. 89; Whitmarsh v. Cutting, 10 Johns. (N. Y.) 360; Sanders v. Ellington, 77 N. Car. 255; Hall v. Durham, 117 Ind. 429, 20 N. E. 282; Gossett v. Drydale, 48 Mo. App. 430.

[578] Dircks v. Brant, 56 Md. 500.

[579] Harris v. Carson, 7 Leigh (Va.) 632; Mason v. Moyers, 2 Rob. (Va.) 606.

[580] Clark v. Banks, 6 Houst. (Del.) 584; Citing Johns v. Whitley, 3 Wils. 65; Boraston v. Green, 16 East 71.

which belongs to the tenant by a custom of the country after the expiration of the lease and after he has removed from the premises.[581] For by custom in that state the right to emblements is extended to tenancies for a fixed and determinate period, so far as relates to a crop put in in the fall when the term ends in the following spring. In such cases the tenant has the right to reënter after the expiration of his term to cultivate and remove the crop;[582] and the tenant has a right to the straw as well as to the grain;[583] but if a tenant put in a crop in the early spring, when his tenancy is to end the same spring or summer, before the crop can mature, he is not entitled to the crop, which goes to the lessor.[584]

In New Jersey a tenant is by custom entitled to enter after the expiration of his term and reap his way-going crop. The custom is established for the benefit and encouragement of agriculture, and is based upon the principle that he who sows in peace shall reap in peace. Its object is to give the tenant the full benefit of the crops for the year of which he would otherwise be deprived when they do not ripen until after the expiration of the term. The rule does not apply to a spring crop, as of oats, which is regarded as the product of the second year, unless it is expressly provided for by the lease.[585] A right conferred by a lease to sow a crop which will not mature till after the termination of the lease carries with it the implied power to enter and harvest the crop at maturity.[586] A privilege of sowing a crop which would mature after the end of the term would apply after a renewal term as well as after the original term. When it has been ascertained what were the tenant's rights the first year, it is also determined what they were the second and third; for it is always a presumption that a lease for one year with the privilege of several is to be continued on the same terms, and with precisely the same rights and privileges to the tenant as during the first year.[587]

The rule in regard to a term for years applies to a tenancy from year to year. A tenant from year to year is not entitled to emblements,

[581] Forsythe v. Price, 8 Watts (Pa.) 282.

[582] Demi v. Bossler, 1 P. & W. (Pa.) 224; Stultz v. Dickey, 5 Binn. (Pa.) 285.

[583] Rank v. Rank, 5 Barr (Pa.) 211; Craig v. Dale, 1 W. & S. (Pa.) 509; Iddings v. Nagle, 2 W. & S. (Pa.) 22.

[584] Demi v. Bossler, 1 P. & W. (Pa.) 224; Carson v. Blazer, 2 Binn. (Pa.) 475, 487; Biggs v. Brown, 2 S. & R. (Pa.) 14.

[585] Howell v. Schenck, 24 N. J. L. 89; Van Doren v. Everitt, 5 N. J. L. 460; Corle v. Monkhouse, 47 N. J. Eq. 73, 20 Atl. 367, citing Wigglesworth v. Dallison, Doug. 201.

[586] Hudson v. Porter, 13 Conn. 59; Van Doren v. Everitt, 5 N. J. L. 460; Boraston v. Green, 16 East 71.

[587] Brown v. Parsons, 22 Mich. 24.

for he cannot be forced to leave unless he has six months' notice before the end of the year, and that puts him on the footing of a tenant for years, and there is no occasion to interfere with the rights of the owner of the land under the general doctrine by allowing him to come in on the doctrine of emblements.[588]

§ 570. The common-law rule is that every one who has an uncertain estate or interest in land, if his estate determines by act of God before severance of the crop shall have emblements, or they go to his executor or administrator.[589] Crops raised upon land during a tenancy at will belong to the tenant, although the landlord brings the holding to an end prior to the maturity of the crops.[590] Littleton, speaking of tenancies at will, says: "If the lessee soweth the land, and the lessor, after it is sown and before the corne is ripe, put him out, yet the lessee shall have the corne, and shall have free entree, egresse, and regresse to cut and carry away the corne, because he knew not at what time the lessor would enter upon him."[591] Thus it seems clear that a tenant at will, having planted during his tenancy, is entitled to the product of his planting. Neither party, by determining the tenancy, can unfairly prejudice the other in regard to rents or emblements. If the lessee terminate before the day on which rent is due, he must pay up the rent to that day; when the lessor determines the rent at such a time, he loses his rent. If the lessor determines the tenancy before the wheat or other produce is reaped or gathered, the lessee shall have the emblements, and free ingress, egress and regress to take them away; but when the lessee determines the tenancy at such a time he loses the emblements.[592] Where a dowress, in possession of land on

[588] Gossett v. Drydale, 48 Mo. App. 430; Sanders v. Ellington, 77 N. Car. 255.

[589] Spencer v. Lewis, 1 Houst. (Del.) 223; Heavilon v. Farmers' Bank, 81 Ind. 249; Shaffer v. Stevens, 143 Ind. 295, 42 N. E. 620; Brown v. Thurston, 56 Me. 126; Talbott v. Hill, 68 Ill. 106; Bevans v. Briscoe, 4 H. & J. (Md.) 139; Towne v. Bowers, 81 Mo. 491; Reilly v. Ringland, 39 Iowa 106, s. c. 44 Iowa 422; Dollar v. Roddenbery, 97 Ga. 148, 25 S. E. 410; Corle v. Monkhouse, 417 N. J. Eq. 73, 20 Atl. 367; King v. Foscue, 91 N. Car. 116; Plummer v. Currier, 52 N. H. 287, 296; Davis v. Brocklebank, 9 N. H. 73; Graves v. Weld, 5 B. & Ad. 105; Bittinger v. Baker, 29 Pa. St. 66; Hunter v. Jones, 7 Phila. (Pa.) 233, s. c. 2 Brewst. (Pa.) 370.

[590] Plummer v. Currier, 52 N. H. 287, 296; Sherburne v. Jones, 20 Me. 70; Rising v. Stannard, 17 Mass. 282, 287; Ellis v. Paige, 1 Pick. (Mass.) 43, 49; Towne v. Bowers, 81 Mo. 491; Reilly v. Ringland, 39 Iowa 106, s. c. 44 Iowa 422.

[591] Litt., ch. 8, § 68. See, Co. Litt. 55a.

[592] Brown v. Thurston, 56 Me. 126; Davis v. Thompson, 13 Me. 209; Sherburne v. Jones, 20 Me. 70; De

which she had sown a crop of wheat, in a suit for partition consented that her dower in the premises might be sold, which was accordingly done, and she received one-seventh of the proceeds of the sale in lieu of dower, it was held that she could not claim emblements, as her estate was terminated by her own act in consenting to the sale and taking the proceeds.[593]

Bad husbandry does not deprive the tenant of his right to the way-going crop,[594] but when he has been ejected for breach of condition he loses his right to emblements.[595]

§ 571. An executor or a lessee of a tenant for life is entitled to crops which were planted during his life time but did not mature till after his death.[496] "This is not only proper to a lessee at will," says Lord Coke, "that when the lessor determines his will that the lessee shall have the corne sowne, etc., but to every particular tenant that hath an estate incertaine, for that is the reason which Littleton expressed in these words, because he hath no certaine or sure estate. And therefore if tenant for life soweth the ground and dieth, his executors shall have the corn for that his estate was uncertaine and determined by the act of God. And the same is the law of the lessee for years of the tenant for life."[597] It being settled that the tenant for life and his under-tenant for years are entitled to the emblements, it is equally well settled that he has the right to ingress, egress and regress to preserve the crop, to gather it, and to carry it off. Where a tenant for life dies in possession, the reversioner or remainderman is not entitled to the occupation of the lands on which a crop is growing until that crop is taken off, or a reasonable time is given for taking it off; and the law must be the same where the lands are leased for years to an under-tenant, who has all the rights which the executors of a tenant for life would have had if he had died in possession.[598] This

Bow v. Colfax, 10 N. J. L. 151; Howell v. Schenck, 24 N. J. L. 89; Towne v. Bowers, 81 Mo. 491; Heavilon v. Farmers' Bank, 81 Ind. 249; Reilly v. Ringland, 39 Iowa 106, s. c. 44 Iowa 422.

[593] Talbot v. Hill, 68 Ill. 106.

[594] Clark v. Harvey, 4 P. F. Smith (Pa.) 142.

[595] Hunter v. Jones, 2 Brewst. (Pa.) 370.

[496] Corle v. Monkhouse, 47 N. J. Eq. 73, 28 Atl. 367; De Bow v. Colfax, 10 N. J. L. 151; Howell v. Schenck, 24 N. J. L. 89, 93; Bradley v. Bailey, 56 Conn. 374, 15 Atl. 746; King v. Whittle, 73 Ga. 482; Perry v. Hamilton, 138 Ind. 271, 35 N. E. 836; Dorsett v. Gray, 98 Ind. 273; Shaffer v. Stevens, 143 Ind. 295, 42 N. E. 620; Gee v. Young, 1 Hayw. (N. Car.) 17; Pouldextex v. Blackburn, 1 Ired. Eq. (N. Car.) 286.

[597] Co. Litt. 55b.

[598] Bevans v. Briscoe, 4 H. & J. (Md.) 139.

rule has been applied to a case where a lessee of a tenant for life sowed the land while he had reason to suppose that the latter was near his death with a fatal disease. To hold that this right may be defeated after the tenant's death, by evidence of his condition of health, or by his declarations or those of his lessee imputing a belief or knowledge that his life would not continue until harvest time, would in many cases subvert an important object of the rule,—the encouragement of husbandry, and open a fruitful source of unseemly litigation. A tenant in failing health would naturally hesitate to put in crops which might be successfully claimed by his successor in title, or in respect to which his estate might be involved in litigation.[599] If the husband of a tenant for life is in possession and tills the land, and she dies before the crop is gathered, he takes the whole as emblements, and it is not a case for apportionment under the Delaware statute, which only applies in case of demise, as where the tenant for life has rented out the land, and his life estate determines during the tenancy.[600] The rule has also been applied in the case of a man who married a dowress who died after a crop had been sown. It was held that the second husband was entitled to reap the crop he had planted before the death of his wife.[601]

§ 572. Rights of lessee under lease subject to a prior lien.—A mortgagor compelled to surrender the estate is not, like a tenant at will, entitled to the emblements, though produced by the mortgagor's labor. The mortgagee may evict him without notice and retain the emblements.[602] A lessee holding under the mortgagor by a lease granted subsequently to the mortgage, and without the mortgagee's concurrence, has no greater rights than the mortgagor; and when evicted by the paramount title of the mortgagee, as he may be without notice, he cannot retain the emblements.[603] A purchaser at a foreclosure sale is entitled to the crops growing at the time of the sale, and may maintain trespass against the mortgagor or his lessee for taking and carrying them away,[604] or replevin for the property.[605] If the mortgagee become the

[599] Bradley v. Bailey, 56 Conn. 374, 15 Atl. 746.

[600] Spencer v. Lewis, 1 Houst. (Del.) 223.

[601] King v. Whittle, 73 Ga. 482.

[602] Gilman v. Wills, 66 Me. 273; Downard v. Groff, 40 Iowa 597; Coor v. Smith, 101 N. Car. 261, 7 S. E. 669; Jones v. Hill, 64 N. Car. 198.

[603] Jones v. Thomas, 8 Blackf. (Ind.) 428; Anderson v. Strauss, 98 Ill. 485.

[604] Shepard v. Philbrick, 2 Denio (N. Y.) 174; Downard v. Groff, 40 Iowa 597.

[605] Scriven v. Moote, 36 Mich. 64; Aldrich v. Reynolds, 1 Barb. Ch. (N. Y.) 613.

purchaser at such sale, he may maintain the action.[606] Moreover, the purchaser at the foreclosure sale may by injunction restrain the mortgagor from taking the crops, and may restrain his creditor from proceeding under execution to levy upon them.[607] But a lessee of land encumbered with a judgment prior to the lease, under which the premises are levied on and sold, is entitled to the way-going crop sown by him prior to the levy and condemnation, in preference to the sheriff's vendee. By statute in Pennsylvania the tenant was required to give up possession three months after the purchaser required him to do so and to pay him rent for the use of the land. This law makes the lessee, under a lease of later date than the lien, a tenant at will of the purchaser under such lien; and it follows on well-settled common-law principles that if he had a crop in the ground before he was notified of the landlord's election to determine the tenancy, he will have a right to take it away. It is essentially a lease for years, but subject to be determined by an uncertain event depending on the will of others, that is, on the will of lien creditors and the purchaser under their liens. If a tenant subject to liens were not entitled to the privileges of a tenant at will, then liens would become a nuisance, preventing the leasing of lands encumbered by them, and requiring leases to be made at ruinous rates, because of the risk that is to be run by the tenant.[608] Furthermore, it has been declared to be right to treat mortgage and judgment liens as entirely equivalent in their effect upon the tenant's rights, where both of them are mere liens upon the land and not titles to it. In states where a mortgage is treated as a title to land, and not as a lien, it is natural enough that, on the foreclosure, the tenant loses his crop; for he is considered as without title, and the mortgagee enters by paramount title and takes all.[609] But in Ohio, for example, it has been held that a tenant's growing crop is safe even against a mortgage;[610] but this doctrine has been declared to rest upon the Ohio ap-

[606] Lane v. King, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105.

[607] Crews v. Pendleton, 1 Leigh (Va.) 297, 19 Am. Dec. 750.

[608] Bittinger v. Baker, 29 Pa. St. 66, overruling Sallada v. James, 6 Barr (Pa.) 144; Groff v. Levan, 4 Harris (Pa.) 179. The doctrine of the principal case was recognized and followed in Dollar v. Roddenbery, 97 Ga. 148, 25 S. E. 410. See also, Miller v. Clement, 4 Wright (Pa.) 484.

[609] Bittinger v. Baker, 29 Pa. St. 66.

[610] Houts v. Showalter, 10 Ohio St. 124; Cassilly v. Rhodes, 12 Ohio 88. In the case of Heavilon v. Farmers' Bank, 81 Ind. 249, the court refers to the case of Jones v. Thomas, 8 Blackf. 428, saying: "When Jones v. Thomas, *supra*, was decided, it was the established doctrine here, as elsewhere, that a mortgage transferred the title to the mortgagee and, after condition broken, if not

praisement law.[611] The reasons given for this doctrine apply to the landlord's share where a crop is put in by the tenant on the shares. As a general rule, a purchaser is entitled to rent coming due after title is vested in him, but a well-defined exception to the rule has been recognized in Ohio in the case of a judicial sale.[612]

In Nebraska the owner of land sold on execution retains the right of possession, and is entitled to the usufruct of such land until confirmation of the sale, so that a judgment debtor is not accountable to the purchaser for hay cut upon the land after sale and before confirmation.[613] It has also been held in that jurisdiction that a mature crop of corn standing upon land sold at judicial sale, and not taken into account by the appraisers, did not pass to the purchaser, but remained the property of the mortgagor, who had planted and cultivated it.[614] So where a purchaser at a foreclosure sale planted and cultivated did not obtain possession of the land, but permitted the tenant to retain possession, notifying him that he must pay rent in money or in kind, the tenant was held to be entitled to the crop.[615]

§ 573. An outgoing tenant in agriculture is not entitled to manure made on the farm, even though it is made by his own cattle

before, enabled him to maintain ejectment, and this led inevitably to the conclusion in that case. The rule, now well established, however, is, that a mortgage creates no estate in the mortgagee, but confers on him only a lien on the estate of the mortgagor, which estate by force of the mortgage, can be transferred to the mortgagee only by a foreclosure and sale according to law. When such foreclosure and sale can or will be accomplished in any case, cannot be anticipated, and so the term of the tenancy being uncertain, the case comes under the general rule already stated; besides, the statute of redemption now prolongs the right of possession of the landowner or occupant beyond the time of sale, whether upon execution or decree, for one year. When that year will terminate cannot be known, of course, until the sale has been made, or at least advertised. After a sale has been made, or perhaps advertised, it would seem that, as against the purchaser, the tenant who would sow must do it at his peril." In Hall v. Durham, 117 Ind. 429, it was held that the rule of Jones v. Thomas, *supra*, applied with full force as to crops sowed upon the land, after deed issues, without the consent of the purchaser, even if it did not apply to crops sowed before with the knowledge that they will not ripen and cannot be harvested till after the deed issues.

[611] Downard v. Groff, 40 Iowa 597.

[612] Albin v. Riegel, 40 Ohio St. 339.

[613] Yeazel v. White, 40 Neb. 432, 58 N. W. 1020.

[614] Foss v. Marr, 40 Neb. 559, 58 N. W. 1020.

[615] Monday v. O'Neil, 44 Neb. 724, 63 N. W. 32.

and from his own fodder.[616] The removal by tenant at will of manure which has been manufactured by him on the premises in his occupancy, in due course of husbandry, is a permanent injury to the reversioner; it is in law voluntary waste; and for such an injury the owner may maintain trespass.[617] Manure made upon a farm in the ordinary manner, from the consumption of its products, is regarded in this country as belonging to the realty, and would pass with the farm if sold, and may not be removed by a tenant in the absence of any special contract to the contrary.[618] The tenant can neither remove the manure nor sell it to be removed, and such sale will vest no property in the vendee. The rule here adopted is not considered as applying to manure made in a livery stable, or in any manner not connected with agriculture and out of the course of husbandry. In such cases the reason of the rule does not apply, and the lessor has no claim to the manure, except such as may result from express contract.[619] The New Hampshire court were not prepared to say that manure made from eel grass gathered from the banks of a river on which a farm lies would stand on this ground. This material was to be regarded not as a product of the farm to be sold off by the tenant like grain or fruit, but as a fertilizer, like muck or sea-weed, which the tenant might lawfully use to enrich his land, but in which his interest was qualified and not absolute.[620]

The general rule is not applicable to land used as a corral or pen for herding large numbers of cattle, brought thither to be slaughtered, and fed with fodder brought from elsewhere. The land furnished nothing for the support of the cattle, and it was not exhausted by cultivation. The tenant was not occupying the land under a farming lease, and the rule governing the case of a tenant under a farming lease is founded on facts and circumstances wholly different.[621] But it does not pre-

[616] Lassell v. Reed, 6 Me. 222; Lewis v. Jones, 17 Pa. St. 262; Wetherbee v. Ellison, 19 Vt. 379.

[617] Perry v. Carr, 44 N. H. 118.

[618] Fay v. Muzzey, 13 Gray (Mass.) 53; Daniels v. Pond, 21 Pick. (Mass.) 367; Lewis v. Lyman, 22 Pick. (Mass.) 437; Lassell v. Reed, 6 Me. 222; Gallagher v. Shipley, 24 Md. 418; Bonnell v. Allen, 53 Ind. 130; Conner v. Coffin, 22 N. H. 538, 541; Plumer v. Plumer, 30 N. H. 558; Perry v. Carr, 44 N. H. 118; Corey v. Bishop, 48 N. H. 146; Wetherbee v. Ellison, 19 Vt. 379; Wing v. Gray, 36 Vt. 261; Stone v. Proctor, 2 Chipm. (Vt.) 108; Ford v. Cobb, 20 N. Y. 344; Goodrich v. Jones, 2 Hill (N. Y.) 142; Middlebrook v. Corwin, 15 Wend. (N. Y.) 169; Pulteney v. Shelton, 5 Ves. 147; Onslow's Case, 16 Ves. 173.

[619] Daniels v. Pond, 21 Pick. (Mass.) 367; Lassell v. Reed, 6 Me. 222; Corey v. Bishop, 48 N. H. 146; Needham v. Allison, 24 N. H. 355; Plumer v. Plumer, 30 N. H. 558.

[620] Hill v. DeRochement, 48 N. H. 87.

[621] Gallagher v. Shipley, 24 Md. 418; Corey v. Bishop, 48 N. H. 146.

vent the application of the rule that the tenant bought some hay and grain, and fed the hay so bought, so long as the manure so made is commingled with that made from the produce of the farm.[622] It has also been held that the general doctrine would cover a dairy farm as well as one used for general agricultural purposes.[623] In Maine the law is that manure on a farm in the possession of a tenant may be seized in execution by his creditor during the continuance of his tenancy and sold for the payment of his debts.[624] The theory on which this doctrine rests is that during the term a tenant could pass a good title to manure, and the landlord's only remedy would be an action in the nature of waste for bad husbandry.

In North Carolina a tenant who is about to remove has a right, where there is no covenant or custom to the contrary, to all the manure made by him on the farm; it is his personal property, and he may take it with him. But the manure ceases to be his if he leaves it when he quits the farm. Taking up with the manure a slight portion of the earth, which is necessarily mixed with it in raking it into heaps, will not make the tenant a tort-feasor.[625]

A covenant by a tenant to leave the manure on the premises at the expiration of his term would override a custom of the country entitling him to receive compensation for manure left under such circumstances;[626] and mutual covenants for the purchase and sale of manure on the premises at the expiration of a tenant's term entitle the off-going tenant to leave the manure on the premises till the sale can be consummated.[627]

[622] Bonnell v. Allen, 53 Ind. 130; Lewis v. Jones, 17 Pa. St. 262.

[623] Bonnell v. Allen, 53 Ind. 130.

[624] Staples v. Emery, 7 Me. 201; Brackett v. Goddard, 54 Me. 309, 313.

[625] Smithwick v. Ellison, 2 Ired. L. (N. Car.) 326.

[626] Roberts v. Barker, 1 C. & M. 808.

[627] Beaty v. Gibbons, 16 East 116.

CHAPTER VIII.

RIGHTS AND LIABILITIES OF THE PARTIES.

1. Landlord's Responsibility for good Condition of Premises, §§ 574–587.
2. Liability imposed by Lessor's Agreement to Repair, §§ 588–598.
3. Liability for Nuisance, §§ 599–611.
4. Premises Occupied by more than one Tenant, §§ 612–624.
5. Responsibility for Waste, §§ 625–639.
6. Actions Relative to Possession, §§ 640–647.

I. *Landlord's Responsibility for Good Condition of Premises.*

§ 574. The well-established general rule is that upon a demise of premises there is no implied warranty or implied condition as to the fitness of the leased property for the purpose for which it is leased.[1] In a well-considered case before the Exchequer Chamber,[2] the action was to recover rent for a pasture, and the defense made was that the land was unfit for pasture, and that the defendant's cattle had been poisoned by a foreign substance on the land. The court held the entire rent could be recovered, and that the facts alleged were not a defense. Park, B., said, in the course of his opinion: "With respect to the other and principal question in this case, viz., whether a contract or condition is implied by law, on the demise of land, that it shall be reasonably fit for the purpose for which it is taken, if the question were *res integra,* I should entertain no doubts at all that no such contract or condition is implied in such a case. The word 'demise' certainly does not carry with it any such implied undertaking."

[1] Bowe v. Hunking, 135 Mass. 380; Dutton v. Gerrish, 9 Cush. (Mass.) 89; Hess v. Newcomer, 7 Md. 325, 337; Clyne v. Helmes, 61 N. J. L. 358, 39 Atl. 767; Gaither v. Hascall-Richards &c. Co., 121 N. Car. 384, 28 S. E. 546; Clifton v. Montague, 40 W. Va. 207, 21 S. E. 858; Harlan v. Lehigh &c. Co., 35 Pa. St. 287; Clark v. Babcock, 23 Mich. 164; Sutton v. Temple, 12 M. & W. 52; Railton v. Taylor, 20 R. I. 279, 38 Atl. 980; Thum v. Rhodes, 12 Colo. App. 245, 55 Pac. 264; Lynch v. Ortlieb, 70 Tex. 727, 8 S. W. 515; Perez v. Rabaud, 76 Tex. 191, 13 S. W. 177; McKeon v. Cutter, 156 Mass. 296, 31 N. E. 389; Friedman v. Schwabacher, 64 Ill. App. 422.

[2] Sutton v. Temple, 12 M. & W. 52.

The same learned judge said on another occasion: "We are all of opinion, for these reasons, that there is no contract, still less a condition, implied by law, on the demise of real property only, that it is fit for the purpose for which it is let. It is much better to leave the parties, in every case, to protect their interests themselves by proper stipulations, and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning."[3] In the case of *Cowen* v. *Sunderland*,[4] Devens, J., delivering the opinion of the court, says: "It is a general rule, well established by the decisions of this court, that the lessee takes an estate in the premises hired, and takes the risk of the quality of the premises, in the absence of an express or implied warranty or of deceit. . . . The rule of *caveat emptor* applies, and it is for the lessee to make the examination necessary to determine whether the premises he hires are safe and adapted to the purposes for which they are hired."

Thus, where the leased premises were described as the "Bedford Salt Furnace Property," together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same, there was no implied covenant on the part of the lessor that the wells were of any particular capacity or suitable for the purpose for which they were leased.[5] The law will not imply a covenant in a lease as to conditions not under the control of the lessor, and with reference to which he and the lessee being ignorant, neither could be supposed to have contracted. The lessee of real property must run the risk of its condition, unless he has an express agreement.[6]

§ 575. Oral evidence of warranty.—Not only will no implication of a warranty of fitness be made, but the rights of the parties cannot be affected by any collateral agreements or undertakings which are not embodied in the written lease. It is well settled that in the absence of fraud, accident or mistake, oral evidence of a warranty will not be admitted.[7] If the lease contains no warranty as to the conditions or

[3] Hart v. Windsor, 12 M. & W. 68, per Parke, B., quoted with approval in Foster v. Peyser, 9 Cush. (Mass.) 242.

[4] Cowen v. Sunderland, 145 Mass. 363, 14 N. E. 117.

[5] Clifton v. Montague, 40 W. Va. 207, 21 S. E. 858; Clark v. Babcock, 23 Mich. 164.

[6] Franklin v. Brown, 118 N. Y. 110, 23 N. E. 126.

[7] Naumberg v. Young, 44 N. J. L. 331, 43 Am. R. 380; McLean v. Nicol, 43 Minn. 169, 45 N. W. 15; Snead v. Tietjin (Ariz.), 24 Pac. 324; Mast v. Pearce, 58 Iowa 579, 8 N. W. 632; Stevens v. Pierce, 151 Mass. 207, 23 N. E. 1006; De Witt v. Berry, 134 U. S. 306, 10 S. Ct. 536; Braley v. Henry, 71 Cal. 481, 12 Pac. 623; York v. Steward, 21 Mont. 515, 55 Pac. 29.

character of a building, the effect of the evidence to fix upon lessor the liability arising from such a warranty changes in a very material manner the rights and liabilities of the parties, and such evidence is not admissible.[8]

§ 576. Demise of dwelling houses.—The rule that there is no implied warranty of fitness applies in a case where the subject-matter of the lease is a dwelling house. The lessor does not undertake that it is fitted for the use for which it is let, or for any purpose, or that it will remain in a tenantable condition.[9] This involves both the right of the landlord to collect rent and his freedom from liability for injuries caused by defects in the premises. If there has been no misrepresentation or fraud, the landlord is entitled to his rent although the premises turn out to be useless.[10] Moreover, the landlord is not liable for damage caused by defects in the premises unless he is guilty of laying a trap or of maintaining a nuisance. In a case where a tenant renting from month to month was injured by a defective fire-escape, the court, applying this doctrine, held the landlord was not liable. "The general rule," said the court, "is that under such a contract the lessee takes the risk as to the condition and quality of the hired premises, and that the landlord is not liable to the tenant for injuries sustained by reason of the defective condition of the buildings leased. By such a lease the lessee purchases an estate in the premises rented, and the rule of *caveat emptor* apples, making it, ordinarily, the duty of the lessee as such purchaser to make such examination of the premises as is required in order to ascertain whether the premises have so fallen into decay or become so dangerous that a person occupying the same is liable to be injured."[11] When a tenant inspects premises, he takes

[8] Lynch v. Ortlieb, 70 Tex. 727, 8 S. W. 515.

[9] Blake v. Ranous, 25 Ill. App. 486; Gallagher v. Button, 73 Conn. 172, 46 Atl. 819; McCoull v. Herzberg, 33 Ill. App. 542; Hanson v. Cruse, 155 Ind. 176, 57 N. E. 904; Foster v. Peyser, 9 Cush. (Mass.) 242; Stevens v. Pierce, 151 Mass. 207, 23 N. E. 1006; Naumberg v. Young, 44 N. J. L. 331, 43 Am. R. 380; Hart v. Windsor, 12 M. & W. 68; York v. Steward, 21 Mont. 515, 55 Pac. 29; Blake v. Dick, 15 Mont. 236, 38 Pac. 1072; Mullen v. Rainear, 45 N. J. L. 520; Meeks v. Bowerman, 1 Daly (N. Y.) 99; Bowe v. Hunking, 135 Mass. 380; Dutton v. Gerrish, 9 Cush. (Mass.) 89; Royce v. Guggenheim, 106 Mass. 201; Scott v. Simons, 54 N. H. 426; Clyne v. Helmes, 61 N. J. L. 358, 39 Atl. 767; Sutton v. Temple, 12 M. & W. 52; Hart v. Windsor, 12 M. & W. 68.

[10] Friedman v. Schwabacher, 64 Ill. App. 422.

[11] Gallagher v. Button, 73 Conn. 172, 46 Atl. 819; Jaffe v. Harteau, 56 N. Y. 398; Edwards v. New York &c. R. Co., 98 N. Y. 245; Towne v. Thompson, 68 N. H. 317, 44 Atl. 492; Bowe v. Hunking, 135 Mass. 380;

the risk of their condition, and he cannot complain because the landlord did not disclose defects in respect to which he had full opportunity of informing himself.[12] If the tenant desires to hold his landlord responsible for the security of the leased building, he should have a covenant to that effect incorporated in the lease.[13] So, where there are no express covenants in a lease, and the landlord is neither dishonest nor negligent, it has been declared to be settled law that the rule of *caveat emptor* applies as to the condition of leased premises. The tenant assumes the risk, and no liability attaches to the landlord.[14] The rule that the letting of a house does not imply that it is fit or will continue fit for the purpose for which it is let applies equally to the case of the letting of several rooms in a tenement house, if they pass out of the control of the landlord into the exclusive possession of the tenant.[15] But although there is no implied contract in a lease of a building that it is well constructed, or safe, or reasonably fit for occupancy, or that it will continue in habitable condition, a landlord is liable to his tenant for damage resulting from defects in the building known to the landlord, or of which he ought to have known, and not known to the tenant, and of which he had not equal means of knowledge.[16]

In a Michigan case where a dwelling house became untenantable from defects in construction and sewer gas, it was held that the tenant could vacate without being liable for future rent.[17] It does not appear that the landlord had been guilty of any deceit, or that he was under any obligation to repair, so that the decision must be regarded as a departure from the prevailing doctrines on this topic. It is worthy of notice that the only authority cited was the case of letting one apartment in an apartment house. The landlord in that case was under general obligation to repair, and retained general supervision over the sewerage, which forced the tenant to vacate. Even under these cir-

Booth v. Merriam, 155 Mass. 521, 30 N. E. 85; Brewster v. De Fremery, 33 Cal. 341; Krueger v. Ferrant, 29 Minn. 385, 13 N. W. 158; Humphrey v. Wait, 22 U. C. C. P. 580.

[13] Blake v. Dick, 15 Mont. 236, 38 Pac. 1072.

[14] Lynch v. Ortlieb, 70 Tex. 727, 8 S. W. 515.

[15] Thum v. Rhodes, 12 Colo. App. 245, 55 Pac. 264; Cowen v. Sunderland, 145 Mass. 363, 14 N. E. 117; Carson v. Godley, 26 Pa. St. 111; Krueger v. Ferrant, 29 Minn. 385, 13 N. W. 158; Wilcox v. Hines (Tenn.), 46 S. W. 297.

[16] McKeon v. Cutter, 156 Mass. 296, 31 N. E. 389; Looney v. McLean, 129 Mass. 33; Bowe v. Hunking, 135 Mass. 380.

[16] Thum v. Rhodes, 12 Colo. App. 245, 55 Pac. 264.

[17] Leonard v. Armstrong, 73 Mich. 577, 41 N. W. 695.

cumstances the decision allowing the tenant to defend against an action for rent was not without a vigorous dissent.[18]

§ 577. Furnished house.—It has been suggested that a distinction exists between the lease of an unfurnished and one of a furnished house. This distinction was discussed and disapproved by the Supreme Court of New Hampshire. The court said: "The sole contention of the defendants is that in a lease of a furnished house there is an implied covenant or condition that it is reasonably fit for the lessee's habitation. If the house is unfurnished it is admitted that such an inference would not be supported by sufficient evidence. A broad distinction in this regard is suggested between a lease of a furnished and a lease of an unfurnished house, which on principle is not apparent. If the landlord knows that the tenant proposes to occupy the house for a term of years as a place for the accommodation of the traveling public, why should the fact that the landlord also leases to him the furniture in the house imply an additional agreement on his part that the house is suitable for hotel purposes or for habitation? Want of repair, and structural defects in the house, do not depend on the furnishings; and there is no more reason why a landlord should bind himself by a warranty against such imperfections in a lease of a furnished house than there is in a lease of an unfurnished house."[19]

In New York the question arose whether the lessor of a furnished house was responsible for offensive odors which rendered the house uninhabitable. There was no fraud, and the lessee had abundant opportunity to inspect the premises. The court held there was no warranty, and that the tenant was bound to pay the rent.[20] So in a case where the cellar of the leased house became filled with water, which rendered it damp and unhealthy, the tenant abandoned it and refused to be held for rent. But in the absence of false representations or fraudulent concealment, this did not justify his conduct, nor could he defend against an action for rent.[21]

§ 578. Exceptions to rule.—There is a noted English case which holds that when a furnished house was let for temporary residence at

[18] Bradley v. Goicouria, 67 How. Pr. (N. Y.) 76.

[19] Davis v. George, 67 N. H. 393, 39 Atl. 979.

[20] Franklin v. Brown, 118 N. Y. 110, 23 N. E. 126. See also, Edwards v. New York &c. R. Co., 98 N. Y. 245; Cleves v. Willoughby, 7 Hill (N. Y.) 83, 86.

[21] Murray v. Albertson, 50 N. J. L. 167, 13 Atl. 394, disapproving Wilson v. Finch, Hatton, L. R. 2 Exch. D. 336.

a watering place, there was an implied condition that it was in a fit state to be inhabited and that the tenant is entitled to quit upon discovering that it is greatly infested with bugs.[22] In this case Lord Abinger said he required no authorities to hold that "a man who rents a ready furnished house does so under the implied condition or obligation—call it what you will—that the house is in a fit state to be inhabited;" but in a subsequent case he said that *Smith* v. *Marrable* was a case of a "contract of a mixed nature—for the letting of a house *and* furniture at Brighton and every one known that the furniture upon such occasions forms the greater part of the value which the party renting it gives for the house and contents. . . . Where the party has had an opportunity of personally inspecting a ready furnished house, by himself or his agent before entering upon the occupation of it, perhaps the objection would not arise; but if a person takes a ready furnished house upon the faith of its being suitably furnished surely the owner is under an obligation to let it in a habitable state." In another case[24] *Smith* v. *Marrable* was further distinguished on the ground that it was a case of "a ready furnished house for a temporary residence at a watering place." In still another it was said that the case was "only an authority for the propositon that in taking furnished apartments at the seaside, or for temporary occupation only, there is an implied warranty that they must be fit for occupation."[25] The principal case, as narrowed down by these subsequent explanations, has been followed and probably represents the law of England.[26]

In the United States the doctrine has been received with disfavor. One American court commented as follows on the principal case: "Certain it is that *Smith* v. *Marrable* has never been followed, except under the precise circumstances on which it was decided, and then only as enabling the tenant to abandon the premises, rescind the lease and defend against the payment of rent. The case has never been cited to raise an implied warranty under any other circumstances without disapproval."[27] This implication of a warranty in a demise of ready-furnished lodgings has been called an exception and likened to a sale of provisions for domestic use where the law implies a war-

[22] Smith v. Marrable, 11 M. & W. 5. To like effect see Ingalls v. Hobbs, 156 Mass. 348, 31 N. E. 286.

[23] Sutton v. Temple, 12 M. & W. 52.

[24] Hart v. Windsor, 12 M. & W. 68. See also, Robertson v. Amazon &c. Co., 46 L. T. (N. S.) 146.

[25] Chester v. Powell, 52 L. T. (N. S.) 722.

[26] Wilson v. Finch, Hatton L. R. 2 Exch. D. 336.

[27] Naumberg v. Young, 44 N. J. L. 331, 345, 43 Am. R. 380.

ranty that the provisions are wholesome.[28] In deciding that there was no implied warranty on the demise of a warehouse, Chief Justice Shaw of the Massachusetts Supreme Court said: "It therefore does not come within the authority of cases, wherein furnished rooms in a lodging house are let for parlor, bedroom and the like, for a particular season of the year in which a warranty may be implied that the rooms are properly furnished and suitably fitted for such particular use. But the authority of these cases has been much shaken, if not wholly overruled, so far as it applies to real estate, by the subsequent cases."[29] The rule that the lessee of a furnished house is justified in abandoning it for unfitness has since been established in Massachusetts by an express adjudication.[30]

§ 579. Liability of landlord for personal injuries to tenant.—In the absence of special circumstances a landlord is not liable for in-

[28] Cleves v. Willoughby, 7 Hill (N. Y.) 83.

[29] Dutton v. Gerrish, 9 Cush. (Mass.) 89, 94. For further discussion of the principles and cases see Murray v. Albertson, 50 N. J. L. 167, 13 Atl. 394.

[30] Ingalls v. Hobbs, 156 Mass. 348, 31 N. E. 286. In this case Justice Knowlton says: "There are good reasons why a different rule should apply to one who hires a furnished room or furnished house for a few days or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than where there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay and without the expense of preparing it for use. It is very difficult and often impossible for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. This distinction between furnished and unfurnished houses, in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house, let for a short time, is in proper condition for immediate occupation as a dwelling. Smith v. Marrable, 11 M. & W. 5; Manchester &c. Co. v. Carr, L. R. 5 C. P. D. 507; Sutton v. Temple, 12 M. & W. 52; Hart v. Windsor, 12 M. & W. 68; Bird v. Greville, 1 C. & E. 317; Charsley v. Jones, 53 J. P. 280."

juries caused to the tenant from defects in the leased premises.[31] Thus, where a tenant was injured by stepping on a defective cover to a cesspool, the landlord was not liable. The accident happened solely because the frame was old and out of repair and there was nothing to show that its condition was not easily discoverable on examination. It was as much the duty of the plaintiff when he hired the house and yard to examine the premises and ascertain whether they were in such repair that she could safely use them as of the defendant.[32] This principle covers all cases where the defect is obvious alike to tenant and landlord and where something not dangerous in itself becomes so by reason of its use upon a particular occasion. Examples of this would be where a child fell down a low embankment which was not protected by a fence,[33] or where a stranger fell down an irregular, unprotected flight of steps on a dark night.[34] So a landlord was not liable to his tenant for the collapse of a public hall.[35]

The liability of the landlord must arise in every instance from the breach of some duty he owes his tenant and it may be laid down as a general rule, supported by the weight of authority, that there is no implied duty on the owner of a house, which is in an unsafe condition, to inform a proposed tenant that it is in such a condition; and that no action will lie against him for an omission to do so in the absence of express warranty or deceit.[36] Many courts in late decisions adhere to this long-established rule of *caveat emptor*. In one case a boiler, defective in construction, exploded.[37] In another a gallery, defective in construction, fell.[38] In another a house was too weak structurally to resist snow slides known to the lessor to be recurrent and dangerous.[39] In another a floor defective in construction fell.[40] In another a stair tread had been sawed. The lessor knew of the sawing but sup-

[31] Bowe v. Hunking, 135 Mass. 380; Keates v. Cadogan, 10 C. B. 591, 70 E. C. L. 591; Robbins v. Jones, 15 C. B. (N. S.) 221, 240, 109 E. C. L. 221.

[32] Booth v. Merriam, 155 Mass. 521, 30 N. E. 85.

[33] Peterson v. Smart, 70 Mo. 34.

[34] Eyre v. Jordan, 111 Mo. 424, 19 S. W. 1095.

[35] Edwards v. New York &c. R. Co., 98 N. Y. 245.

[36] Land v. Fitzgerald, 68 N. J. L. 28, 52 Atl. 229, Mullen v. Rainear, 45 N. J. L. 520; Smith v. State, 92 Md. 518, 48 Atl. 92; Towne v. Thompson, 68 N. H. 317, 44 Atl. 492; Whitmore v. Orono Pulp & Paper Co., 91 Me. 297, 39 Atl. 1032; Platt v. Farney, 16 Ill. App. 216; Sutton v. Temple, 12 M. & W. 52.

[37] Jaffe v. Harteau, 56 N. Y. 398.

[38] Edwards v. New York &c. R. Co., 98 N. Y. 245, 249.

[39] Doyle v. Union Pac. R. Co., 147 U. S. 413, 13 Sup. Ct. 333.

[40] Tuttle v. Gilbert Mfg. Co., 145 Mass. 169, 13 N. E. 465.

posed the tread sufficient.[41] In another a well had been used as a cesspool and thus had become offensive.[42] In another fixtures put up by the lessor were structurally defective and fell.[43] In another a stairway was defective.[44] In another a defective platform fell.[45] In another an unsafe awning fell on a guest.[46] In another a defective gallery fell on a guest.[47] In another defective machinery in a mill gave way.[48] In all these cases, it appearing that the lessor was unaware of the defects, it was held that he was not liable to the lessee or his servants for the injury occasioned by them.

"The reason of the rule is perfectly apparent. If the lessee knows the condition of the premises and rents them without requiring the owner to repair, he takes them as he finds them and has no right to complain of injuries sustained on account of their condition. The owner not being compelled to keep it in repair, if the tenant desires to require that of him, he should so bind him by contract. In the absence of that he must protect himself against dangers which are apparent to him. A building may be perfectly safe and suitable if used for certain purposes, while it may not be for others, and if the tenant has had opportunity to inspect it before he rents it, the landlord cannot anticipate that he will use it in a way his intelligence and observation ought to tell him not to use it."[49] It was said in one case: "Fraud apart, there is no law against letting a tumble-down house and the tenant's remedy is upon the contract, if any."[50]

The principle of *caveat emptor* applies to the occupation of rented premises by a tenant as to any defects which are inherent and unknown to the landlord, and the landlord is not liable to the tenant for injuries received where he had done all that a reasonable prudent man would have done toward fitting the place for occupation.[51] The same rule applies with equal force where the defects in the leased premises were not secret but obvious and apparent to the most casual observer. The tenant takes the risk of their safe occupancy and cannot hold the landlord responsible for injuries caused thereby.[52]

[41] Bowe v. Hunking, 135 Mass. 380.

[42] Kern v. Myll, 94 Mich. 477, 54 N. W. 176.

[43] Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. R. 767.

[44] Willson v. Treadwell, 81 Cal. 58, 22 Pac. 304.

[45] Texas &c. R. Co. v. Mangum, 68 Tex. 342, 4 S. W. 617.

[46] Fellows v. Gilhuber, 82 Wis. 639, 52 N. W. 307.

[47] McConnell v. Lemley, 49 La. Ann. 1433, 34 L. R. A. 609.

[48] Johnson v. Tacoma &c. Co., 3 Wash. 722, 29 Pac. 451.

[49] Smith v. Walsh, 92 Md. 518, 530, 48 Atl. 92, per Boyd, J.

[50] Robbins v. Jones, 15 C. B. (N. S.) 221, 240, 109 E. C. L. 221.

[51] Daley v. Quick, 99 Cal. 179, 33 Pac. 859.

[52] Harpel v. Fall, 63 Minn. 520, 65

§ 580. Fraud a basis of landlord's liability.—Even in the absence of special provisions in a lease in regard to warranty or repairs, one ground on which a landlord may be liable to his tenant for personal injuries caused by a defect in the premises is that he has been guilty of misrepresentation and fraud.[53] The lessor is not, however, liable for injuries resulting to a lessee from the act of his agent in withholding information as to the defective condition of the premises unless there is such a concealment of defects not open to ordinary observation as to amount to fraud or deceit. Furthermore the representations of the agent as to the conditions of leased premises, of which he had the exclusive care, are not binding upon his principal unless they were made at the time of the contract of letting and constituted a part of the *res gestae*.[54] In another case an agent, to make repairs on rented premises, assured the tenant that they were safe for occupation, and the tenant subsequently suffered personal injuries from a defect in the premises. Yet the landlord was not liable. The evidence merely showed that a person authorized only to make repairs, and not authorized to make representations, stated the shed was safe and there was no proof that he did not believe what he said or that he had not some reasonable ground for believing the representations to be true and no evidence was given to show that any fact was suppressed that the landlord was bound to disclose to the tenant.[55] On another occasion the defect causing the accident was so latent that it was not discovered for five months. As it appeared from that that the assertion made by the lessors as to the safety of the premises was not fraudulently made, but was warranted by the appearance of the premises, and was believed to be true when made, they could not be charged with fraud in making it.[56] Yet it has been declared, in a case of this kind, that the affirmation of something as true, regarding the truth or falsity of which the speaker is ignorant, is as much under the interdiction of the law as a false averment knowingly made.[57] Still, as a general rule, a lessor is not bound to disclose any defects in the structure or defects in the condition of premises that makes them unfit for

N. W. 913; McCarthy v. Fagin, 42 Mo. App. 619.

[53] Cate v. Blodgett, 70 N. H. 316, 48 Atl. 281; Perez v. Rabaud, 76 Tex. 191, 13 S. W. 177; Gaither v. Hascall-Richards &c. Co., 121 N. Car. 384, 28 S. E. 546; Cole v. McKey, 66 Wis. 500, 29 N. W. 279.

[54] Cate v. Blodgett, 70 N. H. 316, 48 Atl. 281.

[55] Daley v. Quick, 99 Cal. 179, 33 Pac. 859.

[56] Toner v. Meussdorffer, 123 Cal. 462, 56 Pac. 39.

[57] Pursel v. Teller, 10 Colo. App. 488, 51 Pac. 436. Citing Story's Eq., § 193.

habitation, and on that account a statement by a landlord that the plumbing is in good order is to be regarded merely as an expression of opinion and not as an assertion of a fact.[58] There is a material distinction, however, between passive concealment and active misconduct, such as a false representation which would necessarily, if relied on, have some effect in inducing the other party to enter into the contract.[59] A misrepresentation in regard to the condition of the house upon which the lessee is intended to rely, is held to justify him, on the discovery of the fraud, in abandoning the premises and relieve him from all further obligations under the lease.[60] Where the fraud, which induced the acceptance of a lease, went to the amount of consideration to be paid for it, it was held that the lessee could retain the estate and sue to recover the damages caused by the fraud.[61] A lessee is not precluded from avoiding a lease on account of fraud, because of his covenant that he received the premises in good order and condition.[62] But where a lessee, after renting a house on the representation that it was free from sewer gas, remained in the house and paid rent with knowledge of the presence of such gas, this was held to be an election to treat the lease as valid in spite of the misrepresentation.[63]

§ 581. When there are concealed defects, attended with danger to an occupant and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them in order that the lessee may guard against them.[64] Traps or contrivances may exist by means of which the most careful occupant might be injured. "Such traps or contrivances," says Mr. Justice Field, "are not merely a want of repair. They are, in a sense, active agencies of mischief, which no tenant would expect to find in even a decayed and ruinous tenement."[65] The landlord's liability may be independent of either fraud or mis-

[58] Wilkinson v. Clauson, 29 Minn. 91, 12 N. W. 147; Coulson v. Whiting, 12 Daly (N. Y.) 408.

[59] Doggett v. Emerson, 3 Story (U. S.) 700, 733; Smith v. Countryman, 30 N. Y. 655, 680.

[60] Pursel v. Teller, 10 Colo. App. 488, 51 Pac. 436; Jackson v. Odell, 12 Daly (N. Y.) 345; Keates v. Cadogan, 10 C. B. 591, 70 E. C. L. 591; Cornfoot v. Fowke, 6 M. & W. 358, 373.

[61] Guffey v. Clever, 146 Pa. St. 548, 23 Atl. 161.

[62] Pursel v. Teller, 10 Colo. App. 488, 51 Pac. 436.

[63] Morey v. Pierce, 14 Ill. App. 91.

[64] Cowen v. Sunderland, 145 Mass. 363, 14 N. E. 117; Sunasack v. Morey, 196 Ill. 569, 63 N. E. 1039, reversing 98 Ill. App. 505; Shackford v. Coffin, 95 Me. 69, 49 Atl. 57; O'Malley v. Twenty-five Associates, 178 Mass. 555, 60 N. E. 387.

[65] Bowe v. Hunking, 135 Mass. 380.

representation; mere negligence in failing to communicate his knowledge is sufficient to fix his liability. This doctrine was applied in a case where an old cesspool had been covered over with boards and from four to six inches of earth on which grass and weeds were growing. The landlord was liable for injury suffered by the tenant from falling into the cesspool.[66] And again the landlord was liable where he knew of a defect in a clamp used for hoisting in a factory, and the clamp broke causing injury to an employe of the lessee. The defect was not known to the lessee or discoverable by a reasonable examination of the premises.[67]

A landlord is not an insurer, but if he knows that the premises he is about to let are defective, especially if the dangerous place is not obvious and he does not inform the tenant of the defect, he is liable for any injury caused thereby to the tenant or a member of his family. The law requires good faith of the landlord.[68]

In Minnesota an employer's liability act makes an employer liable to his servant for injuries caused by dangerous and defective machinery. It followed that where a dangerous machine existed at the time a warehouse was leased, the landlord was liable for an injury resulting to an employe of a tenant.[69]

§ 582. Landlord's duty to learn of defects.—The view supported by the better reason as well by courts carrying the greater weight limits the obligation of the landlord to disclosing defects already known to him without examining the property to discover defects. He has done his whole duty in telling of all the secret defects of which he has knowledge.[70] Chief Justice Holmes, speaking for the Massachusetts court, said: "No doubt a duty to take reasonable care to secure reasonable safety might be imposed upon landlords on grounds of policy, irrespective of the date of the lease. But we see no sufficient reason for departing from the general rule when we consider the relation of landlord and tenant from the point of view of contract, and if there is no undertaking to give the tenant more than he hires, we can see no ground for holding a landlord liable in tort for not mak-

[66] Cowen v. Sunderland, 145 Mass. 363, 14 N. E. 117.

[67] Anderson v. Hayes, 101 Wis. 538, 77 N. W. 891.

[68] Moore v. Parker, 63 Kan. 52, 64 Pac. 975; McCarthy v. Fagin, 42 Mo. App. 619.

[69] Tvedt v. Wheeler, 70 Minn. 161, 72 N. W. 1062.

[70] O'Malley v. Twenty-five Associates, 178 Mass. 555, 60 N. E. 387; Shackford v. Coffin, 95 Me. 69, 49 Atl. 57; Coke v. Gutkese, 80 Ky. 598.

ing the same improvement or for not mentioning what he did not know."[71]

A rule placing greater responsibility on the landlord has been adopted by some courts however. This is stated to be that "in the absence of a contract to repair or warranty of condition, both the landlord and tenant must use reasonable care and diligence. If the tenant neglect such reasonable care and diligence to ascertain the condition of the premises, or knowing their condition assumed the risk, then he cannot recover against the landlord. On the other hand, if the landlord neglect to use reasonable care and diligence in ascertaining whether his premises are safe or if he actually knows they are unsafe and conceals or misrepresents their condition, then he is liable, the tenant being in no fault. It is not on the ground of an insurer or warrantor of condition under his lease contract, but on the ground of the obligation implied by law not to expose the tenant or the public to danger which he knows, or in good faith should know, and which the tenant does not know and cannot ascertain by the exercise of reasonable care and diligence."[72]

§ 583. Unsanitary condition of leased house.—The same general rules in regard to a landlord's responsibility for injuries apply in cases of sewer gas and defective plumbing. Improper drainage in a leased house caused the tenant to have diphtheria but the landlord was held not liable in the absence of misrepresentation and deceit. This result was reached on the ground that defective plumbing would not be regarded as a hidden defect, although it might be known to the landlord and not to the tenant. The court stated the rule to be that: "A lessor is not liable to a tenant of the lessee for injuries resulting from the unsanitary condition of the premises, in the absence of fraudulent concealment of the defects complained of, a warranty of fitness, or an agreement to repair."[73] In speaking of the general rule of non-liability Judge Holmes said: "And this rule cannot be eluded by showing that the tenant did not know of a defect and that the landlord did, and then asking a jury to pronounce it a secret source of danger. Everybody knows that houses in a city have drains, and that drains are liable to get out of order or prove unsatisfactory. The

[71] O'Malley v. Twenty-five Associates, 178 Mass. 555, 559, 60 N. E. 387.

[72] Hines v. Wilcox, 96 Tenn. 328, 334, 34 S. W. 420.

[73] Towne v. Thompson, 68 N. H. 317, 44 Atl. 492. But see Tyler v. Disbrow, 40 Mich. 415.

possibility is manifest and there is strong ground for requiring the tenant to insist on a warranty, if he does not wish to take the risk."[74]

But a tenant has a right to rely on the landlord's assurance that premises are free from sewer gas and in a healthy condition, and if the landlord misrepresents he is liable in damages.[75] So where a lessor is guilty of fraud in representing that plumbing in a dwelling house is in good sanitary condition, this furnishes a defense for lessee when sued for rent.[76] All undertakings in regard to the condition of a house do not, however, cover the plumbing. The words of a lease on which this question arose were these: "It is understood and agreed that the owner shall not be called upon or liable for any repairs whatsoever on said premises during the term; the house being now in perfect order." This clause referred only to repairs. "The agreement that the house was 'in perfect order' had respect to its condition as an edifice in perfect repair, and not to the present or future state of the air within it."[77]

§ 584. Duty on landlord to warn against infection.—Defects in the plumbing of a building cannot be discovered, perhaps, by any examination that the intending tenant can be expected to make, but yet it has never been held that the landlord is bound under penalty of fraud, to disclose such defects, even though he is aware of them. The tenant is as much bound to make ordinary repairs to the plumbing as he is to make any other ordinary repairs in a house that he imprudently leases while it is out of order.[78] But there is a duty on a lessor who knows that there is a special danger from infection to disclose it to a lessee. Thus, the combined facts that there had been diphtheria in a house, and that the drains were defective, were enough to warrant the jury in finding that the lessor knew, or ought to have known, as a prudent man, that this combination of circumstances introduced a special danger of infection from the drains. "But it is not enough that the landlord knows of the source of danger, unless also he knows or common experience shows that it is dangerous. He is bound at his peril to know the teachings of common experience, but he is not bound to foresee results of which common experience would not warn

[74] Cutter v. Hamlen, 147 Mass. 471, 475, 18 N. E. 397.

[75] Sunasack v. Morey, 196 Ill. 569, 63 N. E. 1039, *reversing* 98 Ill. App. 505.

[76] Wolfe v. Arrott, 109 Pa. St. 473; Wallace v. Lent, 1 Daly (N. Y.) 481.

[77] Foster v. Peyser, 9 Cush. (Mass.) 242.

[78] Blake v. Ranous, 25 Ill. App. 486; Coulson v. Whiting, 12 Daly (N. Y.) 408.

him and which only a specialist would apprehend."[79] A landlord could be charged with special knowledge of danger of infection when, knowing of the existence of a disused privy vault filled with fecal matter and stagnant water, he took measures to remove the nuisance which were inadequate and insufficient. "If the condition of the vault was a dangerous one and the defendant's attention was called to it and he undertook to remedy it, and used means which were ineffectual for that purpose, and which he knew, or ought to have known, were ineffectual, he cannot escape liability by employing a servant to do the work or escape the consequences of that servant's neglect to do the work properly." The landlord was responsible in damages for disease caused by the offensive odors arising from the vault.[80] A landlord who lets premises, knowing they are infected by a contagious disease, without notifying the tenant thereof, is liable to the latter, in case the disease is communicated, for the damages sustained.[81] And where a landlord improperly filled up an open well and then built over it so that it became a cesspool and a nuisance to the tenant who subsequently rented the premises, causing the death of a member of the tenant's family, it was held that the landlord was liable to the tenant for such improper use of his premises on the doctrine that one must so use his own premises as not to cause injury to others.[82]

In the course of a tenancy at will, the landlord discovered a defect in a drain on the premises but failed to repair it or to inform the tenant of it. The defect was an ordinary defect in the drain in use on the premises, and the danger was the ordinary danger from that source. The tenant contracted typhoid fever from this defect but the landlord was held not to be responsible in damages. He was under no obligation to repair the defect nor was he under obligation to disclose it.[83]

§ 585. Liability to guests of the tenant.—The general doctrine as to the restricted responsibility of a landlord for personal injuries caused to the tenant by defects in the premises applies to visitors of the tenant on the leased premises. The law leaves it to the tenant to say who shall be his guest in his private dwelling. And if a guest does so enter and while there is injured, without his fault, by some defect therein, he must seek his damages from him whose invitation impliedly assured him he could enter safely, and who alone is responsi-

[79] Cutter v. Hamlen, 147 Mass. 471, 18 N. E. 397, per Holmes, J.

[80] Martin v. Richards, 155 Mass. 381, 29 N. E. 591.

[81] Cesar v. Karutz, 60 N. Y. 229.

[82] Kern v. Myll, 80 Mich. 525, 45 N. W. 587.

[83] Bertie v. Flagg, 161 Mass. 504, 37 N. E. 572.

ble for the defect which caused the injury. In such a case the guest can have no greater claim against the lessor than the lessee himself and the members of his family have.[84] In one case a business visitor of the tenant was injured by falling down an embankment adjoining a walk leading from the street to the door of the building owned by the landlord. The accident happened in the night time. There was no defect in the walk itself. It was rendered dangerous, if at all, by the want of a railing or by the absence of a light or some other warning. The visitor sued the landlord but was not allowed to recover, because the landlord had been guilty of no negligence toward him.[85] This same restriction upon the liability of the landlord applies to sub-tenants, servants, employes, and to members of the tenant's family. The reason is that entering under the tenant's title, and not by any invitation, express or implied, from the owner, they assume the risk as the tenant does.[86] Persons who occupy by the tenant's permission cannot be considered as occupying by the invitation of the landlord so as to make him liable to them in a greater extent than he is liable to the tenant.[87] A sub-tenant who occupies in the face of a prohibition in the lease against sub-letting is in no position to call the original landlord to account for defects in the premises. Under such circumstances the landlord can be made responsible neither under his contract to repair, nor by reason of a duty in regard to common passage ways.[88]

§ 586. Injuries to property of the tenant.—Under a lease expressly exempting a landlord from any obligation to make repairs or improvements upon the premises he is not liable to the tenant for damages to his goods occasioned by the leased premises becoming and remaining out of repair. If the building was so out of repair as to render it unfit for occupancy, the tenant had a right to make the repairs himself or vacate the building.[89] In the absence of contractual

[84] McKenzie v. Cheetham, 83 Me. 543, 22 Atl. 469.

[85] Mellen v. Morrill, 126 Mass. 545. To same effect see Eyre v. Jordan, 111 Mo. 424, 19 S. W. 1095.

[86] Smith v. State, 92 Md. 518, 48 Atl. 92; Jaffe v. Harteau, 56 N. Y. 398; Cole v. McKey, 66 Wis. 500, 29 N. W. 279; Ryan v. Wilson, 87 N. Y. 471; Clyne v. Helmes, 61 N. J. L. 358, 39 Atl. 767; Bowe v. Hunking, 135 Mass. 380; Whitmore v. Orono &c. Co., 91 Me. 297, 39 Atl. 1032; Towne v. Thompson, 68 N. H. 317, 44 Atl. 492; Robbins v. Jones, 15 C. B. (N. S.) 221, 240, 109 E. C. L. 221.

[87] Bowe v. Hunking, 135 Mass. 380; Robbins v. Jones, 15 C. B. (N. S.) 221, 109 E. C. L. 221; Jaffe v. Harteau, 56 N. Y. 398.

[88] Donaldson v. Wilson, 60 Mich. 86, 26 N. W. 842; Cole v. McKey, 66 Wis. 500, 29 N. W. 279.

[89] Beneteau v. Stubler, 79 Minn. 259, 82 N. W. 583.

obligation the landlord, as regards his tenant, is only liable for acts of misfeasance, but not of non-feasance. If the landlord is not bound to repair, unless upon covenant to do so, it must logically follow that any injuries arising from a failure on his part to repair can give no cause of action to the tenant, whether resulting to the tenant's goods or to his person. If the landlord owes no duty to his tenant in this regard, then certainly negligence cannot be imputed to him.[90] If a landlord leases a cellar for storing goods, and represents that it is dry and safe from water, the fact that its walls are defectively constructed, so that as the result of a rainstorm and high tide, the water is backed up in a sewer and forced into the cellar, and the goods are injured, does not give the lessee a cause of action in tort to recover damages. The damage does not result from any affirmative wrong done by the landlord, or neglect of duty on his part, for which he can be held responsible in such an action.[91] In New Hanpshire responsibility in such a case seems to rest on the negligence of the landlord in constructing the drain, and it has been held in that state that if tenants, without fault on their part, are injured by the flow of water on their goods, the landlord is liable, provided it can be shown he was guilty of negligence in the construction of the drain or in allowing it to remain out of repair after notice of its condition.[92]

A lessor is liable for his improper or negligent management of parts of a demised building not included in a lease, whereby the lessee is injured and this result does not encroach on the rule that there is no implied warranty in the lease of a building that it is well built or fit for any particular purpose.[93]

§ 587. **By statute in Georgia the landlord must keep the premises in repair,** and is liable for all substantial improvements placed upon them by his consent.[94] He is not responsible to third persons for damages resulting from the negligent or illegal use of the premises by the tenant. But he is responsible to others for damages arising from defective construction, or for damages from failure to keep the premises in repair.[95] The effect of these sections of the code is to make a landlord liable to his tenant for injuries caused by defects in the premises of which he had notice but failed to repair. Thus, the

[90] Ward v. Fagin, 101 Mo. 669, 14 S. W. 738.

[91] People v. Walden, 51 Cal. 588.

[92] Scott v. Simons, 54 N. H. 426, citing Alston v. Grant, 3 E. & B. 128, 77 E. C. L. 128.

[93] Railton v. Taylor, 20 R. I. 279, 38 Atl. 980.

[94] Civ. Code, § 3123.

[95] Civ. Code, § 3118.

landlord is responsible for damage caused to the tenant's goods by a leaky roof[96] and could be held liable for personal injuries to the tenant caused by a defect in the premises.[97] It is essential, however, to create this liability that the landlord shall have notice of the lack of repair and an opportunity to remedy the defect. He is not liable when he has no notice of the defect and has not been notified to repair.[98] "The use of the tenements really belongs to the tenant during the lease; they are his property to use for the term for which they are rented; and the landlord has no right to enter upon them, except by permission of the tenant during the term."[99] Nothing more than a general notice of lack of repair is necessary, however. On receiving such notice it becomes the landlord's duty to inspect and investigate in order that he may make such repairs as the safety of the tenant requires. It follows, therefore, that when, after such notice, the landlord fails within a reasonable time to make the repairs, he is chargeable with notice of all the defects that a proper inspection would disclose.[100] Notice from the tenant of the need of repairs is not necessary when the landlord occupies a part of the demised premises, and can be presumed to know the need of repairs.[101] The landlord is not liable to the tenant for damages resulting from unforeseen and extraordinary causes. Thus the statutory duty of landlord to repair would not make him liable where a leased storehouse was unroofed by a sudden and unusual storm.[102]

The extent of a landlord's liability to strangers by virtue of these statutes is somewhat modified by the general common-law doctrine. Thus, the acts were effective to create a liability on the part of the landlord for a defective coal hole in front of leased premises which caused injury to a traveler on the highway. The landlord had notice of the defect but there was no proof that it existed at the time of the demise.[103] But a landlord was held not liable for injury received by a person from falling on ice which had been allowed by the tenants to accumulate and remain on a sidewalk abutting on the premises. This was true, although the ditch which caused the water to accumulate

[96] Guthman v. Castleberry, 48 Ga. 172; Whittle v. Webster, 55 Ga. 180.

[97] Stack v. Harris, 111 Ga. 149, 36 S. E. 615; Archer v. Blalock, 97 Ga. 719, 25 S. E. 391.

[98] Ocean Steamship Co. v. Hamilton, 112 Ga. 901, 38 S. E. 204.

[99] White v. Montgomery, 58 Ga. 204.

[100] Stack v. Harris, 111 Ga. 149, 36 S. E. 615.

[101] Guthman v. Castleberry, 49 Ga. 272; White v. Montgomery, 58 Ga. 204.

[102] Brunswick &c. Co. v. Spencer, 97 Ga. 764, 25 S. E. 764.

[103] Collier v. Hyatt, 110 Ga. 317, 35 S. E. 271.

was on the premises at the time of the demise. Taken all together the ditch, the accumulation of water, and the formation of ice amounted to a nuisance. This nuisance was, however, the result of the acts of the tenants who were in exclusive possession of the premises; and under such circumstances the landlord cannot be held liable in damages for injuries resulting to a person from a nuisance maintained by a tenant.[104]

Even in Georgia a landlord is not liable for damages caused by defective condition of premises where the injury is caused by contributory negligence of tenant. The question of such negligence must be determined by the jury.[105] The common-law rule in regard to contributory negligence has been slightly modified by a code provision. The result of this modification has been stated as follows: "If the injury in question was occasioned by the negligence of the landlord in failing to repair, the plaintiff, even though in some degree negligent, could nevertheless recover provided her negligence did not amount to a want of ordinary care, the exercise of which would have prevented the injury. Negligence on her part short of a want of such care should be considered by the jury in reducing the damages.[106]

II. *Liability Imposed by Lessor's Agreement to Repair.*

§ 588. Lessor's obligation to repair.—In certain respects a demise is more analogous to a sale of a limited interest in the premises than to any other transaction the lessee becoming the temporary owner. He has many of the rights of an owner as against the outside world and many of the obligations of an owner as well. The lessor is only interested by virtue of his reversionary right and by whatever stipulation he has made for the payment of rent. It follows where there is no stipulation on the part of the landlord to repair or that the premises shall remain in tenantable condition, no obligation to repair is implied from the relation.[107] The general rule is undisputed and is settled by a long line of decisions that a lessor is in no case under obligation to make repairs, unless by force of an express covenant or

[104] Gardner v. Rhodes, 114 Ga. 929, 41 S. E. 63.

[105] Johnson v. Collins, 98 Ga. 271, 26 S. E. 744.

[106] Miller v. Smythe, 95 Ga. 288, 22 S. E. 532.

[107] Gallagher v. Button, 73 Conn. 172, 46 Atl. 819; Gluck v. Baltimore, 81 Md. 315, 32 Atl. 515; Elliott v. Aiken, 45 N. H. 30; Scott v. Simons, 54 N. H. 426; Sheets v. Selden, 7 Wall. (U. S.) 416, 423; Gott v. Gandy, 2 E. & B. 845, 75 E. C. L. 845; Pomfret v. Ricroft, 1 Wm. Saund. 321; Hart v. Windsor, 12 M. & W. 68.

contract to do so, or from statutory enactment.[108] It necessarily follows that the landlord owes no duty and is under no obligation to repair in a case where he has expressly covenanted with the tenant he shall not be liable to make repairs. The contract of the parties is then the measure of their duties and liabilities.[109] Even when premises become defective by reason of deterioration or decay, the landlord is not required to repair in the absence of covenants on his part and rent is payable even when demised premises become untenantable by inherent defect, provided they were habitable at the time of the demise, there being no fraud on the part of the landlord.[110]

§ 589. An obligation to repair cannot be placed on the landlord without clear and explicit language to that effect. Such a duty cannot be raised by inference. The landlord may, and often does, voluntarily make particular repairs for the preservation of the estate and the benefit of the reversion, as well as to induce a tenant to continue a tenancy which otherwise he might terminate on short notice. The fact that a landlord makes some repairs creates no obligation on his part to make others.[111] If repairs are made by the landlord with such frequency and under such circumstances as to furnish evidence of an agreement between the parties that the landlord should make repairs,

[108] **Alabama:** Burks v. Bragg, 89 Ala. 204, 7 So. 156. **California:** Callahan v. Loughran, 102 Cal. 476, 36 Pac. 835; Brewster v. DeFremery, 33 Cal. 341. **Connecticut:** Hatch v. Stamper, 42 Conn. 28. **Indiana:** Mattler v. Strangmeier, 1 Ind. App. 556, 27 N. E. 985; Hanson v. Cruse, 155 Ind. 176, 57 N. E. 904; Kellenberger v. Foresman, 13 Ind. 475; Estep v. Estep, 23 Ind. 114. **Kentucky:** Proctor v. Keith, 12 B. Mon. (Ky.) 252. **Maine:** Libbey v. Tolford, 48 Me. 316. **Massachusetts:** McLean v. Fiske &c. Co., 158 Mass. 472, 33 N. E. 499. **Michigan:** Clark v. Babcock, 23 Mich. 164. **Missouri:** Morse v. Maddox, 17 Mo. 569. **Nebraska:** Murphy v. Illinois &c. Bank, 57 Neb. 519, 77 N. W. 1102; Turner v. Townsend, 42 Neb. 376, 60 N. W. 587. **New York:** Witty v. Matthews, 52 N. Y. 512; McAlpin v. Powell, 70 N. Y. 126. **South Carolina:** City Council v. Moorhead, 2 Rich. L. (S. Car.) 430. **New Jersey:** Heintze v. Bentley, 34 N. J. Eq. 562. **Texas:** Weinsteine v. Harrison, 66 Tex. 546, 1 S. W. 626. **England:** Gott v. Gandy, 2 E. & B. 845, 75 E. C. L. 845; Rhodes v. Bullard, 7 East 116.

[109] Barrett v. Boddie, 158 Ill. 479, 42 N. E. 143; Ely v. Ely, 80 Ill. 532; Moffatt v. Smith, 4 N. Y. 126; Mumford v. Brown, 6 Cow. (N. Y.) 475; Corey v. Mann, 6 Duer (N. Y.) 679.

[110] Petz v. Voigt Brewing Co., 116 Mich. 418, 74 N. W. 651; Fisher v. Thirkell, 21 Mich. 1, 22, 4 Am. R. 422; Gott v. Gandy, 2 E. & B. 845, 75 E. C. L. 845.

[111] McLean v. Fiske &c. Co., 158 Mass. 472, 33 N. E. 499; McKeon v. Cutter, 156 Mass. 296, 31 N. E. 389; Mattler v. Strangmeier, 1 Ind. App. 556, 27 N. E. 985.

the natural inference would be, in regard to portions of the property in use and peculiarly under the observation of the tenant, that the landlord was to repair on notice of defects, and not that he should assume to inspect the property so frequently as to discover and remedy all defects without notice.[112] A provision in the lease that the "premises shall be at all times open to the inspection of said lessor or his agents, to applicants for purchase or lease, and for necessary repairs," does not prove that repairs made by the landlord were made in pursuance of a contract. The lease contained no express agreement to repair, and the jury were not at liberty to read such an agreement into it by the aid of the reservation to the lessor of a right of entry to make necessary repairs.[113]

The reparation of a fire-escape would hardly come within the range of ordinary repairs to a building. It would be extremely difficult to define the limits of a statutory duty to maintain fire-escapes, unless it devolved upon the owner in a tenement house occupied by many persons. Even if such a duty might be assumed by another, under an express agreement, it could not be considered as constituting a part of the obligations of a tenant who hired without any agreement as to repairs. But though a landlord is bound to repair fire-escapes, he owes no duty to keep them safe for children to play on. A child is a trespasser when he enters upon the fire-escape and occupies the position of one who comes upon the property of another without right. Such a person can maintain no action, and even a license is not a protection unless some inducement or enticement is held out by the owner. The child clearly had no right to go upon the platform and was there for no legitimate purpose. It was not intended for any such use, but was to be used as a protection of life in case of danger from fires, and was not intended as a balcony.[114]

§ 590. Payment by landlord for repairs made by tenant.—If the landlord, after the lease is entered into, and being under no legal obligation to make repairs, promises to make them, the promise will not support an action. By law the duty to repair devolves on the tenant. The landlord's promise is without consideration. It is no part of the original agreement, having been made while the tenant was occupying the premises. A mere promise by a landlord to repair the de-

[112] McLean v. Fiske &c. Co., 158 Mass. 472, 33 N. E. 499; Hutchinson v. Cummings, 156 Mass. 329, 31 N. E. 127.

[113] Gulliver v. Fowler, 64 Conn. 556, 30 Atl. 852.

[114] McAlpin v. Powell, 70 N. Y. 126, 26 Am. R. 555.

mised premises before the tenant's term expires, upon the agreement that he will not abandon the property, is without consideration and cannot be enforced.[115] However, an agreement between lessor and lessee for the making of repairs, the costs of which are to be borne jointly by the two, is valid and enforcible. It was urged that the undertaking on the landlord's part was without consideration, and to support this argument several cases were cited to the effect that for one to agree to do what he is already bound to do, or for one to waive a legal obligation on the part of the other, is *nudum pactum;* but that is not this case. The lease did not require any particular repairs or improvements to be made. The tenant was not obliged to make any improvements, and the agreement to make and in part to pay for the particular improvements which were made was a sufficient consideration for the landlord's promise to pay for the remainder.[116]

Since the obligation of a landlord to repair or rebuild leased premises rests solely on express contract, it follows that when the landlord is not bound to repair he is not bound to pay for repairs made by the tenant.[117] It was argued that destruction of a window by a storm was an inevitable accident, and for that reason the tenant could not be compelled to restore the premises, or to pay for its restoration by the landlord, and therefore that the landlord is liable for the restoration of the window. This result does not follow even though the destruction was by inevitable accident, so that the tenant would not have been bound to restore the premises at the expiration of the term of the lease.[118] The tenant must determine for himself the fitness of the buildings for use or whether they are sufficiently commodious for his purpose. If he repairs or enlarges the buildings for his own convenience, even though it be by the persuasion of the landlord, he does not, in the absence of agreement or promise, thereby acquire a right to charge the landlord with the expense of the repairs. The failure of a landlord to erect a house according to his agreement does not authorize the tenant to charge the cost of repairing another house on the landlord.[119] A tenant who makes improvements of a permanent and

[115] Eblin v. Miller, 78 Ky. 371; Libbey v. Tolford, 48 Me. 316, 77 Am. Dec. 229.

[116] Woodworth v. Thompson, 44 Neb. 311, 62 N. W. 450.

[117] Mull v. Graham, 7 Ind. App. 561, 35 N. E. 134; Witty v. Matthews, 52 N. Y. 512; Murphey v. Illinois &c. Bank, 57 Neb. 519, 77 N. W. 1102; Turner v. Townsend, 42 Neb. 376, 60 N. W. 587.

[118] Turner v. Townsend, 42 Neb. 376, 60 N. W. 587.

[119] Hopkins v. Ratliff, 115 Ind. 213, 17 N. E. 288.

fixed character can neither remove them or recover for their cost without a special contract with the landlord.[120]

§ 591. Exempting lessee from obligation to repair.—A common form of lease binds the lessee to keep the premises in repair except as to unavoidable accidents and usual wear and tear. In such a case it seems that the law will not imply a contract on the part of the lessor to repair damages caused by unavoidable accident. A tenant sued his landlord in assumpsit because the landlord failed to repair a wall which had become ruinous. A demurrer to the declaration was sustained. There appears to have been no express covenant for quiet enjoyment or to repair damages caused by unavoidable accidents, and such a contract will not be implied. No implied covenant to rebuild or repair damages on the part of the landlord arises at common law from an exception of casualties by fire, tempest or other causes in the tenant's covenant to repair.[121]

§ 592. The landlord's responsibility for damages caused by his failure to perform his contract to repair rests altogether upon his breach of contract. Thus in a case where a landlord agreed to repair, but failed to do so after being notified of the necessity for repairs, plaster fell and injured the tenant's goods. The tenant was not guilty of contributory negligence because ignorant of the liability of plaster to fall. The court allowed the tenant to recover for the injury suffered in an action of assumpsit. There is no reason why the landlord should not be liable for a breach of his contract, just as any other person who is a party to a contract would be. Where he has violated his contract he should be liable for all the injuries resulting therefrom.[122]

But it may be stated as a general rule that a landlord, who has covenanted to repair, is not liable in tort for personal injuries resulting from the want of repair.[123] Such injuries are too remote to be re-

[120] Hedderich v. Smith, 103 Ind. 203, 53 Am. R. 509.

[121] Kline v. McLain, 33 W. Va. 32, 10 S. E. 11; Clifton v. Montague, 40 W. Va. 207, 21 S. E. 858; Weigall v. Waters, 6 Term R. 488.

[122] Mason v. Howes, 122 Mich. 329, 81 N. W. 111.

[123] Collins v. Karatopsky, 36 Ark. 316; Kabus v. Frost, 50 N. Y. Super. Ct. 72; Spellman v. Bannigan, 36 Hun (N. Y.) 174; Flynn v. Hatton, 43 How. Pr. (N. Y.) 333; Arnold v. Clark, 45 N. Y. Super. Ct. 252; Tuttle v. G. H. Gilbert Mfg. Co., 145 Mass. 169, 13 N. E. 465; Feary v. Hamilton, 140 Ind. 45, 39 N. E. 516, affirming 8 Ind. App. 615, 52 Am. St. 485; Hanson v. Cruse, 155 Ind. 176, 57 N. E. 904; New York Academy &c. v. Hackett, 2 Hilt. (N. Y.) 217; Pryor v. Foster, 130 N. Y. 171, 29 N. E. 123; Sanders v. Smith, 5 Misc. (N. Y.) 1; Brown v. To-

covered as damages for the breach of contract and the duties arising from the relation of landlord and tenant are not increased by such a contract in respect to the duty of the landlord to provide for the personal safety of the tenant. In a recent case on this point it was said: "Under the contract, appellant (the lessee) was entitled to the repairs or to damages for the breach of contract. Appellees (the lessors) broke their contract and are liable in damages. But what is the measure? On principle, the landlord, who is paid by the tenant to make repairs that he is not otherwise under obligation to make, should be held to exactly the same liability that a stranger-contractor would incur. Damages for personal injuries resulting from the mere continuance of obvious defects such as existed here and which the tenant has contracted to have repaired, are not recoverable from the contractor. They are deemed to be too remote and are not within the contemplation of the parties at the time the contract was made. The injury is attributable to the tenant's want of care in the use of the property rather than to the contractor's breach."[124] The cases even go so far as to hold that it is immaterial that the landlord has been notified of the need of repair and has failed for an unreasonable time to make the repairs.[125] Ordinary damages for breach of a general covenant to keep the premises in repair are the expenses of repair and the loss of the premises while the party contracting was in default. Such an agreement in no way contemplates any destruction of life or casualties to the person or property which might accidentally result from an omission to fulfill the agreement.[126]

Where injuries under such circumstances were admittedly too remote to be recovered in an action of contract, it was claimed they could be recovered in an action of tort. But to permit a recovery for such damages, based on the contract simply because it is in the form of an action of tort, would be making a distinction that could not be justified by reason or authority. There must be something more than a mere failure on the part of the landlord to make the repairs he has agreed to make. It makes no difference whether the form of the action is *ex delicto* or *ex contractu*, the real and substantial gravamen of the complaint is the alleged breach of contract, and in such a case the same law is applicable to both classes of actions. A landlord, under

ronto General Hospital, 23 Ont. 599; Ploen v. Staff, 9 Mo. App. 309; Thompson v. Clemens, 96 Md. 196, 53 Atl. 919.

[124] Hanson v. Cruse, 155 Ind. 176, 57 N. E. 904, per Baker, C. J.

[125] Brown v. Toronto General Hospital, 23 Ont. 599.

[126] Flynn v. Hatton, 43 How. Pr. (N. Y.) 333.

contract to repair, may, under some circumstances, be liable for damages for personal injuries by reason of a *negligent* failure to make repairs; but in such case his *negligence* must be firmly established as a basis for the liability.[127]

The tenant's only remedy is to make the repairs at the expense of the landlord.[128] In the case of slight repairs, the tenant is justified after notice of want of repair and the lapse of a reasonable time, to expend what is needed in making the repairs and charge it against his landlord or take it out of his rent.[129]

§ 593. Notice to landlord of need of repairs.—The contract of a landlord to attend to all repairs is not equivalent to a guaranty that the premises should not become unsafe or insecure through lack of repair. The contract does not require that the premises shall be prevented from getting out of repair, but rather implies that they are liable to become so. Such an agreement only binds the landlord to a reasonable degree of care in inspecting the premises and reasonable diligence and promptness in making necessary repairs.[130] In fact a tenant cannot sue his landlord for breach of his covenant to make repairs until notice of the need of repairs has been given. Notice by the tenant of the defects complained of is essential before there can be a breach of the covenant. This rule is reasonable and convenient. By casting the initiative on the tenant it leaves to him the power of having the landlord's repairs executed at times and under circumstances convenient to himself. By securing notice to the landlord, it gives him the control which he ought to have over the extent and mode of repair.[131]

It is to be implied under the circumstances of most cases that the landlord is to repair only on reasonable notice. The mere want of repair, therefore, shows no such negligence as will support an action in favor of the tenant or any sub-tenant for injury caused by an accident occurring from the lack of repair. If no complaint had been

[127] Thompson v. Clemens, 96 Md. 196, 53 Atl. 919, citing Baltimore &c. R. Co. v. Pumphrey, 59 Md. 390, 398.

[128] Brown v. Toronto General Hospital, 23 Ont. 599.

[129] Beale & Taylor's Case, 1 Leon. 237; Makin v. Watkinson, L. R. 6 Exch. 25, 29; Huggall v. McKean, 1 C. & E. 391, 394. But see Weigall v. Waters, 6 Term R. 488.

[130] Frank v. Conradi, 50 N. J. L. 23, 11 Atl. 480; Spellman v. Bannigan, 36 Hun (N. Y.) 174. See McLean v. Fiske &c. Co., 158 Mass. 472, 33 N. E. 499; Hutchinson v. Cummings, 156 Mass. 329, 31 N. E. 127.

[131] Huggall v. McKean, 1 C. & E. 391; Makin v. Watkinson, L. R. 6 Exch. 25.

made, and it did not appear that the landlord knew the condition of the premises, no negligence on his part can be shown.[132] So where a roof weighted with snow fell, the landlord was bound to restore the roof because of his covenant to repair, but he was not obliged to make good the damage caused by the accident, because he had no notice of the lack of repair. In such a case the landlord does not covenant that the building will not give way, but that, if it does, he will repair it, he cannot therefore be held liable for damages occasioned by the fall of the building.[133] Notwithstanding a landlord's covenant to keep the external parts of a building in good repair, he is entitled to a reasonable opportunity to make repairs, and he is not bound to bear the expense of finding the tenant another residence while the repairs go on.[134]

Where a landlord covenanted to repair, but the tenant failed to notify him of the need of repairs and invited a person on the premises who was injured by a defective step, the tenant who occupied was *prima facie* liable for such injury and the landlord was not liable even on his covenant to repair, because he had not been notified of the need of repairs.[135] The determining consideration in fixing liability between lessor and lessee in cases of this kind is, who was in control of the apparatus at the time of the accident. A lessor's agreement to keep an elevator in repair at his own cost does not put him in possession, and so he is not liable for a fall of the elevator.[136] But where the landlord had control of a hoisting apparatus he was liable to a tenant for an injury caused by a defect.[137]

§ 594. Another ground on which the landlord's freedom from responsibility can be placed is the doctrine of contributory negligence. Continued use by the tenant with knowledge of the dangerous condition is a clear assumption of the risk of accident which is not relieved by the landlord's promise to repair.[138] Knowing the premises are unsafe, the liability of danger great, and the expense of repairs trifling, it is the plain duty of the tenant to make them and thus save his family from the threatened danger.[139] It is but a matter of common

[132] Marley v. Wheelwright, 172 Mass. 530, 52 N. E. 1066; Sinton v. Butler, 40 Ohio St. 158; Lieber v. Blanc, 76 Cal. 173, 18 Pac. 260.

[133] Leavitt v. Fletcher, 10 Allen (Mass.) 119.

[134] Green v. Eales, 2 A. & E. (N. S.) 225, 42 E. C. L. 648.

[135] Ploen v. Staff, 9 Mo. App. 309.

[136] Sinton v. Butler, 40 Ohio St. 158.

[137] O'Malley v. Twenty-five Associates, 170 Mass. 471, 49 N. E. 641, strong dissent by Holmes, J.

[138] McGinn v. French, 107 Wis. 54, 82 N. W. 724.

[139] Cook v. Soule, 56 N. Y. 420.

prudence and the tenant, knowing the danger of loss or injury to be great cannot continue to use the dangerous premises, and hide behind a promise to repair.[140] Where the injured party has assumed the risk, the landlord is not liable for an accident caused by a defective construction in a common stairway of a tenement, even though the landlord be guilty of negligence in not replacing the defective part.[141]

It has been suggested, however, that although a tenant may know that premises are out of repair, he may not be in a position to realize that the continued use of them is dangerous.. The question as to whether or not he was in the exercise of due care is a question of fact to be passed upon by a jury; and to convict the tenant of negligence, it is necessary to show not only that the premises were defective, but that the tenant knew of the danger. If they were out of repair, but not so obviously so as that a person of ordinary prudence must have known they were dangerous, then he is entitled to go to the jury upon the question as to whether there was an apparent danger in their use.[142]

§ 595. Rights conferred on third persons by a covenant to repair. A landlord's covenant to keep leased premises in repair does not render him liable to a lodger, sub-tenant, or stranger who suffers injury through a defect in the premises.[143] "The general rule of law undoubtedly is that persons who claim damages on the ground that they were invited into a dangerous place, where they received injuries, must seek their remedy against the person who invited them. There is nothing in the relation of landlord and tenant which changes this rule. . . . If the landlord warrants their fitness, the covenant stands for the benefit of the lessee and not for the benefit of strangers to the contract. And so, if the lessor engages with the lessee, to keep the premises in repair, a breach of the agreement gives a right of action only to the lessee."[144]

That one who is no party to a contract of letting cannot sue in respect of a breach of duty, arising out of the contract, in an action of

[140] Town v. Armstrong, 75 Mich. 580, 42 N. W. 983; Purcell v. English, 86 Ind. 34, 44 Am. R. 255; Miller v. Mariner's Church, 7 Me. 51; Kampinsky v. Hallo, 52 N. Y. St. 265.

[141] Vorrath v. Burke, 63 N. J. L. 188, 42 Atl. 838.

[142] Johnson v. Collins, 98 Ga. 271, 26 S. E. 744.

[143] Quay v. Lucas, 25 Mo. App. 4; Burdick v. Cheadle, 26 Ohio St. 393, 397; Clancy v. Byrne, 56 N. Y. 129, 15 Am. R. 391; Donaldson v. Wilson, 60 Mich. 86, 26 N. W. 842; O'Leary v. Delaney, 63 Me. 584.

[144] Burdick v. Cheadle, 26 Ohio St. 393, 397, quoted in Quay v. Lucas, 25 Mo. App. 4.

tort is decided on similar principles.[145] The general rule whether applied to contracts of letting or other contracts was very fully discussed in an English case,[146] where all the judges *seriatim* in exhaustive opinions decided that the party to the contract alone can maintain the action. "Doubtless where a covenant creates a duty, a neglect to perform that duty is a ground of action for tort. But whenever an action is founded on a breach of contract, the plaintiff suing in respect thereof, must be a party or privy to the contract; else he fails to show a duty towards himself."[147]

In a Massachusetts case, where an accident had been caused by a defect in the sidewalk in front of leased premises, and the landlord was under no obligation to repair, Chief Justice Shaw made the following suggestion: "If, indeed, there be an express agreement between landlord and tenant, that the former shall keep the premises in repair, so that in the case of a recovery against the tenant, he would have his remedy over, then to avoid circuity of action, the party injured by the defect and want of repair, may have his action in the first instance against the landlord."[148] For authority reference is made to an English case,[149] for an injury sustained by a plaintiff by his leg slipping through a hole in the foot pavement, into a vault, owing to some plates being out of repair. It was held that an action could be brought directly against the landlord, on his covenant to repair, to avoid circuity of action.

§ 596. Liability of landlord for unsafe repairs.—A landlord whose neglect to use ordinary skill in making repairs on the demised premises causes a personal injury to the tenant, is liable therefor, although his undertaking to make the repairs was gratuitous and by the tenant's solicitation.[150] Where a landlord made such repairs in per-

[145] Robbins v. Jones, 15 C. B. (N. S.) 221, 238, 109 E. C. L. 221.

[146] Alton v. Midland R., 19 C. B. (N. S.) 213, 115 E. C. L. 213.

[147] Clancy v. Byrne, 56 N. Y. 129, 15 Am. R. 391, per Folger, J.

[148] Lowell v. Spaulding, 4 Cush. (Mass.) 277.

[149] Payne v. Rogers, 2 H. Bl. 350. See also, Fisher v. Thirkell, 21 Mich. 1, 4 Am. R. 422; Perez v. Rabaud, 76 Tex. 191, 13 S. W. 177.

[150] Mann v. Fuller, 63 Kan. 664, 66 Pac. 627; Gregor v. Cady, 82 Me. 131, 19 Atl. 108; Gill v. Middleton, 105 Mass. 477; Little v. McAdaras, 38 Mo. App. 187; Glickauf v. Maurer, 75 Ill. 289; Wertheimer v. Saunders, 95 Wis. 573, 70 N. W. 824; Evans v. Murphy, 87 Md. 498, 40 Atl. 109; Johnson v. Collins, 98 Ga. 271, 26 S. E. 744; Lamparter v. Wallbaum, 45 Ill. 444; Benson v. Suarez, 43 Barb. (N. Y.) 408; Callahan v. Loughran, 102 Cal. 476, 36 Pac. 835; Leslie v. Pounds, 4 Taunt. 649.

son and represented them to be safe, but they were so negligently made that the tenant's wife fell and was injured, it was argued, that upon a gratuitous undertaking of this nature, the defendant could only be held responsible for bad faith or for gross negligence. But the reply was that in assuming to make the repairs, the landlord professed to have the requisite skill as a mechanic to accomplish the desired result. The true question for the jury was, whether the defendant had discharged the duty which he assumed, with due regard to the rights of others.[151] The landlord has been held liable, generally, in such a case without regard to the inquiry whether he acted in person or through a servant;[152] and he has been held liable in cases where the work was admittedly performed through a servant or agent, who presumably was not an independent contractor.[153]

However, a different rule has been outlined and applied to a case where gratuitous repairs made by the landlord were performed through the agency of a servant. This rule only puts on the landlord the obligation to secure a skillful workman. In support of this view the Kentucky court said: "The landlord did not agree to do the work with his own hands, or to supervise its execution, nor did he pretend to do either. His agreement was to have the work done by another person. As we have already seen, the agreement was wholly gratuitous, and he was only bound to do properly that which he undertook to do, and he did that if he sent a suitable person to do the work, and is not responsible for that person's negligence or unskillfulness."[154] Of course, where the landlord employes an improper and unskillful person to make alterations in a leased building, he is liable for injury caused by the workman's lack of skill. This is so even though the landlord would not be liable if he had employed an independent contractor.[155]

[151] Gill v. Middleton, 105 Mass. 477, to same effect Gregor v. Cady, 82 Me. 131, 19 Atl. 108. In the note to Coggs v. Bernard, Smith Lead. Cas. (6th Am. ed.) 355, it is said: "A distinction exists between nonfeasance and misfeasance,—between a total omission to do an act which one gratuitously promises to do and a culpable negligence in the execution of it. . . . If a party makes a gratuitous engagement and actually enters upon the execution of the business and does it amiss through the want of due care by which damage ensues to the other party, an action will lie for this misfeasance."

[152] Mann v. Fuller, 63 Kan. 664, 66 Pac. 627.

[153] Little v. McAdaras, 38 Mo. App. 187; Evans v. Murphy, 87 Md. 498, 40 Atl. 109.

[154] Eblin v. Miller, 78 Ky. 371, per Cofer, J.

[155] Evans v. Murphy, 87 Md. 498, 40 Atl. 109.

It seems obvious that there must be some negligence for which the landlord is responsible in order to make him liable. Thus a tenant could not recover for an injury suffered by reason of the removal of steps during the making of repairs, such removal being necessary and proper. An emergency arose and the tenant attempted to descend by sliding down to the ground. She fell and was injured in this attempt; but the fall was clearly occasioned by her own negligence or was attributable to accident alone.[156] Quite a different case was that where a building which was being raised by the landlord fell on a clerk of the tenant who had gone under it for a purpose in connection with his master's business. The accident was due to neglect in not securely proping up the building.[157] Pending the doing of the work of repair the tenant assumes the risk in using the part of the premises which are undergoing repairs. So when a tenant *thought* the rebuilding of a flight of steps had been completed and fell while descending them in consequence of a loose board, the landlord was not liable, as he had been guilty of no undue postponement of the work. It was the tenant's duty while repairs were progressing to make sure that the repairs were completed or that the descent of the stairs was safe.[158]

The intervening criminal act of a third person will relieve a landlord from liability for negligence in making repairs on the leased premises. Thus where the servants of a landlord negligently left windows open and a burglar stole the tenant's goods, the landlord was not responsible for the loss. The repairs were on a part of the building occupied by the landlord and a partition had been taken away, exposing the tenant's stock of goods, but there intervened as the direct cause an independent criminal act. The landlord's negligence may have put a temptation in the way of another person to commit a wrongful act, by which the tenant was injured; and yet the landlord's negligence was in no legal sense a cause of the injury.[159]

Negligent repairs by tenant do not render the landlord liable to stranger. Where a lessee has undertaken to make the repairs on the leased premises, his landlord is not responsible for his negligence in making them, which causes damage to an adjoining owner. Moreover, by agreeing to allow the tenant a certain sum for such repairs, the landlord does not make himself responsible for the prudence and

[156] Alexander v. Rhodes, 104 Ga. 807, 30 S. E. 968.

[157] Lamparter v. Wallbaum, 45 Ill. 444.

[158] Callahan v. Loughran, 102 Cal. 476, 36 Pac. 835.

[159] Andrews v. Kinsel, 114 Ga. 390, 40 S. E. 300.

care of the tenant, there being no evidence that the landlord made the tenant his agent or servant in making the repairs.[160]

§ 597. Repairs effected through agent or independent contractor. The well-settled rule of the law of agency is that where a person contracts with another exercising an independent calling to do a work for him according to the contractor's own methods and not subject to his control or orders except as to the results to be obtained, the former is not liable for the wrongful acts of such contractor or his servants. This rule was applied by the Supreme Court of Missouri to a case where a landlord employed an independent contractor to construct a new privy on leased premises, rendered necessary by the action of the city government in declaring the old privy a nuisance. The accident occurred through the negligence of the contractors in allowing the vault to remain without a barrier for an unreasonable time; but the landlord was not liable.[161] Again, in the same jurisdiction, it was held that the landlord was not liable for the negligence of an independent contractor, employed to repair plumbing in the leased premises, in leaving a trap door open, as a result of which the tenant fell into the cellar and was severely injured.[162]

On the other hand it has been held that the doctrine of freedom from liability for the negligence of an independent contractor does not apply where a landlord is making repairs or alterations on rented premises.[163] The landlord's license to make the improvements involved an undertaking on his part that the work, if done, should be performed in such manner as to cause no unnecessary damage.[164] In one case a new roof was put on a leased building at the request of the tenants. Independent contractors, who were doing the job, tore off the old roof during threatening weather and the goods of the tenant were injured by rain. In holding the landlord liable the court said: "By entering upon the performance of the work, though through the medium of third parties, the landlord assumed and owed the tenant a particular duty in the premises, namely, that reasonable

[160] Murray v. Richards, 1 Allen (Mass.) 414.

[161] Wiese v. Remme, 140 Mo. 289, 41 S. W. 797. To same effect see Meany v. Abbott, 6 Phila. (Pa.) 256.

[162] Burns v. McDonald, 57 Mo. App. 599.

[163] Jefferson v. Jameson &c. Co., 60 Ill. App. 587; Wilber v. Follansbee, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559; Wertheimer v. Saunders, 95 Wis. 573, 70 N. W. 824; Robbins v. Atkins, 168 Mass. 45, 46 N. E. 425; Lindsey v. Leighton, 150 Mass. 285, 22 N. E. 901; Glickauf v. Maurer, 75 Ill. 289.

[164] Jefferson v. Jameson &c. Co., 60 Ill. App. 587.

care and caution should be used in conducting the work of taking off the old roof and putting on the new one to avoid doing any injury to the property of the tenant. This was an absolute duty imposed by law, upon the particular facts, and was just as binding as if the defendants had stipulated in the lease for its performance. The work to be done was one attended with risk and danger to the property of the tenant by reason of its exposure to the elements. That one upon whom the law devolves a duty cannot shift it over upon another, so as to exonerate himself from the consequences of its non-performance, is very clear."[165]

§ 598. Non-performance of landlord's voluntary promise to repair. As long as the landlord refrains from making voluntary repairs, no liability attaches by reason of his promise to make them. This rule has been applied in a case where a landlord failed to perform a voluntary promise to rebuild fences, and crops were damaged in consequence.[166] It has also been applied in a case where personal injuries to an employé of the tenant were caused by a defective tank.[167] In explaining the decision in the latter case the court said: "The promise was merely gratuitous, not made at the time of the lease, and was no part of the original contract; it was without consideration and could not be enforced." So a tenant himself could not recover for a personal injury caused by a defect in a common stairway which existed at the time of leasing, even though when notified of its existence the landlord promised to repair it but failed to do so.[168]

The contributory negligence of a tenant in walking down an abandoned stairway, which he knew to be "rickety and rotten," would bar his recovery for injuries caused by the breaking of the stairs, even though the landlord had been notified of the defect and had promised to repair it.[169] But a promise to repair on the part of the landlord might operate to relieve the tenant from the charge of contributory negligence if he had a right to assume the repairs had been made. Such was the case where a tenant continued his daily use of a defective passageway in a tenement house, relying on the landlord's promise to repair it.[170]

[165] Wertheimer v. Saunders, 95 Wis. 573, 70 N. W. 824, per Pinney, J.

[166] Proctor v. Keith, 12 B. Mon. (Ky.) 252.

[167] Perez v. Rabaud, 76 Tex. 191, 13 S. W. 177.

[168] Dowling v. Nuebling, 97 Wis. 350, 72 N. W. 871.

[169] Toun v. Armstrong, 75 Mich. 580, 42 N. W. 983.

[170] Bold v. O'Brien, 12 Daly (N. Y.) 160.

An essentially different doctrine was announced where a landlord promised to repair the flooring of a stall which had been rented for the use of a horse. The court held that the lessee of the stall had a right to rely on the promise of the lessor that the flooring would be repaired and to allow his horse to remain. For an accident to the horse in consequence of the lessor's failure to perform his promise the lessee was allowed to recover. It is worthy of notice, however, that one judge dissented from this result and thought the tenant was without remedy.[171]

III. *Liability for Nuisance.*

§ 599. The occupier and not the owner is bound as between himself and the public to keep buildings and other structures abutting on the highway and street in repair so that it may be safe for the use of travellers passing along the same; and the occupier is *prima facie* liable to parties injured through any defect in the same or want of care in the use of such buildings.[172] By occupier in this statement is meant, not merely the person who physically occupies the building, but the person who occupies it as a tenant having the control of it, and being, as to the public, under the duty of keeping it in repair.[173] The general rule is that the landlord is not liable to strangers for injuries caused by a defect or want of repair in the premises, unless he has agreed to make repairs, or the defect or want of repair existed at the time of letting and was of such a character as to constitute a nuisance or make the premises permanently dangerous.[174] The principle underlying this general rule is that the landlord is liable for injuries resulting from his own negligence and not for those resulting from that of his tenant.[175] If the landlord leases premises to another in good and safe condition, he is not liable for any injury which may result by reason of the negligence of the tenant in using them.[176]

[171] Johnson v. Dixon, 1 Daly (N. Y.) 178.

[172] Lee v. McLaughlin, 86 Me. 410, 30 Atl. 65.

[173] Cunningham v. Cambridge Sav. Bank, 138 Mass. 480.

[174] Frischberg v. Hurter, 173 Mass. 22, 52 N. E. 1086; Leonard v. Storer, 115 Mass. 86; Mellen v. Morrill, 126 Mass. 545; Caldwell v. Slade, 156 Mass. 84, 30 N. E. 87; Gwinnell v. Eamer, L. R. 10 C. P. 658; Pretty v. Bickmore, L. R. 8 C. P. 401; Nelson v. Liverpool &c. Co., L. R. 2 C. P. D. 311; Gandy v. Jubber, 5 B. & S. 78; Todd v. Flight, 9 C. B. (N. S.) 377, 99 E. C. L. 377; Deller v. Hofferberth, 127 Ind. 414, 26 N. E. 889; Rider v. Clark, 132 Cal. 382, 64 Pac. 564.

[175] Gordon v. Peltzer, 56 Mo. App. 599.

[176] Texas Loan Agency v. Fleming, 92 Tex. 458, 49 S. W. 1039.

Thus where a stranger was injured by a defect in the entrance to leased premises which was no part of the sidewalk, the landlord was not liable in the absence of a covenant to repair on his part and of any proof that the defect existed at the time the premises were demised.[177]

(1) "But where the owner leased premises which are a nuisance or must in the nature of things become so by their use, then whether in or out of possession, he is liable for injuries resulting from such nuisance. (2) Where the premises are let for rent or profit, to be used for purposes for which they are not fit or safe, and all this was known or ought to have been known to the lessor, he is also liable for injuries resulting from such use. (3) Where property at the time of the demise is not a nuisance, and an injury happens by some act of the tenant or while he has entire possession and control of the premises, the owner is not liable."[178] The liability of an owner for the safety of premises depends on his right to assert actual control over them and not upon the state of the technical legal title. The mere fact that there was a formal and unasserted right outstanding would not prevent the landlord's being chargeable to the same extent as if there had been no flaw in his right of possession.[179]

§ 600. Injuries on abutting sidewalks.—When an accident happens to a passer-by through a defect in a sidewalk in front of leased premises, the lessor is in general not liable in damages in the absence of any covenant on his part to keep the premises in repair. If the lease is silent as to who should make repairs, it is the duty of the lessee to make them.[180] In a well considered case before the Supreme Court of Michigan, the plaintiff brought an action to recover for damages received from falling into a scuttle or coal hole in the sidewalk in front of the demised premises. The lessor was under no covenant to repair and there was no evidence that the scuttle was not properly constructed. The landowner was held not to be liable and the reason for the decision stated to be because he was not in posses-

[177] Black v. Maitland, 11 N. Y. App. Div. 188.

[178] Henson v. Beckwith, 20 R. I. 165, 37 Atl. 702, per Stiness, J.; Rosewell v. Prior, 2 Salk. 460; Pretty v. Bickmore, L. R. 8 C. P. 401; Rex v. Pedly, 1 A. & E. 822; Nelson v. Liverpool &c. Co., L. R. 2 C. P. D. 311.

[179] Learoyd v. Godfrey, 138 Mass. 315.

[180] Gott v. Gandy, 22 E. L. & Eq. 173; Leavitt v. Fletcher, 10 Allen (Mass.) 119, 121; Elliott v. Aiken, 45 N. H. 30, 36; Estep v. Estep, 23 Ind. 114; City of Lowell v. Spaulding, 4 Cush. (Mass.) 277; Heintze v. Bentley, 34 N. J. Eq. 562.

sion.[181] But if the scuttle had been out of repair when the lease was made the owners would then have been held liable.[182] Such was not the case where the cover of the coal hole was in good repair and had an *S* attached by which it could be fastened down. Landlords are not obliged to see that the covers on coal holes in premises which are in the occupation of a tenant are kept securely fastened. The cause of the accident was rather the neglect of the tenant to fasten the cover than the worn condition of the hole.[183] In many other cases of injuries through defective vaults or gratings on an abutting sidewalk it has been held that the owner, being out of possession and not bound to repair, was not liable in an action for injuries received in consequence of the neglect to repair.[184] It is neither the sense nor the policy of the common law to make a landowner an insurer of the good repair of premises and liable for all injuries irrespective of negligence.

An attempt was once made to hold a landlord liable for injuries caused by a coal hole on leased premises on the ground that such use of the highway amounts to a nuisance, when constructed without license or authority from the public. The coal hole in question had been constructed prior to any legislation, state or municipal, relating to vaults under sidewalks or to coal holes. But the court were of opinion that the want of special license or authority to construct or maintain the coal hole did not constitute it a nuisance.[185] The abutting owner may use the highway in front of his premises when not restricted by positive enactment for loading and unloading goods, for vaults and shutes, for shade trees, etc., and only on condition that he does not unreasonably interfere with the safety of the highway for public travel.[186] In another case it was contended that until the abutting owner had secured a legislative permit it was unlawful to

[181] Fisher v. Thirkell, 21 Mich. 1, 4 Am. R. 422. To same effect see Stewart v. Putnam, 127 Mass. 403; East End Imp. Co. v. Sipp, 14 Ky. L. R. 924; Gordon v. Peltzer, 56 Mo. App. 599; Adams v. Fletcher, 17 R. I. 137, 20 Atl. 263; Bears v. Ambler, 9 Pa. St. 193. A contrary result is reached in Georgia by virtue of a statute. Collier v. Hyatt, 110 Ga. 317, 35 S. E. 271.

[182] Stoetzele v. Swearingen, 90 Mo. App. 588; Dalay v. Savage, 145 Mass. 38, 12 N. E. 841.

[183] Frischberg v. Hurter, 173 Mass. 22, 52 N. E. 1086.

[184] Payne v. Rogers, 2 H. Bl. 350; Cheetham v. Hampson, 4 Term R. 318; Bears v. Ambler, 9 Pa. St. 193; City of Lowell v. Spaulding, 4 Cush. (Mass.) 277; Owings v. Jones, 9 Md. 108.

[185] Adams v. Fletcher, 17 R. I. 137, 20 Atl. 263.

[186] Weller v. McCormick, 52 N. J. L. 470, 19 Atl. 1101.

excavate under the sidewalk and place there a coal hole, even though it may be done in a careful manner and left reasonably safe for passing pedestrians. Under the city charter as it existed at the time the vault was constructed power was given the common council by ordinance "to have exclusive control and power over the streets, sidewalks and highways of the city . . . and to regulate the building of vaults under sidewalks." The city had not exercised this power and had not by ordinance provided any rules or regulations for building vaults, and it was argued that the construction of the vault was without lawful authority and its erection a nuisance. But the court thought the better doctrine to be "that the want of a special license or authority to construct and maintain the coal hole in question did not constitute it a nuisance."[187]

If in addition to the fact that an injury is caused by a defect in the original construction of a building, the owner has general supervision over the leased premises, he will of course be liable. The ground floor of a building which was leased for a store had an unprotected area-way in front of it abutting on the sidewalk. It was held that the landlord was liable to a traveler along the highway who was injured by falling into the area-way.[188]

§ 601. Injuries from falling articles.—Where a part of a leased building becomes detached and falls on a passerby, the general rule is that the landlord is not liable unless the defect causing the accident existed at the time of the demise. After five years' occupation by a tenant under a lease putting no obligation on the landlord to repair, a cap-stone blew off the demised premises and suit was brought against the landlord for the damage caused thereby. The court decided the landlord was not liable. The event showed that at the date of the lease there was no immediate danger, as the accident did not happen till more than three years later. Even if inspection would have disclosed that the cap-stone would crumble in the course of five years, it would be going too far to say that the covenant of the tenant to repair did not reach it. It would be going still further to say that the landlord must be taken to have contemplated the event, or that the tenants having full control, and, as the plaintiff asserts, the right and duty as towards the public to do what was necessary to make the place

[187] Gordon v. Peltzer, 56 Mo. App. 599, citing Adams v. Fletcher, 17 R. I. 137, 20 Atl. 263. To same effect see Stoetzele v. Swearingen, 90 Mo. App. 588.

[188] Larue v. Farren Hotel Co., 116 Mass. 67.

safe, were not the only responsible parties.[189] In another case the plaintiff was injured by the fall of a window blind from a part of the defendant's building, which had been let to a tenant. The judge found as a fact that at the time of the accident the blind was in the exclusive use and control of the tenant. The defendant was held not liable in the absence of evidence to control the presumption of law that it was the duty of the tenant to keep the premises safe for persons passing or standing on the sidewalk below.[190]

An increased liability may be placed on the landlord by statute or city ordinance. An ordinance in the city of San Francisco prohibited the construction of awnings in front of buildings over the public streets except upon the condition that the awning should be securely placed and supported. Under this enactment the owner of a building who erects such an awning, or suffers one to be erected by a tenant, assumes an obligation to the public to keep it well secured, and is liable to a party who suffers an injury from a falling of the awning, owing to a defect in its supports, although at the time of the injury the building was occupied by a tenant under a lease. Where one has secured a privilege from the public on a condition, he cannot, after availing himself of the privilege, avoid his obligation to perform the condition by leasing the premises.[191] The tenant himself is not, however, in a position to take advantage of such an ordinance, after suffering injury from a defective awning. Where it did not appear that the defects existed at the time of the demise, and the lease contained no covenants on the part of the landlord to repair, the tenant could not recover, even though a city ordinance made it the duty of the landlord to make such repairs as were necessary for the safety of travellers.[192]

§ 602. Snow and ice.—The general doctrine seems to be that a traveller along a highway who has been injured by snow and ice falling from a building abutting on the highway has a right of action to recover for his injuries. Statutes provide the duites of towns in regard to highways and make them liable if they fail to perform their duty. But individuals are also liable for any injuries they may cause

[189] Munroe v. Carlisle, 176 Mass. 199, 57 N. E. 332.

[190] Szathmary v. Adams, 166 Mass. 145, 44 N. E. 124; Kirby v. Boylston &c. Asso., 14 Gray (Mass.) 249; Milford v. Holbrook, 9 Allen (Mass.) 17, 21; Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 15 N. E. 84.

[191] Jessen v. Sweigert, 66 Cal. 182, 4 Pac. 1188.

[192] Kahn v. Love, 3 Ore. 206.

by interfering with the safety and convenience of travellers. It cannot be doubted that the proprietor of land adjoining a highway may erect upon it a structure that will catch the falling rain and snow, and retain it till it becomes a large mass, and allow it to freeze and thaw. But the question here is, whether he may construct his roof in such a manner that after the mass has accumulated it will, in certain states of the weather, be projected by its own weight upon the sidewalk. If he may, then the risk is on travellers, and they must take notice that, at certain seasons, the sidewalks are not safe and convenient for travel, but must be avoided.[193] But this obligation depends on possession and control more than on ownership, the limited extent of the landlord's liability being shown by a case where a traveller along a highway was injured by falling snow and ice from a building which had been leased for a long term. By the terms of the lease the lessee had bound himself to make all needful and necessary repairs, both internal and external, on the demised premises, and so the owner was not liable for the fall of ice, because the lessee was the occupant of the entire estate, and, as between himself and the public, was bound to keep the building in such a state of repair that the adjoining highways should be safe for the use of travellers thereon. The control of the tenant included the roof of the building as well as the interior, and he might have cleared the roof by the exercise of due care.[194] Furthermore, the leased house was not a nuisance in itself for which an indictment would lie. As Judge Holmes aptly remarked: "If it was, half the householders in Boston are indictable at the present moment." The house would become a nuisance at times by the mere working of nature unless the tenant cleared the roof, but the tenant could have prevented this by the use of reasonable care. "In such cases it cannot matter whether the wrong on the part of the tenant is an act which makes the premises a nuisance, or an omission which allows them to become one. It is as much his duty to act in the latter case as it is to abstain in the former. In either, as against the public, the landlord, unless he has assumed the duty himself by covenant, has a right to rely upon the tenant's managing the premises in his occupation in such a way as to prevent their being a nuisance."[195]

[193] Shipley v. Fifty Associates, 101 Mass. 251; Lee v. McLaughlin, 86 Me. 410, 30 Atl. 65.

[194] Leonard v. Storer, 115 Mass. 86; Lee v. McLaughlin, 86 Me. 410, 30 Atl. 65.

[195] Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 15 N. E. 84, per Holmes, J.; Lee v. McLaughlin, 86 Me. 410, 30 Atl. 65.

In a case where a building was leased to many tenants, the lessors having general supervision over the whole and entire control of the outside doors and passageways, so far as was necessary for the making of repairs, and being under obligation to make repairs, they were liable for injuries caused by falling snow and ice which had collected on the roof. Under such circumstances it was the lessor's duty to keep the roof free from snow and ice.[196] So, a lease "of all chamber stories" to one tenant, the ground floor and celler being let to another, was held to convey no right to use or control the outside of the roof. These leases did not relieve the lessor from his duty as owner to remove whatever substances might gather on the roof and become a nuisance to travelers on the highway.[197]

§ 603. Landlord and tenant both responsible.—Where there has been a nuisance of continued existence upon demised premises, the lessor and the lessee may both be liable for the damages resulting therefrom,—the lessee in the actual occupation of the premises, if he continues the nuisance after notice of its existence and request to abate it; and the lessor, if he at first created it and then demised the premises with the nuisance upon them, and at the time of the damage resulting therefrom is receiving a benefit therefrom by way of rent or otherwise.[198] If the wrong causing the damage arises from the nonfeasance or the misfeasance of the lessor, the party suffering damage may sue him. Thus the owner of premises who lets them to a tenant in a dangerous condition, and who permits them to remain so until, by reason of want of reparation, they fall upon and injure the house of an adjoining owner, is liable to an action.[199] Virgin, J., speaking for the Maine Court, said: "It is settled law that where the owner lets premises which are in a condition which is unsafe for the avowed

[196] Kirby v. Boylston &c. Asso., 14 Gray (Mass.) 249.

[197] Shipley v. Fifty Associates, 101 Mass. 251, s. c. 106 Mass. 194.

[198] Swords v. Edgar, 59 N. Y. 28, 17 Am. R. 295; Staple v. Spring, 10 Mass. 72; Rosewell v. Prior, 2 Salk. 460, 12 Mod. 635; Rich v. Basterfield, 4 M. G. & S. 783, 56 E. C. L. 783; Irvine v. Wood, 51 N. Y. 224, 10 Am. R. 603; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; McDonough v. Gilman, 3 Allen (Mass.) 264; Morris Canal &c. Co. v. Ryerson, 27 N. J. L. 457; Samuelson v. Cleveland &c. Co., 49 Mich. 164, 73 N. W. 499; Buesching v. St. Louis &c. Co., 73 Mo. 219, 39 Am. R. 503; Nugent v. Boston &c. R. Co., 80 Me. 62, 12 Atl. 797; Joyce v. Martin, 15 R. I. 558, 10 Atl. 620; Padberg v. Kennerly, 16 Mo. App. 556; Griffith v. Lewis, 17 Mo. App. 605; Fleischner v. Citizens' Inv. Co., 25 Ore. 119, 35 Pac. 174.

[199] Todd v. Flight, 9 C. B. (N. S.) 377, 99 E. C. L. 377.

purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable whether in or out of possession, for the injuries which result from their state of insecurity to persons lawfully upon them; for by the letting for profit he authorized a continuance of the condition they were in when he let them, and is, therefore, guilty of misfeasance."[200]

If it be urged that an absolute deed would put an end to the former owner's liability and that a lease is *pro tanto* as effectual as a deed, inasmuch as for a space it prevents the lessor from entering on the premises to make repairs, this leaves out of view that, by a lease reserving rent, the owner and lessor derives a profit from the continuance of the nuisance. The putting it out of one's power to abate a nuisance is as great a tort as not to abate it when it is in your power to do it.[201] So, where a lease contemplated the continuance of a nuisance already in existence, the landlord's fault would be plain, and there would be no doubt as to his liability.[202] In such a case both landlord and tenant would be liable.[203]

§ 604. Necessity for request to abate nuisance.—The rule that any person injured by a continuing nuisance can maintain an action against the landowner who created it, or against a grantee who continues it, is subject to the provision that the grantee, if he merely suffers it to remain, must first be asked to abate it.[204] One of the earliest, if not the earliest case in which this rule was announced, is *Pennruddock's Case*,[205] where it was resolved that an action lies against one who erects a nuisance without any request made to abate it, but not against the feoffee unless he does not remove the nuisance after request. On this point Chief Justice Hornblower said: "The

[200] Nugent v. Boston &c. R. Co., 80 Me. 62, 77, 12 Atl. 797.

[201] Rosewell v. Prior, 2 Salk. 460, 12 Mod. 635; Swords v. Edgar, 59 N. Y. 28, 17 Am. R. 295.

[202] Samuelson v. Cleveland Iron Co., 49 Mich. 164, 13 N. W. 499; Smith v. Elliott, 9 Pa. St. 345; Helwig v. Jordan, 53 Ind. 21, 21 Am. R. 189; Grady v. Wolsner, 46 Ala. 381, 7 Am. R. 593.

[203] Samuelson v. Cleveland &c. Co., 49 Mich. 164, 13 N. W. 499; Irvine v. Wood, 51 N. Y. 224, 10 Am. R. 603.

[204] Prentiss v. Wood, 132 Mass. 486; Pierson v. Glean, 14 N. J. L. 36, 25 Am. Dec. 497; Woodman v. Tufts, 9 N. H. 88; Plumer v. Harper, 3 N. H. 88, 15 Am. Dec. 333; Carleton v. Redington, 21 N. H. 291; Johnson v. Lewis, 13 Conn. 303, 33 Am. Dec. 405; Noyes v. Stillman, 24 Conn. 15; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193; Hubbard v. Russell, 24 Barb. (N. Y.) 404; Wenzlick v. McCotter, 87 N. Y. 122, 41 Am. R. 358.

[205] 5 Coke 100b.

law, as settled in *Pennruddock's Case,* has never, I believe, been seriously questioned."[206] The doctrine of the cases is that he who erects a nuisance does not, by conveying the land to another, transfer the liability for the erection to the grantee; and the grantee is not liable until, upon request, he refuses to remove the nuisance.[207] Before an action can be maintained against a person coming into possession of property on which there is a nuisance, there must be a request upon him to abate it.[208]

This principle in regard to the liability for nuisances has a twofold application to the law of landlord and tenant. One result is that a lessee who takes possession of premises upon which there is an existing nuisance is not liable for its continuance except upon failure to comply with a request to remove it.[209] In those cases in which the nuisance exists at the time of the creation of the estate for years and the lessee does nothing except maintain the demised premises in the condition in which he received them, the person who suffers from the nuisance must look to the landlord and not to the tenant for redress.[210] The second result is that he who creates a nuisance on his own premises cannot escape liability for its continuance by demising the premises whereon the nuisance is. Such liability will exist, although the tenant stipulates to keep the premises in repair.[211] The lessee would be liable for the continuance of a nuisance existing on the demised premises at the time he acquired the estate, after he has been notified of its existence and failed to abate it. Any notice is sufficient which brings to the knowledge of the tenant the existence of the nuisance and the desire of the complainant to have it removed.[212]

Another result is that a grantee of an estate subject to an outstanding lease is not liable for the continuance of a nuisance upon the granted premises. The position of the landlord in such a case is stronger than that of an ordinary grantee. The lessee who occupied the premises was under obligation to the public to see that they did not become a nuisance, and it was his duty to respond for any damage

[206] Pierson v. Glean, 14 N. J. L. 36, 25 Am. Dec. 497.

[207] Eastman v. Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201.

[208] Bonner v. Welborn, 7 Ga. 296; Western &c. R. Co. v. Cox, 93 Ga. 561, 20 S. E. 68; Middlebrooks v. Mayne, 96 Ga. 449, 23 S. E. 398.

[209] McDonough v. Gilman, 3 Allen (Mass.) 264; Beavers v. Trimmer, 25 N. J. L. 97.

[210] Meyer v. Harris, 61 N. J. L. 83, 38 Atl. 690.

[211] Ingwersen v. Rankin, 47 N. J. L. 18; McDonough v. Gilman, 3 Allen (Mass.) 264; Rosewell v. Prior, 2 Salk. 460, 12 Mod. 635.

[212] Central Railroad v. English, 73 Ga. 366.

sustained by any person from the nuisance. The owners of the reversion had the right, in the absence of notice, to suppose that he would discharge such duty and protect the public, and they were under no obligation to see by watchful diligence that he performed such duty.[213] A mortgagee who purchased the mortgaged premises under a power of sale and then allowed the mortgagor to continue in possession on payment of a certain rent does not stand in the position of a grantee subject to an outstanding lease. He would be liable for injuries caused by a nuisance existing at the time of the sale.[214] Where the nuisance causing the injury consists of a dangerous place which causes an accident to the person of a stranger, different considerations enter into the case. A person in control of real estate, either as owner or lessee, owes a duty to all persons whom he invites on his premises to have them reasonably safe for use. He cannot escape from this obligation by showing the dangerous condition existed at the time he received the premises. So a grantee was held liable for an accident caused by an open area-way abutting on a public sidewalk, though he had not altered its construction.[215] And a lessee was jointly liable with his lessor for an injury caused by a defect in a public wharf.[216]

§ 605. A lessor is not liable for a nuisance created and maintained on the premises by the tenant,[217] or for a nuisance which arises from the tenant's neglect to make proper repairs while the property is in

[213] Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193; Gandy v. Jubber, 5 B. & S. 78, s. c. 9 B. & S. 15; Lufkin v. Zane, 157 Mass. 117, 31 N. E. 757; McCarthy v. York Co. Sav. Bank, 74 Me. 315, 24 Atl. 900. *Compare* Abbott v. Jackson, 84 Me. 449, 24 Atl. 900. It was said in Rex v. Pedly, 1 A. & E. 822, 827: "If a nuisance be created and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance." But this seems inconsistent with the opinion written by the court of the Exchequer Chamber in Gandy v. Jubber, 9 B. & S. 15, and the statement has often been doubted or denied.

[214] Dalay v. Savage, 145 Mass. 38, 12 N. E. 841.

[215] Condon v. Sprigg, 78 Md. 330, 28 Atl. 395, citing Coupland v. Hardingham, 3 Camp. 398; Fisher v. Prowse, 2 B. & S. 770.

[216] Joyce v. Martin, 15 R. I. 558, 10 Atl. 620.

[217] Vason v. City of Augusta, 38 Ga. 542; Grogan v. Broadway &c. Co., 87 Mo. 321, 14 Nev. App. 588; Lufkin v. Zane, 157 Mass. 117, 31 N. E. 757; Baker v. Allen, 66 Ark. 271, 50 S. W. 511; Fleichner v. Citizens' Inv. Co., 25 Ore. 119, 35 Pac. 174; Wunder v. McLean, 134 Pa. St. 334, 19 Atl. 749; Riley v. Simpson, 83 Cal. 217, 23 Pac. 293.

the control of the tenant.[218] Moreover, as between landlord and tenant, the party presumptively responsible for a nuisance upon the leased premises is the tenant.[219] During the life of the lease, the lessors are not owners, and inasmuch as the nuisance is neither created nor maintained by them, there is no principle of law upon which an action can be maintained against them.[220] If the premises are a nuisance, not in themselves but in consequence of the use made of them by the tenant, then the question is whether this use is authorized by the landlord. If the premises can be used by the tenant in the manner intended by the landlord, either as shown by the construction of the premises or by the terms of the lease, or by other evidence, without becoming a nuisance, the landlord is not liable for the acts or neglect of the tenant which creates the nuisance. If the tenant creates the nuisance without authority of the landlord, and after he has entered into occupation as tenant, the landlord is not liable.[221]

Even in case of injury from a private nuisance, the landlord will not be liable, where the tenant had exclusive possession of the premises, and where the nuisance was created by the tenant.[222] For a nuisance to a dwelling on adjoining property arising from a cesspool on the demised premises, the landlord will be responsible in damages when the leakage was caused by its improper construction or by a defective condition in existence at the time the tenant took possession. But if the cesspool was properly constructed and was in repair when the tenant took possession and leakage was due to subsequent neglect of tenant to repair, the landlord will not be liable.[223]

§ 606. **Moreover, a landlord is not liable for injuries resulting from an improper use of the demised premises by the tenant.** The fall of an awning constructed solely as a protection against the sun and rain was occasioned by the negligent and improper conduct of the tenant in permitting it to be used as a standing place for a number of people. It was held the landlord was not liable to a third person for an

[218] Pope v. Boyle, 98 Mo. 527, 11 S. W. 1010.

[219] Samuelson v. Cleveland &c. Co., 49 Mich. 164, 13 N. W. 499; Swords v. Edgar, 59 N. Y. 28, 17 Am. R. 295; Todd v. Flight, 9 C. B. (N. S.) 377, 99 E. C. L. 377.

[220] Grogan v. Broadway &c. Co., 87 Mo. 321, 14 Mo. App. 588.

[221] Lufkin v. Zane, 157 Mass. 117, 31 N. E. 757.

[222] Freidenburg v. Jones, 63 Ga. 612; Jones v. Freidenburg, 66 Ga. 505; Edgar v. Walker, 106 Ga. 454, 32 S. E. 582. *Overruling* Center v. Davis, 39 Ga. 210.

[223] Wunder v. McLean, 134 Pa. St. 334, 19 Atl. 749.

injury caused by the fall.[224] Provided the premises were in a suitable state at the time the demise was made, the conditions must be such that they become a nuisance from ordinary use in order to charge the landlord with responsibility to a stranger.[225] In one case a railway company leased land to a party for the purpose of erecting an elevator. After the elevator was built, grain became scattered near it and attracted plaintiff's cow, which was run over, without negligence on the part of defendant's engineer. The defendant was not liable because the elevator was not a nuisance but a lawful structure, and the landlord is not liable for the negligence of the tenant in the use of the premises.[226] The lessor of a dam is not liable for the mismanagement of water gates by the lessee. The mere erection of the dam did no injury and the lessor of the mill would not be liable for the mismanagement of the water by the lessee.[227] So, where the owner of land to which a ferry was annexed as a franchise leased the land together with the ferry, he was not responsible for any damage sustained by a third person from the mismanagement of the ferry by the lessee.[228]

§ 607. The landlord is liable for the damage caused when the premises were let with the want of repair or the nuisance complained of already existing.[229] It has also been held that a landlord would be liable for a nuisance caused by lack of repair where the non-repair which produced the injury was of such an extensive and material character that, having reference to the duration of the term, the tenant cannot be presumed to have assumed to make it.[230] But the general doctrine seems to be that, to bring liability home to the owner, the leased structure must be in such a condition that it would be likely to become a nuisance, in the ordinary and reasonable use for the purpose for which it was constructed and let, in the event of the landlord's failure to repair.[231] The tenant is ordinarily bound to repair

[224] Kalis v. Shattuck, 69 Cal. 593, 11 Pac. 346.

[225] Riley v. Simpson, 83 Cal. 217, 23 Pac. 293.

[226] Gilliland v. Chicago &c. R. Co., 19 Mo. App. 411.

[227] Sargent v. Stark, 12 N. H. 332.

[228] Norton v. Wiswall, 26 Barb. (N. Y.) 618; Biggs v. Ferrell, 12 Ired. L. (N. Car.) 1.

[229] Vason v. City of Augusta, 38 Ga. 542; Kalis v. Shattuck, 69 Cal. 593, 11 Pac. 346; City of Peoria v. Simpson, 110 Ill. 294; Tomle v. Hampton, 129 Ill. 379, 21 N. E. 800, affirming 28 Ill. App. 142; Nelson v. Liverpool &c. Co., L. R. 2 C. P. D. 311; Frischberg v. Hurter, 173 Mass. 22, 52 N. E. 1086; Lufkin v. Zane, 157 Mass. 117, 31 N. E. 757; Daley v. Savage, 145 Mass. 38, 12 N. E. 841.

[230] Deutsch v. Abeles, 15 Mo. App. 398; Griffith v. Lewis, 17 Mo. App. 605.

[231] Kalis v. Shattuck, 69 Cal. 593, 11 Pac. 346; Jessen v. Sweigert, 66

the premises leased to him, except where landlord covenants to repair and where the premises are let with a nuisance upon them. In these latter cases a landlord would be liable to a stranger for injuries caused by a defect in the premises.[232] Thus, the landlord would be liable for injuries caused by the fall of a leased wharf where the whole structure was decayed and insecure,[233] but he would not be liable for an accident caused by a loose board on a wharf. It was clearly the duty of the lessee in the latter case to keep the driveway safe for use.[234] This same principle seems to have been applied in a case where injury to a third person occurred by reason of a broken fence on leased premises. The non-repair existed at the time of the demise but it was of such a nature that the tenant was under obligation to make the repairs. The court did not apply the general rule that a landlord is liable for injury caused by defects existing at the time of the demise.[235]

A landlord is liable to a third person for an injury caused by the use of the premises by the tenant in the manner contemplated and intended by the parties to the lease. Thus where a water-wheel on the leased premises frightened the horse of a traveler along an adjoining highway, the landlord was responsible for the injury.[236]

The landlord would not, however, be liable when the structural defect was due entirely to the tenant's negligence. A tenant fitted up a room in a building in an improper manner and was injured in consequence. The landlord was not liable, even though before the accident happened the tenant's term expired and he held on a month to month tenure.[237]

§ 608. **Injuries on public wharves.**—If property be of a public character a landlord cannot with impunity rent it in an unsafe condition and, if he does, may be required to answer to those who are brought upon it, at the instance of his lessee, for injuries they sustain. "A wharf, furnishing the only mode of ingress and egress to a summer resort where crowds are invited to come, if in an unsafe and dangerous condition is certainly a nuisance of the worst character. It will not do for the owner, knowing its condition or having, by the

Cal. 182, 4 Pac. 1188; Rector v. Buckhart, 3 Hill (N. Y.) 193; Mullen v. St. John, 57 N. Y. 567.

[233] O'Connor v. Andrews, 81 Tex. 28, 16 S. W. 628.

[234] Swords v. Edgar, 59 N. Y. 28, § 608.

[235] Abbott v. Jackson, 84 Me. 449, 24 Atl. 900.

[236] Blood v. Spaulding, 57 Vt. 422.

[237] House v. Metcalf, 27 Conn. 631.

[232] Glass v. Coleman, 14 Wash. 635, 45 Pac. 310.

exercise of any reasonable care, the means of knowing it, to rent it out and receive rent for it, but escape all liability when the crash comes. He who solicits and invites the public to his resorts, must have them in a reasonably safe condition, and not in a condition to risk the lives and limbs of his visitors."[238] It follows that the lessor is liable to strangers for injuries received on a defective wharf.[239]

This doctrine in regard to public wharves has, however, been treated as an exception to the general rule of non-liability and explained on the ground that a dock is regarded as a species of public highway, and the owner who suffers a nuisance to be created on his dock is liable upon the ground of nuisance.[240] And it seems to be true that the owner of a wharf who invites travelers to use it as a passageway, is under an obligation to keep it reasonably safe for such use.[241]

§ 609. Collapse of building.—The rule that a landlord is responsible for injuries resulting from the continuance of a nuisance existing upon demised premises at the time of the demise has been applied to the case of a building falling from its own weight. The building in controversy was what is known as a "grout building," consisting principally of mortar, and was old. It fell and injured the plaintiff, who was rightfully upon the premises. It was held that an action against the owner alone could be maintained and that the tenant was not a necessary party, although there was an outstanding lease at the time the accident occurred. The court say: "If, therefore, the building in controversy was originally negligently constructed of unsafe and unsuitable materials, so that it was liable to fall of its own weight, it constituted a nuisance;" and the owner would be liable to the injured person. The fact that the building stood a number of years without falling would afford every slight evidence that it was properly constructed.[242]

The extent of a landlord's liability for the safety of halls and galleries used for public exhibitions is a matter of controversy. To charge the landlord with responsibility for the insecure condition of a house used for private purposes, it is necessary to show that he knew,

[238] Albert v. State, 66 Md. 325, 7 Atl. 697.

[239] Smith v. State, 92 Md. 518, 48 Atl. 92; Albert v. State, 66 Md. 325, 7 Atl. 697; State v. Boyce, 73 Md. 469, 21 Atl. 322; Swords v. Edgar, 59 N. Y. 28; Joyce v. Martin, 15 R. I. 558, 10 Atl. 620.

[240] Edwards v. New York &c. R. Co., 98 N. Y. 245.

[241] Baltimore &c. R. Co. v. Rose, 65 Md. 485, 4 Atl. 899.

[242] Waterhouse v. Schlitz Brew. Co., 12 S. D. 397, 81 N. W. 725.

or had reason to know, that the structure was dangerously weak and imperfect. This same rule of liability has been applied to the leasing of a public hall.[243] This decision places the responsibility on the tenant to see that the premises are not overloaded so as to render them dangerous. The dissenting judges contended that the rule was different with reference to erections in which public exhibitions and entertainments were designed to be given, and for admission to which the lessors either directly or indirectly received compensation. In such a case the lessor owed a duty to those who attend an entertainment, requiring him to use all reasonable precautions to protect them from danger.

That a stranger who is injured by the fall of a public grandstand is entitled to recover from the owner who continues in possession seems to have been settled by an English case. A grandstand at a race course, constructed by a competent builder, fell and injured a spectator who had entered by license of the proprietors. The defect in construction was not discoverable by inspection, yet the court held that the proprietors were liable. The same reasoning which was applicable to the case of a carrier of passengers is applicable to the case of a person who provides places for spectators at races or other exhibitions. Not only did the court think that when the reasons of justice and convenience on the one side and on the other are weighed, the balance inclines in favor of the plaintiff, but they were also of opinion that the weight of authority is on the plaintiff's side.[244]

§ 610. **Statutory nuisances.**—An act in regard to the illegal sale of liquor provided that the owner and all persons interested in the building or premises in which such common nuisance has been kept and maintained, as well as the keeper, may be made parties to injunction proceedings.[245] On this act the question arose whether the owner was liable to an injunction without being "adjudged" to have had knowledge of the unlawful use of his premises, and whether he could be properly joined as a party to the proceedings without an allegation in the information of such knowledge. The court held the landlord was not liable to an injunction without knowledge of the nuisance. There was no reason to suppose that the legislature intended to depart from the rule of the common law which would not subject a landlord to the consequences of his tenant's maintaining a nuisance

[243] Edwards v. New York &c. R. Co., 98 N. Y. 245.

[244] Francis v. Cockrell, L. R. 5 Q. B. 184, 501.

[245] Vt. Act of 1898, No. 90.

without the landlord being chargeable with notice of the existence of the nuisance. While the adjudication does not convict the owner of crime, it casts odium on him by reason of an unlawful act of another person, committed without his knowledge or fault. The injunction, if issued, would compel the landlord to become a guarantor that the tenant shall not violate the law in the future.[246]

It may be laid down as a general rule that a landlord cannot be made responsible in a criminal proceeding for the act of his tenant in creating a nuisance, even though he knew of it and did not dissent. In criminal cases the commonwealth must prove that the defendant himself did the act charged. There are, it is true, some exceptional cases where it is sufficient to prove the act of an agent, but no case goes so far as to convict a landlord for the act of his tenant, even though he knew of it and did not dissent.[247]

There would seem to be no constitutional objection to a city ordinance making a landlord civilly liable for the clean and proper condition of leased premises after he had received due notice of the filthy condition which caused them to be a nuisance. The tenant may be an irresponsible party; the landlord can select his own tenants and impose on them all reasonable restrictions; but a town or city has no such authority. Nor can it be urged that, when the terms "owner" and "occupant" are used in a city ordinance, the occupant is the owner for the time being. If such were the construction, then one of the words would be superfluous.[248] It should be noted, however, that the Missouri Court of Appeals interpreted a similar ordinance to put the responsibility on the tenant alone, on the ground that it would be unconstitutional if it applied to the landlord. The argument of the court was that the landlord had surrendered entire possession and control for the term, and had no more right of entry than any stranger. The tenant could resist the landlord's invasion of the premises as a violation of law, and the ordinance requiring the landlord to abate nuisances would command a violation of law and impose penalties for a failure to violate the law.[249]

§ 611. What constitutes a reletting.—Since the liability of the landlord in many cases depends on whether the nuisance causing the injury existed at the time the demise was made, it becomes important to determine what the date of the leasing is. No difficulty ordinarily

[246] State v. Massey, 72 Vt. 210, 47 Atl. 834.

[247] Commonwealth v. Switzer, 134 Pa. St. 383, 19 Atl. 681.

[248] Bangor v. Rowe, 57 Me. 436.

[249] St. Louis v. Kaime, 2 Mo. App. 66.

arises except in the case of a periodic tenancy, where the controversy is whether there is a continuing demise or a new demise with each recurring period. The Court of Queen's Bench thought the letting must be deemed to begin anew with every successive year of a year to year tenancy.[250] But on appeal the Court of Exchequer Chamber took the opposite view. The ground for this difference of opinion is stated as follows: "We agree . . . that it is a sound principle of law that the owner of property receiving rent should be liable for a nuisance existing on his premises at the date of the demise; but that wherein we differ is, that a landlord from year to year, having the power to give the ordinary notice to quit, and not giving it, is thereby to be held as reletting the premises, and that such failing to give notice is equivalent to a reletting."[251]

The Missouri Court of Appeals approved and adopt the opinion of the Court of Queen's Bench on this point, without noticing the subsequent action of the Court of Exchequer Chamber on appeal. Thompson, J., says in his opinion: "That rule, it seems to us, is more consonant with the respective duties of landlord and tenant in respect to the rights of adjoining landowners, than a rule which, by a fiction, enlarges the term of the tenant, holding merely at the will of the landlord and liable to be ejected after a month's notice, to a term for years and which makes him *prima facie* liable to third persons for injuries resulting from a non-repair of the premises."[252] When the same question came before the Supreme Court of Kentucky it was held that under a month to month tenancy, the landlord must be regarded as leasing the premises at the beginning of every month.[253]

Where a lease contains a provision for extending the original term, such a renewal would not be a reletting, and the landlord would not be

[250] Gandy v. Jubber, 5 B. & S. 78.

[251] Gandy v. Jubber, 9 B. & S. 15.

[252] Griffith v. Lewis, 17 Mo. App. 605, 613. The opinion continues with the following argument: "Where the extent of the term which the tenant has in the premises is but thirty days, the value of which may be a few dollars only, a rule which would make him liable to make any repairs except those of a trifling or temporary character, such as the restoration of window panes broken by him or the like, would not only be absurd and unjust, but would be contrary to what we know to be the general practice in the cases of such tenancies in this state. In the present case a rule that would make a tenant from month to month of a tenement house liable to repair a privy vault which had become dilapidated in consequence of years of decay, which repair might, and probably would, cost several times the amount of a month's rent, would be highly absurd."

[253] East End Imp. Co. v. Sipp, 14 Ky. L. R. 924.

liable for a nuisance existing on the premises at the beginning of the renewal term. But where the lessor and lessee execute a new lease which operates as a surrender of the old one, this is a new letting. The landlord would be responsible for the condition of the premises at the time the surrender took place.[254]

IV. *Premises Occupied by more than one Tenant.*

§ 612. Obligation to repair roof.—The general doctrine that in the absence of express covenants a landlord is not bound to repair applies to a case where tenant had leased the lower floor of a several family house and the upper floor continued in the possession and within the control of the landlord himself. There was no greater obligation on the landlord to repair than if the premises had been side by side.[255] According to the general doctrine a landlord is under no obligation to guarantee that leased premises are or will continue suitable or safe for the lessee's use; and this rule extends to parts of the premises not expressly demised to the tenant, such as a common roof which is necessary to his protection.[256] It has been urged that the landlord would be liable on the basis of the maxim *sic utere tuo ut alienum non laedas*. This maxim restrains a man from using his own property to the prejudice of his neighbor, but is not usually applicable to a mere ommission to act, but rather to some affirmative act or course of conduct which amounts to or results in an invasion of another's rights. A man "is bound to protect his neighbor against injury caused by his own structures," but in the absence of contract, he is not bound to replace or repair structures which have fallen into decay, merely for the purpose of protecting his neighbor's property, simply because such structures previously afforded such protection.[257] Thus, where tenant of a lower floor was injured by the neglect of the landlord to repair a roof over the entire premises which were in his possession, it was held that this maxim did not put the landlord under obligation to put in repair his property to afford protection to his

[254] Fleischuer v. Citizens' Inv. Co., 25 Ore. 119, 35 Pac. 174.

[255] Krueger v. Ferrant, 29 Minn. 385, 13 N. W. 158; Carstairs v. Taylor, L. R. 6 Exch. 217; Keates v. Cadogan, 10 C. B. 591, 70 E. C. L. 591; Pomfret v. Ricroft, 1 Saund. 321; Chauntler v. Robinson, 4 Exch. 163; Doupe v. Genin, 45 N. Y. 119; Brewster v. De Fremery, 33 Cal. 341; Walker v. Gilbert, 2 Robt. (N. Y.) 214.

[256] Hanley v. Banks, 6 Okla. 79, 51 Pac. 664; Krueger v. Ferrant, 29 Minn. 385, 13 N. W. 158.

[257] Doupe v. Genin, 45 N. Y. 119; Krueger v. Ferrant, 29 Minn. 385, 13 N. W. 158.

neighbor merely because it previously afforded such protection.[258] The landlord is not liable either upon an implied covenant to repair or upon the relation of the parties to each other on the leased premises. Here the lessor had been merely passive; he had no affirmative duty toward lessee. So long as a lessor abstains from all action he is within the line of his duty.[259]

Under similar circumstances, however, the Supreme Court of Maine held the landlord liable. The landlord had the care and control of the roof for the benefit of himself and his tenants. By implication, he undertook so to exercise his control as to inflict no injury upon his tenants. Such was the reasoning of the court in making the decision.[260] Among the cases relied on for authority was one[261] where a landlord was held liable for injury caused to his tenant by a waste pipe of an engine operated by the landlord. The Mississippi court criticize the Maine case as follows: "The decision and its reasoning are not satisfactory, and the vice of the opinion is that it confounds the passivity of the landlord with affirmative action on his part amounting to negligence. It overlooks the fundamental principle in all leases, by which the lessor is made to 'hands off' during the continuance of the lease. He may not be required to affirmatively aid the tenant in repairs; and he may not affirmatively act inconsistently with his lessee's right to possession and enjoyment, and so long as the lessor abstains from all action, he is within the line of his duty. The Maine case confounds negligence with non-intervention, and is unsound."[262] The Illinois Court of Appeals reached the same conclusion as the Maine court in a case where damage was caused by the landlord's failure to repair a leaky roof. The ground of decision was that as the lessee had agreed to repair the part of the premises let to him, the fair implication was that the lessor undertook to keep the remainder of the building in repair.[263]

§ 613. Duty as to side-walls.—The responsibility of a landlord of a tenement house to strangers for injuries received from a falling wall which has remained within his control does not extend to the tenants.

[258] Krueger v. Ferrant, 29 Minn. 385, 13 N. W. 158; Vai v. Weld, 17 Mo. 232; Jones v. Millsaps, 71 Miss. 10, 14 So. 440.

[259] Jones v. Millsaps, 71 Miss. 10, 14 So. 440.

[260] Toole v. Beckett, 67 Me. 544, 24 Am. R. 54.

[261] Priest v. Nichols, 116 Mass. 401.

[262] Jones v. Millsaps, 71 Miss. 10, 16, 14 So. 440, per Woods, J.

[263] Trower v. Wehner, 75 Ill. App. 655, citing Bissell v. Lloyd, 100 Ill. 214.

The landlord is not bound to repair and it is immaterial whether the tenant be the lessee of the whole or of only a part of the premises. So, where the main wall of a building fell through the negligence of the landlord, he was not liable for injury caused thereby to a tenant of certain rooms.[264] A court has applied the general rule of non-liability to the case of a building falling because of excavations on an adjoining lot and crushing furniture belonging to a tenant, who occupied only the basement story,[265] and to the case of the swelling and bulging out of the side walls of a storeroom whereby it became untenantable.[266]

The duty of a landlord to a tenant of a part of a building precludes him from allowing any other part of the building from being put to a use which will injure such tenant. Furthermore, on letting a part of the premises, the landlord impliedly agrees that he has not authorized anything which will endanger the safety of the building. These rules were applied in a case where a tenant of an upper story was authorized to store heavy articles which the landlord knew the building would not support. The landlord was held liable for the injury to a tenant of the lower floor upon the collapse of the building.[267] In a case with similar facts the court say in the course of an opinion reaching a similar result: "Had it (the building) fallen before it was used at all, had the superstructure been so defective as to be unable to sustain itself,—it would have been indictable as a common nuisance; and nobody doubts that the owner, at whose instance it was erected, would have been answerable to individuals for the damage occasioned; but the wrong consisted, not in erecting walls incapable of standing alone, but in building and renting the store for a specific purpose for which it was unfit and unsafe. In itself it may not have been a common nuisance, but the maxim *sic utere* is not confined to common nuisances. . . . Tempted by a large rent the landlord permitted this building to be subjected to burdens too heavy for it to bear, though lighter than the tenant had a right to impose, and herein is the ground of his liability."[268]

It has been held that a landlord was liable for an accident caused to a tenant by a falling sign-board. The tenant rented only part of the ground floor of a one-story building and the rest of the building,

[264] Ward v. Fagin, 101 Mo. 669, 20 Am. St. 650, 10 L. R. A. 149.

[265] Sherwood v. Seaman, 2 Bosw. (N. Y.) 127.

[266] Kline v. McLain, 33 W. Va. 32, 5 L. R. A. 400.

[267] The Brunswick-Balke-Collender Co. v. Rees, 69 Wis. 442, 34 N. W. 732.

[268] Godley v. Hagerty, 20 Pa. St. 387, 59 Am. Dec. 731, affirmed in Carson v. Godley, 26 Pa. St. 111, 67 Am. Dec. 404.

including the roof, was occupied by the landlord. The sign-board belonged to the landlord and was used to advertise his business. The landlord had, during the entire term, exercised control over and taken charge of the outside of the building. He could not be exonerated from responsibility to keep in reasonably safe and secure condition that portion of the building over which he retained control. The jury had found that the landlord was guilty of negligence in allowing the fastenings of the sign-board to become insecure and that the tenant was in the exercise of due care.[269] If the person injured had been a traveller along the highway or a business visitor of the landlord, there would have been no doubt as to the liability of the landlord. It would have rested on the general doctrine as to the responsibility of an owner of real estate. The result of the case is to place upon the landlord an equal burden of responsibility for the personal safety of his tenants.

An awning extending over the sidewalk across the whole front of a building is an entire structure. It could be built and maintained for the advantage of shops in the building without being leased with them. The responsibility for the good repair of such an awning remains with the general owner, who is a partial occupant. His liability for the awning is like that which he would be under for the condition of the roof, the eaves, the chimneys, and other parts of the building not appropriated to the exclusive use of any particular tenant, or to all of them to the exclusion of the landlord.[270]

§ 614. Duty of landlord as to common passageways in tenement. —The prevailing rule seems to be that a landlord who leases separate portions of the same building to different tenants, and retains exclusive control, for the purpose of repairs and construction, of the porches, galleries, and stairways, used in common by all the tenants, is under an implied obligation to use reasonable diligence to keep such reserved parts in a safe condition for the use of a tenant occupying a part of the premises and for the members of his family. For a failure to perform that duty the law attaches to him liability for injury to such tenant or to a member of his family.[271] But the gen-

[269] Payne v. Irvin, 144 Ill. 482, 33 N. E. 756, affirming 44 Ill. App. 105.

[270] Milford v. Holbrook, 9 Allen (Mass.) 17.

[271] McGinley v. Alliance Trust Co., 168 Mo. 257, 66 S. W. 153; Schwandt v. Metzger &c. Co., 93 Ill. App. 365; Gleason v. Boehm, 58 N. J. L. 475, 34 Atl. 886; Sawyer v. McGillicuddy, 81 Me. 318, 17 Atl. 124, 3 L. R. A. 458; Lindsey v. Leighton, 150 Mass. 285, 22 N. E. 901; Watkins v. Goodall, 138 Mass. 533; Looney v. McLean, 129 Mass. 33, 37 Am. R. 295;

eral rule that, on the demise of a building, there is no implied covenant of fitness, applies to the letting of several rooms in a tenement house if they pass entirely out of the control of the landlord.[272] Yet the rule relieving the landlord, in the absence of special agreement, from making ordinary repairs during the term of the lease, does not release him from liability in case of injuries resulting from his failure to keep in proper repair such portions of a tenement house as are not leased to any particular tenant, but are retained in the control of the landlord for the common use of several tenants.[273] The basis of this liability has been declared to be the landlord's invitation to the tenant to use the common passageways in passing to and from the demised rooms and the analogy is to a landowner who invites customers to his place of business.[274] In respect to the common passageways of tenement houses, a landlord owes the same duty to his tenant as to a business visitor, according to this theory of the law.[275]

By evidence showing an agreement by a landlord to repair a railing or banister causing an injury after notice of its dangerous condition, and that the stairway of which this railing or banister formed a part was used in common by other tenants in the building, that the injured person was a member of a tenant's family and, not knowing the danger, was injured by reason of the defective and dangerous condition of the railing, a case is made out to go to the jury.[276] But a verdict finding that a person descending a stairway with which he was not familiar, in the dark, and, having at hand means to insure his safety, passes on with no precautions except the groping with his hands and feeling with his feet, is exercising the care which a prudent person would exercise, cannot be supported, as it is clearly contrary to the evidence.[277] Still, mere continued use of a common passageway after knowledge of its dangerous condition is not of itself con-

Donohue v. Kendall, 98 N. Y. 635, affirming 18 Jones & S. 386; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580, 36 N. Y. St. 452; Palmer v. Dearing, 93 N. Y. 7; Peil v. Reinhart, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843.

[273] McKeon v. Cutter, 156 Mass. 296, 31 N. E. 389.

[274] Gallagher v. Button, 73 Conn. 172, 46 Atl. 819; Peil v. Reinhart, 127 N. Y. 381, 27 N. E. 1077; Looney v. McLean, 129 Mass. 33; Moynihan v. Allyn, 162 Mass. 270, 38 N. E. 497; Coupe v. Platt, 172 Mass. 458, 52 N. E. 526.

[275] Sawyer v. McGillicuddy, 81 Me. 318, 17 Atl. 124.

[276] McCarthy v. Fagin, 42 Mo. App. 619; Gillion v. Reilly, 50 N. J. L. 26, 11 Atl. 481.

[277] Schwandt v. Metzger &c. Co., 93 Ill. App. 365.

[277] Gleason v. Boehm, 58 N. J. L. 475, 34 Atl. 886; Hilsenbeck v. Guthring, 131 N. Y. 674, 30 N. E. 580.

clusive evidence of a lack of due care on the part of the tenant.[278] In order to fix the responsibility upon the landlord, however, the defect must have been the cause of the accident. Thus, where a horse had been hitched to an outside stairway and, becoming frightened, pulled it down, to the injury of the tenant's wife, the landlord was not liable. The injury was caused by the horse and it was not the landlord's duty to protect the tenant from intruders.[279]

§ 615. There are other decisions in which the reasoning is directly opposed to the principles just laid down.[280] The argument in these contrary decisions is that the liability of the landlord cannot be increased by the circumstance that he lets to more than one tenant. In one case it was said: "It is difficult to perceive how the fact that the landlord hired out apartments to separate tenants and that the common stairway was the common passageway for all, can exert a controlling influence upon the question of the landlord's liability. The landlord's duty is the same whether he demises to one or to many, so far as concerns his liability to the tenant for personal injuries caused by a failure to repair."[281]

[278] Looney v. McLean, 129 Mass. 33.

[279] Platt v. Farney, 16 Ill. App. 216.

[280] Purcell v. English, 86 Ind. 34, 44 Am. R. 255; Cole v. McKey, 66 Wis. 500, 29 N. W. 279, 57 Am. R. 293; Humphery v. Wait, 22 U. C. C. P. 580; Dowling v. Nuebling, 97 Wis. 350, 72 N. W. 871.

[281] Purcell v. English, 86 Ind. 34, 44 Am. R. 255. This subject is discussed in an exhaustive article in the American Law Review, volume 6, page 614. The conclusion reached is that the rule of *caveat emptors* applies in regard to passageways in a tenement house and that the tenant and those relying on his right cannot hold the landlord responsible for defects in construction or for lack of repair. The basis of this conclusion is shown in the following quotation: "It is true that these portions are not parcel of the demise, strictly speaking, nor is the tenant charged with any active duty with what as to the public or the landlord he has no exclusive—we might perhaps say any—control over. He is not the bailee thereof, and his character as such in regard to the demised premises will not assist us to settle his rights here. But it is not to be inferred from this that he is a stranger thereto and that he can hold the landlord to the same responsibility as a third person can. It has indeed been attempted to determine his rights by the application of the maxim *sic utere tuo*. But it will be seen, as we suggested at the beginning of this article, that the fundamental question, rather, is what is the extent of the ownership than what is the mode of user required. This question we have in part answered by the cases just reviewed, which settle that the general title remains with the lessor. But this ownership is not exclusive,

§ 616. **To make a landlord liable for injuries caused by water flowing from a closet** on the tenant, it must be shown that the agencies causing the damage were under the supervision of the landlord or his agent and that there was neglect in the management thereof.[282] "The liability of the landlord does not necessarily follow from the fact that the building does not contain the latest and most improved system of water pipes. He does not insure against the negligence of his tenants."[283] So it may be stated as a general rule that where the water fixtures are properly constructed and the damage was caused by the negligence of another tenant, the landlord is not liable; for landlords are not responsible for the carelessness of their tenants in the use of such fixtures.[284] But it seems a landlord might become liable for damage caused by leakage in a water-closet caused by improper use of it by tenants when he knew of such improper use and permitted it to continue. The court in holding the landlord liable admit he would not be responsible if the tenant above wantonly threw down water on the tenant below, but place the liability on the slender ground that he knew of a previous leak.[285] The court argue that the landlord is responsible for a nuisance upon the premises but fail to observe that the closet was not a nuisance in itself but only became one by the improper conduct of the tenants. Water pipes running through a room occupied by a tenant to a vacant room within the control of the landlord were allowed to freeze and injured the tenant's goods, both landlord and tenant having access to the shut-off. The

for there can be no doubt that the tenant has a qualified interest in the nature of an easement in the same; and just in so far as this easement extends, a right, with a corresponding duty, of inspection also extends, and, therefore, an assumption of the risks from the original construction, and also from the temporary condition of the parts of the premises in which the easement is enjoyed, so far as the same could be inspected." The conclusion of the author is stated as follows: "We think, therefore, we are justified in the conclusion that even as to the condition and repair, as well as the construction of such portions of the premises as are not expressly demised, but which the tenant is merely licensed or privileged to use in connection with his own tenement, the principle of *caveat emptor* applies, and restricts recovery for whatever he could have discovered or can remedy by due inquiry or inspection."

[282] Mendel v. Fink, 8 Ill. App. 378.

[283] McCarthy v. York Co. Sav. Bank, 74 Me. 315.

[284] Haizlip v. Rosenberg, 63 Ark. 430, 39 S. W. 60; Kenny v. Barns, 67 Mich. 336, 34 N. W. 587; Rosenfield v. Newman, 59 Minn. 156, 60 N. W. 1085; White v. Montgomery, 58 Ga. 204; Allen v. Smith, 76 Me. 335; Greene v. Hague, 10 Ill. App. 598; Strauss v. Hamersley, 13 N. Y. 816.

[285] Marshall v. Cohen, 44 Ga. 489.

landlord was not liable for the injury because he was under no duty to shut off the water, although he had the right to do so for his own protection if he chose.[286] A covenant in a lease of rooms in a building to save the lessor harmless from injury caused by the bursting of water-pipes was followed by a provision that all merchandise and furniture of the lessee should be at his sole risk and hazard, in case of injury by fire or water. The language of the provision being broad, was held by its natural import to throw upon the lessee the risk of loss or damage to his property in the store, caused by the leakage or bursting of water pipes in any part of the building. One of the clauses in the lease would be superfluous if it were only intended to exempt the lessor from liability for damage caused by bursting of water pipes within the leased premises.[287]

§ 617. **To whom this duty extends.**—The use of rooms in a tenement for dwellings equally necessitates the use of the passage by tradesmen in delivering goods, by persons having other business with the occupant or by those who visit him for social reasons. With respect, therefore, to all persons visiting such a tenant upon any lawful occasion, the duty of the landlord is similar to that which he owes to the tenant.[288] This duty extends to the servants and agents of the tenant. Thus, in one case a person boarding with the tenant was injured by a defect in a common platform used by the occupants of the building for drying clothes. The landlord was held liable. Although the boarder was working gratuitously, she was in a sense a servant or agent of the tenant and she went upon the roof in the agent's right.[289] The landlord also owes the same duty to business visitors of the tenant and is liable for injuries suffered by them. All persons having occasion to visit any of the offices in a building on legitimate business with any of the tenants therein have an implied invitation from the owners of the property to use the common entrance and passage for that purpose; and the landlord owes a duty to all such persons which carries with it an obligation to exercise reasonable care and prudence to provide a safe and suitable entrance to such offices, and to have the approaches thereto so constructed and maintained that visitors would not be liable to step into dangerous pitfalls by reason of misleading

[286] Buckley v. Cunningham, 103 Ala. 449, 15 So. 826.

[287] Fera v. Child, 115 Mass. 32; Taylor v. Bailey, 74 Ill. 178.

[288] Gleason v. Boehm, 58 N. J. L. 475, 34 Atl. 886; Miller v. Hancock, L. R. (1893) 2 Q. B. 177; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580.

[289] Wilcox v. Zane, 167 Mass. 302, 45 N. E. 923; Ganley v. Hall, 168 Mass. 513, 47 N. E. 416.

doors and deceptive landings.[290] Where a tenant in an apartment house called in an officer to arrest a person who was creating a breach of the peace, the officer came to the house lawfully and could recover from the landlord for an injury caused by a defect in a common passageway. It would not affect his right to recover if the arrest were unlawful.[291] This duty on the part of the landlord does not, however, extend to mere social visitors. Such a visitor would be a mere licensee, if there was no previous appointment to call, and no previous notice of an intention to call had been given.[292] An exception to this rule has been made where the guest comes upon the express invitation of the tenant. In regard to this question, Knowlton, J., said: "The contract (for the safe use of the common passageway) impliedly included not only the tenant himself, but the members of his family, and his servants and agents who might rightfully occupy and use the tenement with him. It included boarders and lodgers, if, in a proper use of the tenement, such persons might be received there by the tenant. It included all persons, who in connection with the use of the tenement by the tenant, might properly pass over the platform under the express authority of the tenant and in his right. To all such persons, by virtue of her contract with the tenant, the landlord owed the same duty that she owed to the tenant personally, to keep the platform reasonably safe."[293]

§ 618. **Duty of landlord to strangers.**—As regards strangers there can be no doubt, on either principle or authority, that the liability of a landlord for injuries caused by the negligent maintenance of the portions of the building which are in his possession cannot be in any way affected by the fact that other portions of it have been leased to and are in possession of tenants. When a building consisting of a number of different apartments is divided among several tenants, each one of whom takes a distinct portion and none of whom rent the entire building, each tenant is responsible only for so much as his lease includes, leaving the landlord liable for every part of the building not included in the actual holding of any one tenant.[294] Thus a landlord who leases the several parts of his building to different tenants, and who retains control of the roof, will be liable for

[290] Foren v. Rodick, 90 Me. 276, 38 Atl. 175; Readman v. Conway, 126 Mass. 374.

[291] Learoyd v. Godfrey, 138 Mass. 315.

[292] Ganley v. Hall, 168 Mass. 513, 47 N. E. 416. *Compare* McKenzie v. Cheetham, 83 Me. 543, 22 Atl. 469.

[293] Coupe v. Platt, 172 Mass. 458, 52 N. E. 526.

[294] O'Connor v. Andrews, 81 Tex. 28, 16 S. W. 628.

injuries resulting to persons passing on the street from ice and snow sliding upon them therefrom.[295] This same principle has been applied where injuries to third persons resulted from the fall of side walls;[296] where an awning erected along the whole front of a building for the benefit of shops fell and caused injuries;[297] and where a traveller along the highway in front of the premises was injured by a defective coal hole in the sidewalk.[298] The shops on the ground floor of a building were rented to separate tenants and were connected with the sidewalk by a wooden platform which was not separated into parts. A defect in the platform caused an injury to a stranger and the landlord was held liable in the absence of any covenant by the tenant to repair.[299] It has even been held that a covenant by one of several tenants to save the lessor harmless from any claim or damage arising from neglect in not removing snow and ice did not release the landlord from liability. The injury occurred from the collection of snow and ice on the sidewalk in front of the premises. The effect of this covenant was not to give the lessee the sole occupancy of the sidewalk in front of the premises, so the general rule of liability where parts of a building are let to different tenants would apply.[300]

§ 619. What constitutes a fulfilment of the landlord's duty.— The obligation resting on the landlord is the same as that resting on the general owner of real estate who holds out invitations or inducements to other persons to use his property. The duty upon such an owner is that reasonable care and skill have been exercised to render the premises reasonably fit for the uses which he has invited others to make of them.[301] It is the landlord's duty to use due care to keep the platforms and common passageways in a condition as good as they were at the time of hiring, and to inform the tenant of any hidden defect which could not be discovered by reasonable diligence on his part and of which the tenant for his proper protection ought to be informed.[302] But the landlord is not bound to change the mode of

[295] Shipley v. Fifty Associates, 101 Mass. 251, 3 Am. R. 346; Kirby v. Boylston &c. Asso., 14 Gray (Mass.) 249, 74 Am. Dec. 682.

[296] O'Connor v. Andrews, 81 Tex. 28, 16 S. W. 628.

[297] Milford v. Holbrook, 9 Allen (Mass.) 17, 85 Am. Dec. 735.

[298] Jennings v. Van Schaick, 108 N. Y. 530, 15 N. E. 424, 11 Cent. R. 317.

[299] Readman v. Conway, 126 Mass. 374.

[300] Leydecker v. Brintnall, 158 Mass. 292, 33 N. E. 399.

[301] Gillvon v. Reilly, 50 N. J. L. 26, 11 Atl. 481.

[302] Moynihan v. Allyn, 162 Mass. 270, 38 N. E. 497; Quinn v. Perham, 151 Mass. 162, 23 N. E. 735; Woods v. Naumkeag &c. Co., 134 Mass. 357.

construction to render the premises safe. Thus where the floor of a passage was composed of loose rough boards at the time of hiring and no change for the worse had occurred, the landlord was not liable to the tenant for an accident caused by this defect. The tenant took a tenement with a poor approach, well knowing its condition and therefore cannot complain of an injury caused by it.[303] No duty is imposed upon the landlord in respect to the safe use of the means of passage provided by him. If those means are such as the rule required to be provided he has performed his duty. If a stairway is fit for use in ascending and descending, the responsibility of safely using it is upon the person using it. If to use it safely at night, a light is requisite, the tenant must provide it and not the landlord. If upon the failure of natural light artificial light is necessary to make the descent of a stairway safe, it is erroneous to place the duty of providing such a light upon the landlord.[304] So there is no obligation on the part of the landlord to remove ice and snow from the steps of a tenement house. That is the tenant's duty if he desired to use the steps. The ice and snow are the proximate cause of an injury.[305] But these principles were held not to apply to a stairway in an office building, constructed around a well which became unsafe by reason of darkness before night had really fallen. The landlord had control of the halls and starways and furnished the light for them. The court held that the jury were justified in finding under such circumstances that the landlord owed the duty of providing sufficient light to render the passageway reasonably safe and that he had failed in that duty.[306]

§ 620. The place where the accident occurs is not material provided it was on a common platform or passageway which the landlord was bound to keep in a reasonably safe condition. Thus the landlord was held to be answerable for a defective condition in a stairway intended to furnish access to the roof of a shed, used in common by all the tenants for drying clothes.[307] He was also responsible for the safety of slats upon the roof of a tenement, used for a similar purpose.[308] But it seems that the place where the accident happens must have been intended by the landlord for the use to which it is being

[303] Quinn v. Perham, 151 Mass. 162, 23 N. E. 735.

[304] Gleason v. Boehm, 58 N. J. L. 475, 34 Atl. 886.

[305] Woods v. Naumkeag &c. Co., 134 Mass. 357.

[306] Marwedel v. Cook, 154 Mass. 235, 28 N. E. 140.

[307] Looney v. McLean, 129 Mass. 33, 37 Am. R. 295; Wilcox v. Zane, 167 Mass. 302, 45 N. E. 923.

[308] Alperin v. Earle, 55 Hun (N. Y.) 211.

put to make him liable. So, where tenants were simply given permission to dry clothes on the roof, the landlord was under no obligation to keep it in repair.[809] This same rule has been held in Illinois in a case with facts almost identical with that of *Ivay* v. *Hedges*.[810] The Illinois court argues that "there was no express contract for the use of the roof; it was not included in the written lease, and there was at most so far as the evidence discloses, merely a verbal permission to the particular tenant to make such use of the roof. . . . If it could be regarded as a part of the premises demised, . . . it is difficult to perceive how, under the evidence as here presented, there could be any obligation on the part of the landlord to keep the roof in repair."[811]

A cellar staircase may be a common passageway for a defect in which the usual responsibility of a landlord of a tenement house would attach.[812] It would be for a jury to determine whether a platform in front of leased shops and bordering on a highway were constructed and controlled by the owner of all the shops, for the common use of the occupants of all the shops and of the public. If they found this to be the case, the tenants would not be liable for defects in the platform, but the responsibility therefore would remain on the landlord.[813] The landlord is not, however, bound to repair platforms and passageways intended for the exclusive use of one tenant and not for common use.[814]

§ 621. Defective carpeting of passageways.—The landlord of a building let in parcels to many tenants is bound to keep the carpetings and matting in the common halls and stairways in proper repair. Wear and tear on such furnishing is to be expected and worn places and holes making the passage dangerous can easily be discovered on inspection. So permitting a stairway carpet with holes in it to remain on the stairs of a tenement house, with notice of its condition, renders the owners liable for injuries to a tenant from a fall caused by catching her foot in one of the holes.[815] A landlord was also held responsible for a fall received by reason of the unsafe condition of a

[809] Ivay v. Hedges, L. R. 9 Q. B. D. 80.

[810] Ivay v. Hedges, L. R. 9 Q. B. D. 80.

[811] Culver v. Kingsley, 78 Ill. App. 540.

[812] Robbins v. Atkins, 168 Mass. 45, 46 N. E. 425.

[813] Readman v. Conway, 126 Mass. 374.

[814] Donner v. Ogilvie, 49 Hun (N. Y.) 229, 232; Flynn v. Hatton, 43 How. Pr. (N. Y.) 333, 346.

[815] Peil v. Reinhart, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843; Palmer v. Dearing, 93 N. Y. 7; Gillvon v. Reilly, 50 N. J. L. 26, 11 Atl. 481, 10 Cent. R. 428; Henkel v. Murr, 31 Hun (N. Y.) 28, 30.

mat in an entrance hall of an apartment house.[316] The question whether the tenant has been guilty of contributory negligence is to be submitted to the jury in view of all the circumstances of the case. Where the landlord had promised to repair the defect, and the plaintiff thought he had done so, and the passageway was dimly lighted, so that the defect was not visible, a finding by the jury that there was no contributory negligence was not disturbed by the court.[317] Other important inquiries are whether the defect was of such a nature as to render the stairs not reasonably fit for the purpose of passage and whether the landlord has failed to exercise reasonable care in the matter.[318]

§ 622. **Repairs interfering with enjoyment.**—A landlord may be liable to tenants of one floor in an apartment house for injury done them without regard to his negligence in making alterations and repairs on another part. Such was the case where the quiet enjoyment of the tenant was interfered with. The complaint did not count upon the negligence of the defendant in making repairs, but was founded on the theory that the plaintiff was the tenant of the defendant on the two upper floors of the building; that defendant, as owner of the building, conducted certain alterations and improvements on the second floor by tearing down partitions and walls whereby plaintiff was damaged, and her quiet enjoyment of the premises as a tenant was interfered with. The landlord is bound to conduct his operations so as not to dispossess or render uninhabitable the portion of the building they have demised to others. If he fails of this duty, he is liable to his tenants irrespective of the question of negligence. As against third parties, he could take down the outer or inner walls at will, subject only to liability for injury from negligence, but as against his tenant he could not do the same thing, even in the most careful manner, if the result destroyed the quiet enjoyment of such tenant.[319]

§ 623. **Liability of landlord for negligence of janitor.**—The general rule of law that an employer is responsible for injuries caused by the negligence of his servants applies in the case of a janitor employed by a landlord. There is nothing in the relation of landlord and tenant which would relieve the landlord from liability. Thus a

[316] Neyer v. Miller, 19 Jones & S. (N. Y.) 516.

[317] Palmer v. Dearing, 93 N. Y. 7.

[318] Gillvon v. Reilly, 50 N. J. L. 26, 11 Atl. 487, 10 Cent. R. 428.

[319] McDowell v. Hyman, 117 Cal. 67, 48 Pac. 984.

sub-lessee could recover from the landlord for the misconduct of the janitor of the building, who in the course of his employment let water overflow the premises.[820] A janitor is not, however, bound to inquire into the condition of water pipes in parts of the building which are under lease. He has a right to assume the continuance of previous good repair. So a landlord was not liable where his janitor turned on water which flooded the premises through a break in a tenant's room.[821]

§ 624. A tenant of a part of a building is bound to exercise due care in the use and control of his part of the premises to prevent injury to other tenants in the building or to his employés or business visitors. The ordinary doctrine of responsibility upon an occupier of real estate is not altered by the circumstance that the premises occupied consist of a portion of a building only and that there may be certain duties and obligations on the part of the general owner. Thus the occupant of an upper tenement would be liable for the negligence of his servant in leaving a faucet open, which caused water to overflow and flood the tenement below.[822] Although such tenant is not bound at his peril absolutely to prevent injury to others by the escape of water,[823] he is liable on the ground that he has been negligent. Where the occupation and right to use the water fixtures are exclusive, the party is responsible for their proper use and care; and liability attaches on proof that negligence has occurred and damage has ensued.[824]

A case of a different nature arose where a servant of a tenant was injured by a defect in a common passageway in a building occupied by many tenants. The employer was held liable. It was contended in behalf of the defendants that as they were tenants in the building, with control over only a portion of it, there being other tenants therein, the duty to keep the premises in safe repair was upon the owner of the building and that the defendants could not be charged with negligence for a failure in that respect. But the court replied that the principles applicable to the case were those of master and servant and the duty the master owed his servant to provide him a safe place in which to perform his labors. The master cannot absolve

[820] Pike v. Brittan, 71 Cal. 159, 11 Pac. 890.

[821] Greene v. Hague, 10 Ill. App. 598.

[822] Simonton v. Loring, 68 Me. 164, 28 Am. R. 29.

[823] Losee v. Buchanan, 51 N. Y. 476, 486; Swett v. Cutts, 50 N. H. 439; Brown v. Collins, 53 N. H. 442.

[824] Moore v. Goedel, 34 N. Y. 527, 532; Simonton v. Loring, 68 Me. 164, 28 Am. R. 29.

himself from responsibility in his behalf by showing that the premises furnished by him were rented from a third person and were jointly occupied by him with other tenants. It was further contended that the full extent of the defendant's duty was to warn their employé of the danger. The court did not assent to this, but disposed of the case on the ground that even if a warning would have been sufficient, there had been none in the present case.[325]

V. *Responsibility for Waste.*

§ 625. Waste may be defined to be any act or omission of duty by a tenant of land which does a lasting injury to the freehold, tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of an inheritance, or to destroy the identity of the property, or impair the evidence of title.[326] It is lasting damage to the inheritance caused by the destruction by a tenant for life or years of such things on the land as are not included in its temporary profits.[327] Permissive waste, as the name implies, consists in the mere neglect or omission to do what will prevent injury, as to suffer a house to go to decay for lack of repair. Voluntary waste, on the other hand, consists in the commission of some destructive act, as pulling down a house or cutting down timber.[328] "At common law, a writ of waste lay against a tenant in dower, tenant by the curtesy and guardian in chivalry, but not against lessees for life or years.[329] The reason for this diversity was that the estates and interests of the former were created by law, and therefore the law gave a remedy against them, but the latter came in by the act of the owner, who might have provided in his demise against the doing of waste by his lessee, and if he did not it was his own negligence and default.[330] This doctrine was found extremely inconvenient, as tenants took advantage of the ignorance of their landlords and committed acts of waste with impunity. To remedy this inconvenience the statute of Marlbridge[331]

[325] Dieters v. St. Paul Gaslight Co., 86 Minn. 474, 91 N. W. 15.

[326] Bandlow v. Thieme, 53 Wis. 57, 9 N. W. 920; Melms v. Pabst Brewing Co., 104 Wis. 7, 79 N. W. 738.

[327] Proffitt v. Henderson, 29 Mo. 325; Childs v. Kansas City &c. R. Co. (Mo.), 17 S. W. 954; Sherrill v. Connor, 107 N. Car. 630, 12 S. E. 588; London v. Warfield, 5 J. J. Marsh. (Ky.) 196; Jackson v. Brownson, 7 Johns. (N. Y.) 227.

[328] Consolidated Coal Co. v. Savitz, 57 Ill. App. 659; Bouvier's Law Dict., Art. Waste; White v. Wagner, 4 H. & J. (Md.) 373, 391.

[329] 2 Inst. 299, 305; Co. Lit. 54.

[330] 2 Inst. 299; Doct. & Stu., ch. 1, p. 102.

[331] 52 Hen. III, ch. 23.

was passed. But, as the recompense given by this statute was frequently inadequate to the loss sustained, the statute of Gloucester[332] increased the punishment by enacting that the place wasted should be recovered together with treble damages."[333] At common law the only parties liable for waste were tenants of legal estates, i. e., estates which were created by act of law as distinguished from those created by act of the parties. Prior to the statutes of Marlbridge and Gloucester, when a limited estate was created by deed, the particular tenant was not liable for waste unless it was expressly so stipulated.[334] Since those statutes the better view seems to be that tenants for life and for years under deeds or grants are liable for permissive as well as voluntary waste. In the earlier English reports instances are frequent in which lessees for life or for years have been held liable for permissive waste and their liability is grounded on the statutes which subjected them to the action of waste.[335] More recent cases[336] throw some doubt on this conclusion, but they are not regarded as settling the law against the older cases, and the opinions of Coke and Blackstone.[337] In the United States, unless exempted by the terms of his lease, a tenant for life or for years is responsible for waste done or permitted on the demised premises.[338]

§ 626. **With respect to the mode of procedure by which a tenant was made to account for the waste committed by him,** the writ of waste authorized by the statute fell into disuse in England and was finally abolished by statute,[339] being superceded by an action on the case in the nature of waste.[340] The form of writs in this action are found in the most approved books of precedents.[341] It has been de-

[332] 6 Edw. I, ch. 5.

[333] Moore v. Townshend, 33 N. J. L. 284, per Depue, J.; Sackett v. Sackett, 8 Pick. (Mass.) 309, 313; Stetson v. Day, 51 Me. 434; Lothrop v. Thayer, 138 Mass. 466; Chase v. Hazelton, 7 N. H. 171.

[334] Palmer v. Young, 108 Ill. App. 252.

[335] Griffith's Case, Moore 69; Darcy v. Askwith, Hobart 234; Glover v. Pipe, Owen 92; 2 Bl. Comm. 283; Co. Litt. 52a, 53b.

[336] Gibson v. Wells, 4 B. & P. 290; Herne v. Bembow, 4 Taunt. 764; Torriano v. Young, 6 C. & P. 8.

[337] Moore v. Townshend, 33 N. J. L. 284; Davies v. Davies, L. R. 38 Ch. D. 499, 58 L. T. 514, 57 L. J. Ch. 1093.

[338] White v. Wagner, 4 H. & J. (Md.) 373; Palmer v. Young, 108 Ill. App. 252; Consolidated Coal Co. v. Savitz, 57 Ill. App. 659; Stevens v. Rose, 69 Mich. 259, 37 N. W. 205.

[339] 3 and 4 William IV, ch. 27.

[340] Greene v. Cole, 3 Saund. 252, note 7; Jefferson v. Jefferson, 3 Lev. 131; West v. Treude, Cro. Car. 187; White v. Wagner, 4 H. & J. (Md.) 373.

[341] 3 Chitt. Plead. 434; 8 Went. Plead. 588; Randall v. Cleaveland, 6 Conn. 328.

cided that case in the nature of waste will lie, although the tenant has specially covenanted not to do waste,[342] and that this action may be maintained for permissive as well as for voluntary waste.[343] Case in the nature of waste is a different action from a writ of waste, being a common-law remedy, attended with the imposition of ordinary damages only, and is not possessory in its character. It does not require that the defendant should be charged as lessee or assignee, or that the writ should conclude by stating the waste to have been to the disinheriting of the plaintiff, and there is nothing in its character necessarily to prevent its lying against a stranger. The remedy in this action is co-extensive with the liability to injury, and the reversioner has a right to elect against whom to proceed.[344] In this country, although adopted in some of the states, the action of waste has been but little used, having been, in practice, virtually superseded by the action on the case in the nature of waste for the recovery of damages merely, or by bill in equity, praying an injunction against the commission of waste.[345] Though trespass *quare clausum* may be maintained by the owner for an injury to the freehold, when it is in the occupation of a tenant at will,[346] this doctrine is not to be extended so as to apply to a remainderman who is not entitled to possession. It has been held that such an action will not lie by the reversioner for waste committed by a person acting under authority from a tenant for life.[347] But the reversioner or remainderman is not without remedy, when the injury is of a permanent nature affecting the inheritance, for an ac-

[342] Kinlyside v. Thornton, 2 W. Bl. 1111.

[343] White v. Wagner, 4 H. & J. (Md.) 373; Greene v. Cole, 3 Saund. 252, note 7; Pomfret v. Ricroft, 1 Saund. 321.

[344] Chase v. Hazelton, 7 N. H. 171; Mason v. Stiles, 21 Mo. 374; Davis v. Smith, 15 Mo. 467; Randall v. Cleaveland, 6 Conn. 328; Jackson v. Pesked, 1 M. & S. 234; Attersoll v. Stevens, 1 Taunt. 183.

[345] Randall v. Cleaveland, 6 Conn. 328; Stevens v. Rose, 69 Mich. 259, 37 N. W. 205; White v. Wagner, 4 H. & J. (Md.) 373; Chase v. Hazelton, 7 N. H. 171; Stetson v. Day, 51 Me. 434. *In Georgia* the statute of Gloucester was in force as far as it made a tenant in dower liable in waste, but not as to the penalty of forfeiture. Conditions were such that the stringent rules of the English law relative to waste were not applicable. So damages could be recovered but forfeitures could not be enforced. Woodward v. Gates, 38 Ga. 205. *In Delaware* a tenant was liable to indictment under the act of 1831 for cutting timber, if the landlord's consent be disproved. State v. Jackson, 2 Harr. (Del.) 542.

[346] Bartlett v. Perkins, 13 Me. 87; Davis v. Nash, 32 Me. 411; Kimball v. Sumner, 62 Me. 305; Starr v. Jackson, 11 Mass. 519.

[347] Shattuck v. Gragg, 23 Pick. (Mass.) 88.

tion would lie against the tenant, either on the case or for waste, or an action on the case would lie against a stranger.[348]

§ 627. At common law and under the early English statutes a tenant at will was punishable for voluntary waste, but not for permissive waste.[349] The rule has been declared in general terms that a tenant, no matter what the duration of his term, is liable to his landlord for voluntary or commissive waste.[350] Tenants in dower, by the curtesy, for life or lives, and for years, were included in the statute of Gloucester. Tenants at will were always considered as omitted from the statute of Marlbridge, as well as from the statute of Gloucester, and therefore continued not to be punishable for mere permissive waste, and punishable for voluntary waste by action of trespass as at common law. The reason of this exemption of tenants at will from liability for permissive waste was the uncertain nature of their tenure, which would make it a hardship to compel them to go to any expense for repairs. Their exemption from the highly remedial process of waste provided by the statute of Gloucester is attributable to the fact that the owner of the inheritance might at any time, by entry, determine the estate of the tenant and thus protect the inheritance from spoil or destruction.[351] If a tenant at will, holding from year to year, commit voluntary waste, he forfeits all right of notice to quit, as he thereby determines this estate;[352] for waste by a tenant at will has the effect of ending the tenancy and making the tenant a trespasser.[353] The possession of a tenant at will, who has committed voluntary waste, may be considered the actual possession of the landlord, who may thereafter maintain trespass *quare clausum* against his former tenant at will.[354] Since a tenant at will or by sufferance is

[348] Lawry v. Lawry, 88 Me. 482, 34 Atl. 273; Stetson v. Day, 51 Me. 434; Shattuck v. Gragg, 23 Pick. (Mass.) 88.

[349] Torriano v. Young, 6 C. & P. 8, 25 E. C. L. 295; Countess of Salop v. Crompton, Cro. Eliz. 777, 784; Countess of Shrewsbury's Case, 5 Coke 14; Harnett v. Maitland, 16 M. & W. 258; Moore v. Townshend, 33 N. J. L. 284; Coale v. Hannibal &c. R. Co., 60 Mo. 227; Daniels v. Pond, 21 Pick. (Mass.) 367; Lothrop v. Thayer, 138 Mass. 466; Boefer v. Sheridan, 42 Mo. App. 226.

[350] Boefer v. Sheridan, 42 Mo. App. 226.

[351] Moore v. Townshend, 33 N. J. L. 284.

[352] Perry v. Carr, 44 N. H. 118; Phillips v. Covert, 7 Johns. (N. Y.) 1.

[353] Pettingill v. Evans, 5 N. H. 54.

[354] Perry v. Carr, 44 N. H. 118; Ripley v. Yale, 16 Vt. 257, 260; Wickham v. Freeman, 12 Johns. (N. Y.) 183; Phillips v. Covert, 7 Johns. (N. Y.) 1; French v. Fuller, 23 Pick. (Mass.) 104; Starr v. Jackson, 11 Mass. 519; Lienow v. Ritchie, 8 Pick. (Mass.) 235; Daniels v.

not liable to his landlord for permissive waste, as where the demised premises are damaged by the acts of a stranger, he will therefore have no action against the stranger who causes the injury.[355] But tenants who were bound to answer to their landlord in the full value of waste committed have been held to be entitled to recover a like amount against the stranger by whose act the waste was committed.[356]

In Maine it has been held that an action of trespass on the case is maintainable by the owners of the fee against a tenant at will for acts prejudicial to the inheritance.[357] But the authority on which this decision is rested merely holds that case is the proper remedy of a reversioner out of possession to bring against a stranger who does an injury to the inheritance.[358]

The burning of a building through the negligent keeping of a fire by a tenant is generally regarded as permissive waste.[359] So if landlords would protect themselves from the mere negligence of their tenants, they should take a written lease with proper covenants. The reasonable rule is that a tenant at will is not liable to his landlord for the mere negligence of himself or his servants in kindling or guarding fires in stoves or chimneys for the purpose of heating the premises, but that he is liable for willful burning and also for such gross negligence as amounts to reckless conduct.[360]

A tenant in possession under a lease giving lessee an option to purchase, which has not been exercised within the required time, is liable for waste committed on the premises during his possession.[361]

§ 628. Independent of an express agreement on the part of a lessee, the law imposes on him an obligation to treat the premises in such a way that no substantial injury shall be done to the property

Pond, 21 Pick. (Mass.) 367; Lothrop v. Thayer, 138 Mass. 466, 473; Chalmers v. Smith, 152 Mass. 561, 26 N. E. 95.

[355] Coale v. Hannibal &c. R. Co., 60 Mo. 227.

[356] Austin v. Hudson River R. Co., 25 N. Y. 334; Cook v. Champlain Transp. Co., 1 Denio (N. Y.) 91.

[357] Files v. Magoon, 41 Me. 104.

[358] Lienow v. Ritchie, 8 Pick. (Mass.) 235.

[359] Countess of Shrewsbury's Case, 5 Coke 14; 4 Kent. Com. 81; 1 Add. Cont. (8th ed.) 253; Add. Torts 239; Smith's Ld. & Ten. (3d ed.) 287; Gibbons on Dilapidations (2d ed.) 108, 128; Comyn's Ld. & Ten. 171.

[360] Lothrop v. Thayer, 138 Mass. 466, 476. See also, Read v. Pennsylvania R. Co., 44 N. J. L. 280. In Schwartz v. Salter, 40 La. Ann. 264, it was held that a lessee is not responsible for losses by fire that are occasioned without his fault or neglect, when the local statute and the instrument under which he holds contain a provision to that effect.

[361] Powell v. Dayton &c. R. Co., 16 Ore. 33, 16 Pac. 863.

during the continuance of the lease, so that the same may be restored to the possession of the owner in a condition unimpaired by the negligent conduct of the lessee.[362] That a tenant is liable for negligence and carelessness in the management of the leased premises, whereby damages result to such premises, is quite clear as a matter of law.[363] As a general proposition of law, the landlord is not bound to repair during a term without a special agreement, while it is the duty of the tenant to keep the premises in repair.[364] There is an implied obligation arising out of the relation of landlord and tenant that the tenant will use reasonable care to prevent damage to the inheritance.[365] Every contract whereby the relation of landlord and tenant is created contains as an implied part of it an obligation to use the premises in a tenantlike manner, unless expressly excluded. Besides the express written agreement there is an additional burden imposed by law; but it is all parcel of the original contract, by which the relation of landlord and tenant was created between the parties.[366] The lessee is not bound to make substantial, lasting or general repairs, but only such ordinary repairs as are necessary to prevent waste and decay of the premises.[367] "This obligation arises from the mere relation of landlord and tenant. It is not a covenant to repair generally, but so to use the property as to avoid the necessity for repairs, as far as possible."[368] This rule that a lessee is liable for ordinary repairs, also holds true of a tenant from year to year in the absence of agreement or statute.[369] But the doctrine in regard to a tenant at will is that he is not liable to his landlord for permissive waste by neglect to make proper repairs.[370] A tenant from year to year is only bound to

[362] Genau v. District of Columbia, 20 Ct. Cl. 389; Carlin v. Ritter, 68 Md. 478, 482, 6 Am. St. 467; Snydam v. Jackson, 54 N. Y. 450.

[363] Wright v. Tileston, 60 Minn. 34, 61 N. W. 823.

[364] Kellenberger v. Foresman, 13 Ind. 475; Moffatt v. Smith, 4 N. Y. 126; Russell v. Rush, 2 Pittsb. R. (Pa.) 134; Hitner v. Ege, 23 Pa. St. 305.

[365] Nave v. Berry, 22 Ala. 382; Warder v. Henry, 117 Mo. 530, 23 S. W. 776; Hughes v. Vanstone, 24 Mo. App. 637; Kellenberger v. Foresman, 13 Ind. 475.

[366] Holford v. Dunnett, 7 M. & W. 348, 352.

[367] Snydam v. Jackson, 54 N. Y. 450; Long v. Fitzimmons, 1 W. & S. (Pa.) 530; Bold v. O'Brien, 12 Daly (N. Y.) 160; Johnson v. Dixon, 1 Daly (N. Y.) 178; Payne v. James, 45 La. Ann. 381, 12 So. 492; Prosser v. Pretzel (Kan.), 55 Pac. 854. See John Morris Co. v. Southworth, 154 Ill. 118, 39 N. E. 1099, reversing 50 Ill. App. 429.

[368] Brown v. Crump, 1 Marsh. 567. Quoted in United States v. Bostwick, 94 U. S. 53, and Williams v. Kearny Co., 61 Kan. 708, 60 Pac. 1046.

[369] Hitner v. Ege, 23 Pa. St. 305.

[370] Parrott v. Barney, Deady 405, 18 Fed. Cas. No. 10773a.

keep the demised house wind and water tight, and that is all he is bound to do. A tenant who covenants to repair is to sustain and uphold the premises, but that is not the case with a tenant from year to year.[371] Although a lessee from year to year is not liable to general repairs,[372] a tenant at will as well as a tenant for life or for years is under an implied agreement to use the premises in a tenantlike manner, and not by his voluntary act unnecessarily to injure them. While this agreement does not include an obligation on the part of a tenant at will to repair defects resulting from the action of the elements, or from a reasonable use of the premises, or from an unavoidable accident, it creates a liability to an action of contract for a wrongful act in violation of it.[373] The acceptance of rent for the full term is not necessarily a waiver of a right to recover damages for breach of such a contract, but merely evidence of a waiver, although it may be a waiver of a right to bring trespass *quare clausum*.[374]

In Vermont it has been held that a landlord may recover in assumpsit damages caused to the leased premises by the negligence of his tenant for a fixed term, even though there are no convenants in the lease.[375]

§ 629. **A tenant is only bound to make tenantable repairs, and is not liable for the ordinary "wear and tear" of the premises,** such as are incident to the reasonable use and occupation of the same. The tenantable repairs which the law imposes on the tenant, in the absence of an undertaking on his part to repair, are such repairs as are required in the reasonable use and occupation of the premises, such as keeping fences in order, replacing windows and doors broken during the pendency of the lease.[376] If a demised building should fall because it was too weak to endure an apparently legitimate use, it could not be said that the injury was inflicted by a tenant. If the building fell in consequence of its own defects, the loss would be from ordinary

[371] Auworth v. Johnson, 5 C. & P. 239, 24 E. C. L. 545.

[372] Horsefall v. Mather, Holt. 7.

[373] Chalmers v. Smith, 152 Mass. 561, 26 N. E. 95; Holford v. Dunnett, 7 M. & W. 348; United States v. Bostwick, 94 U. S. 53, 66; 1 Add. Contr. (8th ed.) 383.

[374] Chalmers v. Smith, 152 Mass. 561, 26 N. E. 95.

[375] Wilcox v. Cate, 65 Vt. 478, 26 Atl. 1105.

[376] Genau v. District of Columbia, 20 Ct. Cl. 389; Hughes v. Vanstone, 24 Mo. App. 637; Long v. Fitzimmons, 1 W. & S. (Pa.) 530; Davenport v. United States, 26 Ct. Cl. 338; Hoyleman v. Kanawha &c. R. Co., 33 W. Va. 489; Kellenberger v. Foresman, 13 Ind. 475.

wear and tear.[377] A tenant is not absolutely liable for the occurrence of a permanent injury to the demised premises over and above ordinary wear and tear. Such injury must be shown to be caused by some wrongful act or negligence of the defendant before he can be made to respond in damages.[378] The ordinary care and attention which is usually required of millers operating leased mills would be cleaning and dressing the stones, adjusting and regulating the machinery, cleaning the race of such deposits or accretions as would follow the use of the mill, and such other similar acts which demand the miller's skill, yet which require neither the expenditure of money nor the consumption of much time or labor.[379] It would be the tenant's duty to remove temporary or accidental obstructions from drains, spouts, water pipes and the like, and to keep the premises in as good order as he received them, whether stipulated for in the lease or not.[380] Ordinary repairs must be paid for by the tenant unless he covenants otherwise, but extraordinary repairs ought to be paid for by the landlord.[381]

If it does not appear that the want of repair is causing an immediate injury to the estate, a life tenant could properly delay a reasonable time to make the repairs, in order that they may be made at such reasonable expense as the nature of the repairs and the condition of the estate would reasonably require. The tenant cannot be held to a more rigid rule in respect to the estate than would be observed by a prudent man of his own estate absolutely.[382]

§ 630. **Where the lessees in a lease of real property have expressly covenanted to repair,** the express covenant takes the place of the implied covenant and becomes the measure of the tenant's liability.[383] Though acts of a tenant are tortious in their nature, they may also be breaches of his contract with his landlord for which the tenant will be responsible in an action *ex contractu*.[384] Where lessees contracted "to take good care of the leased building, and guard particularly against fire and waste," they could be sued in contract for injuries for which they would otherwise be liable in tort. But a tenant

[377] Machen v. Hooper, 73 Md. 342, 21 Atl. 67; Hess v. Newcomer, 7 Md. 325.

[378] Sheer v. Fisher, 27 Ill. App. 464.

[379] Stultz v. Locke, 47 Md. 562.

[380] Russell v. Rush, 2 Pittsb. R. (Pa.) 134.

[381] Scheerer v. Dickson, 3 Brewst. (Pa.) 276; Hitner v. Ege, 23 Pa. St. 305.

[382] Harvey v. Harvey, 41 Vt. 373.

[383] California &c. Co. v. Armstrong, 17 Fed. 216, 8 Sawy. (U. S.) 523.

[384] Carter v. George, 30 Kan. 45, 1 Pac. 58.

for years, being liable for permissive waste, would also be liable in an action sounding in tort for injuries to the inheritance, although he were bound by express covenants to repair.[385] An action may be one of tort purely, although the existence of a contract may have been the occasion or furnished the opportunity for committing the tort.[386] It would be sufficient to allege the making of a lease, the entry of the lessee, the good condition of the premises, and the injury caused by the bad management of the lessee. Such a cause of action is one sounding in tort and not in contract.[387]

A lease in the terms "to have and to hold and to use and control as the lessee thinks proper for his benefit during his natural life" is equivalent to a leasing without impeachment of waste. A clause without impeachment of waste does not operate as a license to destroy the estate or to commit malicious waste, such as cutting down fruit or shade trees; but it enables the tenant to cut wood and open mines. The real intention of such a clause is to enable the tenant to do many things which would otherwise amount to waste. These words do not operate as a license to the tenant to destroy the estate or to commit malicious waste.[388]

§ 631. On a demise of farming lands a covenant is raised by operation of law that they shall be used as such and cultivated in a husbandlike manner; that no waste shall be committed and that the soil shall not be exhausted by negligent or improper tillage.[389] The bare relation of landlord and tenant is a sufficient consideration to oblige the tenant to farm in a good and husbandlike manner, according to the custom of the country.[390] But the distinction must be noticed between waste and bad husbandry. "It is not waste at common law," observes Baron Parke, "either wilful or permissive, to leave the land uncultivated. In order to oblige him to farm according to good husbandry, you must have either some express contract, or some implied contract from the custom of the country."[391] In Vermont a landlord can maintain assumpsit for the failure of his tenant on the shares to

[385] Moore v. Townshend, 33 N. J. L. 284.

[386] Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632.

[387] Wright v. Tileston, 60 Minn. 34, 61 N. W. 823.

[388] Stevens v. Rose, 69 Mich. 259, 37 N. W. 205.

[389] Walker v. Tucker, 70 Ill. 527; Chapel v. Hull, 60 Mich. 167, 26 N. W. 874; Conrad v. Morehead, 89 N. Car. 31.

[390] Powley v. Walker, 5 Term R. 373; Hallifax v. Chambers, 4 M. & W. 662; Westropp v. Elligott, L. R. 9 App. Cas. 815, 823.

[391] Hutton v. Warren, 1 M. & W. 466, 476.

conduct the leased farm in a husbandlike manner.[392] In that state it is also settled that an action of account is the proper remedy for the adjustment of controversies growing out of the common mode of leasing farms for a share of the products and profits.[393] To avoid being guilty of waste, the tenant of a farm is bound to keep fences in good repair, and he is responsible for all damage caused by his failure to do so.[394] It has been declared that the law requires a tenant to make ordinary repairs to buildings, to repair and keep up fences, and to remove and keep down filth growing on farming and grazing lands at his own expense, unless otherwise provided in the lease.[395]

According to the law of England, if an ancient meadow which has been meadow time out of memory, as brook meadow, is converted into arable land, this is waste.[396] Proof that land has been meadow so far as memory extends not to the contrary is conclusive evidence of its being ancient meadow, in the absence of earlier evidence still. In the United States, the principle of the common law under consideration was not applicable at the time of settlement, and has not been applicable at any time since; for it has been the constant usage of farmers to break up their grass lands for the purpose of raising crops by tillage and laying them down to grass again.[397] So it may be laid down as a general rule in this country that plowing up meadow land and planting a grain crop,[398] or converting meadow land into pasture land,[399] is not waste when such a course is natural and would not be injurious to the reversion. But where a tenant starts in to plow up all the meadow land on the farm, which will seriously injure it and destroy its rental value, the landlord can have him enjoined from committing such waste.[400]

The destruction of ornamental trees, fences and walls, and the quarrying and removal of stone and gravel, is voluntary waste.[401] Digging up and carrying away fruit trees also constitutes the same kind of waste.[402] So it has been held that barking and plowing up

[392] Reynolds v. Chynoweth, 68 Vt. 104, 34 Atl. 36.

[393] La Point v. Scott, 36 Vt. 603.

[394] Andrews v. Jones, 36 Tex. 149; Fenton v. Montgomery, 19 Mo. App. 156; Hoyleman v. Kanawha &c. R. Co., 33 W. Va. 489.

[395] Windon v. Stewart, 43 W. Va. 711, 28 S. E. 776.

[396] Tresham v. Lamb, 2 Rolle Abr. 814; Darcy v. Askwith, Hobart 234; Atkins v. Temple, 1 Rep. in ch. 14.

[397] Pynchon v. Stearns, 11 Metc. (Mass.) 304, 45 Am. Dec. 207.

[398] Hubble v. Cole, 85 Va. 87, 7 S. E. 242.

[399] Clemence v. Steere, 1 R. I. 272.

[400] Chapel v. Hull, 60 Mich. 167, 26 N. W. 874.

[401] United States v. Bostwick, 94 U. S. 53.

[402] Bellows v. McGinnis, 17 Ind. 64.

young apple trees by cultivating a crop among them is not ordinary "wear and tear" of a farm rented for a year.[403] To permit stock to go into an orchard and destroy fruit trees is a want of reasonable care, and constitutes waste on the part of a tenant.[404] The same is true of the act of a tenant in turning hogs into a meadow, whereby it is rooted up and injured.[405] On a demise of farming lands the lessee covenanted that he would "generally improve the property." This general improvement, by a fair construction, referred to the treatment of the lands in their use for agricultural purposes. The mode of cultivation, the proper and sufficient use of manures in enriching the land, and matters of that sort, are within the meaning of such a stipulation. To hold it to relate to improvements of any other character would leave the obligations of the tenant under it unbounded. Such a construction cannot properly be contended for.[406]

§ 632. A tenant, whether rightfully in possession or not, cannot, without the consent of the landlord, make material changes or alterations in a building to suit his taste or convenience, and, if he does, it is waste. The law is undoubtedly so settled. Any material change in the nature or character of the buildings made by the tenant is waste, although the value of the property should be enhanced by the alteration.[407] A tenant cannot, under the pretense of advantage to the reversioner, change the nature of buildings, and such changes, though beneficial, would be waste.[408] The American cases have modified the law of waste in regard to farming lands to adapt it to the circumstances of a new and growing country, in order to encourage the tenant for life in making a reasonable use of wild and undeveloped land.[409] But it has been declared that there can be no pretense of a modification in the rule against waste in the case of tearing down houses or taking away inner walls or partitions. It would be difficult to set any limits to such acts by judicial decisions. Where such

[403] Thompson v. Cummings, 39 Mo. App. 537.

[404] Warder v. Henry, 117 Mo. 530, 23 S. W. 776.

[405] Bellows v. McGinnis, 17 Ind. 64.

[406] Naye v. Noezel, 50 N. J. L. 523, 14 Atl. 750.

[407] Brock v. Dole, 66 Wis. 142, 28 N. W. 334; Kidd v. Dennison, 6 Barb. (N. Y.) 9, 13; Douglass v. Wiggins, 1 Johns. Ch. (N. Y.) 435; Klie v. Von Broock, 56 N. J. Eq. 18, 37 Atl. 469.

[408] Jackson v. Andrew, 18 Johns. (N. Y.) 431, 434; M'Cullough v. Irvine, 13 Pa. St. 438; Doe v. Jones, 4 B. & Ad. 126; Agate v. Lowenbein, 57 N. Y. 604.

[409] Hastings v. Cruncleton, 3 Yeates (Pa.) 261; Findlay v. Smith, 6 Munf. (Va.) 134; Ballentine v. Poyner, 2 Hayw. (N. Car.) 110; Irwin v. Covode, 224 Pa. St. 162.

changes are desired they should be left to the agreement of the parties.[410] In the cases which are supposed to illustrate this modification, a permission by the owner to the tenant to alter and change the building is either found in the terms of the demise or is to be implied from the circumstances of the case.[411] If by the terms of his lease it appears that additions and improvements were to be made by the lessee, no action of waste can be sustained against him, although he make such alterations as at common law would have been waste.[412] A covenant on the part of a lessee to keep repaired such improvements as he should make creates an implied contract on the part of the lessor that such improvements might be made, although they would be waste at common law.[413] Where a lease authorized a lessee to make inside alterations, provided he did not injure the premises, it was held to be a question of fact to be submitted to the jury whether the taking down of partitions did not injure the premises.[414] The reason for this is that such expressions do not relieve the tenant from liability for voluntary waste, and the acts of the tenant must be to the permanent improvement of the estate, and such as a prudent owner would do.[415] A covenant by a lessee to make no strip or waste would not be inconsistent with a permission to him to make improvements; a covenant of this kind would restrain the tenant from injuring the premises, but would not preclude him from making such alterations in the demised premises as might be for their interest and benefit, although they might come within the strict legal definition of waste.[416]

The rise in value of land during the holding of the tenant cannot be taken into account in determining whether the act of the tenant injures the inheritance. It is waste for a tenant for life to tear down a building, although the estate, without the building, is more valuable intrinsically than it was at the beginning of the life estate, because of a general rise in values.[417] A mere intention to erect a better structure will not prevent the tearing down of a building from being waste.[418] A stipulation in a lease allowing alterations to adapt build-

[410] Agate v. Lowenbein, 57 N. Y. 604; Klie v. Von Broock, 56 N. J. Eq. 18, 37 Atl. 469.

[411] Klie v. Von Broock, 56 N. J. Eq. 18, 37 Atl. 469.

[412] Hasty v. Wheeler, 12 Me. 434; Doe v. Jones, 4 B. & Ad. 126.

[413] Doe v. Jones, 4 B. & Ad. 126.

[414] Agate v. Lowenbein, 57 N. Y. 604.

[415] Vincent v. Spicer, 22 Beav. 380. The *reductio ad absurdam* suggested in Garth v. Cotton, 1 Ves. Sr. 524, 1 Dick. 123, that tenant might commit waste if it did not amount to waste has been disapproved.

[416] Hasty v. Wheeler, 12 Me. 434.

[417] M'Cullough v. Irvine, 13 Pa. St. 438.

[418] Dooly v. Stringham, 4 Utah 107, 7 Pac. 405.

ings on land for other purposes than that of livery stable does not confer a right to tear down and destroy such building, even though a better or more expensive one be erected in its place.[419] A tenant has no right to pull down a building,[420] even though the structure is in such a state of dilapidation that it is beyond repair. But he may protect himself by tearing it down when it is so ruinous as to be liable to fall and cause injury.[421]

§ 633. The cases in this country relied on to show an amelioration of the strict English rule are Jackson v. Tibbits,[422] and Winship v. Pitts.[423] In the former case the waste was the cutting a door between two rooms in the second story, and putting a window in the door of a cellar. These changes were beneficial to the premises. The judge, at the trial, charged that this was waste and worked a forfeiture, but a new trial was granted on the ground that the whole premises were not forfeited, but only the part wasted, and, further, that there was proof from which the jury might infer a waiver. In the second case a tenant of a lot which had vacant land in the rear proposed to erect a stable there, and the landlord, owning other land in the neighborhood, filed a bill for an injunction. The chancellor held that the mere erection of a stable on vacant land was not waste. It never has been waste for a tenant to erect a new edifice on vacant land.[424] A Massachusetts case has gone further and adopted the doctrine that the changes and alterations attendant upon the development of land near a city for residential purposes is not waste if the land is thereby increased in value. So there was declared to be no authority for holding that the opening of a new street by a tenant and draining land were acts of waste. If breaking up meadow land occasionally was a judicious and suitable mode of husbandry, the changing the surface by breaking up and cultivating it was not waste; removing soil for the building of houses and erecting them, and digging drains, if the estate on the whole would be equally or more valuable to the owners of the inheritance, would not be waste.[425]

The effect of changing conditions was illustrated in a striking way

[419] Davenport v. Magoon, 13 Ore. 3.
[420] Cannon v. Barry, 59 Miss. 289.
[421] Clemence v. Steere, 1 R. I. 272.
[422] Jackson v. Tibbets, 3 Wend. (N. Y.) 341.
[423] Winship v. Pitts, 3 Paige (N. Y.) 259.
[424] Klie v. Von Broock, 56 N. J. Eq. 18, 37 Atl. 469; Hubble v. Cole, 85 Va. 87, 7 S. E. 242; Pynchon v. Stearns, 11 Metc. (Mass.) 304, 45 Am. Dec. 207; Winship v. Pitts, 3 Paige (N. Y.) 259, 262; Bac. Abr. Waste, ch. 5.
[425] Pynchon v. Stearns, 11 Metc. (Mass.) 304; 45 Am. Dec. 207.

in a case arising in Wisconsin. Advancing business and manufacturing interests surrounded a once elegant mansion, until it stood isolated and alone, standing upon just enough ground to support it, and surrounded by factories and railway tracks, absolutely undesirable as a residence and incapable of any use as business property. Such a complete change of conditions, not produced by the tenant, but resulting from causes which none could control, could not be ignored, and the ironclad rule could not be applied that a tenant can make no change in the uses of the property because he will destroy its identity. The tenant was not required to stand by and preserve the useless dwelling house. The court restricts the scope of this decision, and says that it is not to be construed as justifying a tenant in making substantial changes in the leasehold property, or the buildings thereon, to suit his own whim or convenience, because he may be able to show that the change is in some degree beneficial. Under all ordinary circumstances, the landlord or reversioner is entitled to receive the property at the close of the tenancy in substantially the condition in which it was when the tenant received it, but after a complete and permanent change of surrounding conditions, the question whether a life tenant has been guilty of waste in making changes necessary to make the property useful is a question of fact for the jury.[426]

Furthermore, changed economic conditions have been held to release a life tenant of farming land from his obligation to repair, when the structures which were suffered to decay were not suited for use under changed conditions. The rule has been stated to be that where a prudent owner of the fee would have suffered the barn or other building, unsuitable because of its great proportions to his wants under the new state of society since the abolition of slavery, to have fallen into decay rather than incur the cost of repair, then the tenant would not be liable for permissive waste.[427]

§ 634. The intent or motive with which a tenant acts is immaterial in determining what constitutes waste. A tenant for life cannot pull down buildings, cut off timber trees, or do other acts which tend to the disherison of the remainderman or reversioner, and justify them on the ground that he acted in good faith, without any purpose of permanently injuring the estate. Such acts, in law, constitute waste, for which the tenant for life is liable, however innocent or

[426] Melms v. Pabst Brewing Co., 104 Wis. 7, 79 N. W. 738.

[427] Sherrill v. Connor, 107 N. Car. 630, 12 S. E. 588.

honest may have been the purpose with which they were done.[428] Where a statute declared it criminal in a tenant during his term to wilfully and unlawfully injure or damage the leased house, and the tenant removed from the house certain window sashes which he had placed in them, under a claim that they belonged to him, it was held that it did not come within the meaning of the statute.[429] A tenant who, as a wilful wrong-doer, commits waste by removing a building is chargeable to the reversioner with the highest probable or speculative value of such building.[430]

§ 635. **A tenant for life or for years who cuts standing timber for the purpose of sale,** and not merely for necessary estovers or for reasonable clearing for cultivation, is guilty of waste according to the common-law rule.[431] This rule has been applied, even though the tenant has a right to cut firewood and firewood is taken in exchange, because firewood might have been secured directly, without resorting to the cutting of timber trees.[432] So it has been held to be objectionable for a tenant to cut timber to burn bricks which have been made for the purpose of sale.[433] An exception to the general rule allows the tenant to exchange timber cut on the leasehold premises for lumber with which to make necessary repairs when that seems to be the most economical mode of making the repairs.[434]

An authority to clear land for cultivation does not, according to an Alabama decision, give the tenant a right to make merchandise of the timber taken from the parts cleared, nor does an authority to use land and take care of it confer such a power.[435]

A tenant for life or for years of a farm has a right to cut wood in reasonable quantities for fires and repairs.[436] It is not required or

[428] Clark v. Holden, 7 Gray (Mass.) 8.

[429] State v. Whitener, 93 N. Car. 590.

[430] Tate v. Field, 57 N. J. Eq. 53, 40 Atl. 206.

[431] Warren County v. Gans, 80 Miss. 76, 31 So. 539; Padelford v. Padelford, 7 Pick. (Mass.) 152; Kidd v. Dennison, 6 Barb. (N. Y.) 9; Proffitt v. Henderson, 29 Mo. 325; Davis v. Gillian, 5 Ired. Eq. (N. Car.) 308; Clemence v. Steere, 1 R. I. 272; Loudon v. Warfield, 5 J. J. Marsh. (Ky.) 196; Sargent v. Towne, 10 Mass. 303; Conner v. Shepherd, 15 Mass. 164.

[432] Padelford v. Padelford, 7 Pick. (Mass.) 152.

[433] Livingston v. Reynolds, 26 Wend. (N. Y.) 115.

[434] Loomis v. Wilbur, 5 Mason (U. S.) 13; Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601; Miller v. Shields, 55 Ind. 71.

[435] Ladd v. Shattock, 90 Ala. 134, 7 So. 764.

[436] Hubbard v. Shaw, 12 Allen (Mass.) 120; Calvert v. Rice, 91 Ky. 533, 34 Am. St. 240; Loudon v.

expected of the tenant that he shall expend his money in buying plank or lumber to improve fences and keep the premises in repair, so that the timber may pass from him to the inheritance untouched, although its judicious use may lessen the value of the estate. The owner of the fee would use the timber. He would not cut trees in a yard left for ornamental purposes, nor could the tenant, without being guilty of waste; but ordinary woodland can be used in a prudent manner for the benefit of the premises.[437] But to make improvements which it is not the duty of the tenant to make, he may not commit waste upon the inheritance by cutting timber, and justify it on the ground that the benefit compensates the damage.[438] Thus, where a building is destroyed by act of God, the tenant has no right to take timber from the estate, to its injury, to rebuild, on the ground of its compensating the injury by equal benefit, because this would be allowing the tenant to force the reversioner to submit to the judgment and will of the tenant in a matter touching his estate which might not be in accordance with his own.[439]

Although it is ordinarily implied that every tenant of a farm is entitled to wood necessary for fuel and for repairs on fences and buildings, where a tenant covenants to keep in repair he must supply his own materials for use in making repairs.[440] The profitable enjoyment of the land is not the proper criterion to determine the question of waste. There may be waste where there is such profitable enjoyment, and there may be profitable enjoyment without waste. The cutting of timber may be necessary to the profitable enjoyment of the land according to the tenant's standard of profit, and yet be a great outrage upon the rights of the reversioner. If land is valuable for the timber upon it alone, it would surely be waste for a tenant to cut and carry away all the timber of any value; in that case the tenant must respect the rights of the owner of the inheritance.[441] If a tenant for life by right of dower permitted a pasture to become woodland, bearing a growth fit for timber, and it was *de facto* such woodland when the wood and timber were cut, such cutting was waste, in the same man-

Warfield, 5 J. J. Marsh. (Ky.) 196; Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362; Walters v. Hutchins, 29 Ind. 136; Alexander v. Fisher, 7 Ala. 514; Miller v. Shields, 55 Ind. 71.

[437] Calvert v. Rice, 91 Ky. 533, 34 Am. St. 240.

[438] Miller v. Shields, 55 Ind. 71; Clarke v. Cummings, 5 Barb. (N. Y.) 339; Sohier v. Eldredge, 103 Mass. 345, 351; Smith v. Jewett, 40 N. H. 530.

[439] Miller v. Shields, 55 Ind. 71.

[440] Harris v. Goslin, 3 Harr. (Del.) 340.

[441] Proffitt v. Henderson, 29 Mo. 325.

ner and to the same extent as it would have been had it been woodland of the same description when it was set off to her as dower. It was wood and timber land when the timber was cut; it was held by a tenant for life; and therefore cutting timber and other wood for purposes other than the use of the estate for timber and fuel, by tenant for life was waste. The tenant in dower had no right, after the land had become covered with a growth of wood and timber by her permission, to cut it, beyond the amount required for the estate itself, even though it might have been good husbandry in an owner in fee thus to take off the wood and timber, clear up the land and thus again bring it under cultivation.[442]

An action of trover or replevin will lie at the suit of a landlord against his tenant, pending the tenancy, for wood into which trees wrongfully severed from the demised premises by the tenant have been converted.[443] The tenant's possession of the land entitles him to the possession of all that is attached to it so as to constitute a part of the freehold—as trees—so long as they remain so attached and continue to be a part of the freehold; but he has no title to trees and can assert no adverse claim to them against his landlord. The title to them, as to the land, remains in the landlord. When they are severed from the freehold they cease to be a part of the thing leased by the tenant; they are no longer a part of the realty. To show title to the personalty in such case involves no inquiry into the title of the land from which the severance has been made, and no inquiry as to the right of possession of the land. The plaintiff is not required to say he had title to the land, and the defendant is not allowed to say that the plaintiff has no title; that issue cannot be made; the relation of landlord and tenant entirely eliminates it.[444]

§ **636. Where wild timber land is leased for farming,** the parties are presumed to intend that the lessee should be at liberty to cut part of the timber to fit the land for cultivation.[445] In the United States

[442] Clark v. Holden, 7 Gray (Mass.) 8; McGregor v. Brown, 10 N. Y. 114.

[443] Brooks v. Rogers, 101 Ala. 111, 13 So. 386; Street v. Nelson, 80 Ala. 230; Harlan v. Harlan, 15 Pa. St. 507, 513; Anderson v. Hapler, 34 Ill. 436; Congregational Society v. Fleming, 11 Iowa 533; Dorsey v. Moore, 100 N. Car. 44, 6 S. E. 270; Farrant v. Thompson, 5 B. & Ald. 826; Truss v. Old, 6 Rand. (Va.) 556, 18 Am. Dec. 748; Mooers v. Wait, 3 Wend. (N. Y.) 104, 20 Am. Dec. 667.

[444] Brooks v. Rogers, 101 Ala. 111, 13 So. 386.

[445] Ballentine v. Poyner, 2 Hayw. (N. Car.) 110; Ward v. Sheppard, 2 Hayw. (N. Car.) 283; King v. Miller, 99 N. Car. 583, 6 S. E. 660; Chase v. Hazelton, 7 N. H. 171; 9; Jackson v. Brownson, 7 Johns. (N. Y.) 227, 233; Mooers v. Wait, 3

the cutting of timber in order to clear up wild land and fit it for cultivation, if consonant with the rules of good husbandry, is not waste, although such acts would clearly be waste in England.[446] So it has been held that a tenant in dower may clear woodland assigned to her in dower, provided she does not exceed a just proportion of the whole tract.[447] The timber thus cut for the purpose of clearing may be sold without rendering the tenant liable for waste.[448] A life tenant of wild timber lands has a right to sell enough timber to pay taxes and the expenses of protecting the property.[449] For the purpose of redeeming land sold for taxes, and of subsequently keeping down the taxes, a life tenant will be permitted to fell timber in such quantities and at such places as do not seriously impair the value of the inheritance.[450] It naturally follows that to cut decaying trees, in order to give younger trees a chance to grow, has been held not to be waste.[451] Whether or not the cutting of timber upon the premises by the tenant for life be waste will depend on the custom of farmers, the situation of the country, and the value of the timber.[452] It has been declared that the cutting down of timber is not waste unless it does a lasting damage to the inheritance and deteriorates its value; and not then if no more is cut down than was necessary for the ordinary enjoyment of the land by the tenant for life.[453] In determining what extent of clearing land amounts to waste, regard must be had to the condition of the premises, and the inquiry should be, were the acts of felling trees such as a judicious, prudent owner of the inheritance would have committed;[454] and it is for the jury to determine how much may be cut before the tenant is guilty of exceeding such a limit.[455]

Wend. (N. Y.) 104, 107; Jackson v. Andrew, 18 Johns. (N. Y.) 431.

[446] McNichol v. Eaton, 77 Me. 246; Drown v. Smith, 52 Me. 141; Wilkinson v. Wilkinson, 59 Wis. 557, 18 N. W. 527; Melms v. Pabst Brewing Co., 104 Wis. 7, 79 N. W. 738; Cannon v. Barry, 59 Miss. 289; Lambeth v. Warner, 2 Jones Eq. (N. Car.) 165; King v. Miller, 99 N. Car. 583, 6 S. E. 660; Crockett v. Crockett, 2 Ohio St. 180.

[447] Hastings v. Cruncleton, 3 Yeates (Pa.) 261; Lynn's Appeal, 7 Casey (Pa.) 44; Sayers v. Hoskinson, 110 Pa. St. 473, 1 Atl. 308; Alexander v. Fisher, 7 Ala. 514.

[448] Davis v. Gilliam, 5 Ired. Eq. (N. Car.) 308; Keeler v. Eastman, 11 Vt. 293.

[449] Crockett v. Crockett, 2 Ohio St. 180.

[450] Cannon v. Barry, 59 Miss. 289.

[451] Keeler v. Eastman, 11 Vt. 293; Sayers v. Hoskinson, 110 Pa. St. 473, 1 Atl. 308.

[452] M'Cullough v. Irvine, 13 Pa. St. 438.

[453] Shine v. Wilcox, 1 Dev. & B. Eq. (N. Car.) 631; Ballentine v. Poyner, 2 Hayw. (N. Car.) 110.

[454] Woodward v. Gates, 38 Ga. 205.

[455] Chase v. Hazelton, 7 N. H. 171; Kidd v. Dennison, 6 Barb. (N. Y.) 9; Jackson v. Brownson, 7 Johns. (N. Y.) 227, 233; Mooers v. Wait, 3

§ 637. It is the duty of a tenant for life to cause all taxes assessed against his estate during the tenancy to be paid, and if he neglects this duty, thereby subjecting the estate to sale, an action at law for waste may be maintained against him.[456] Where there is no covenant or provision to the contrary, a life tenant must keep down all charges upon the property necessary to preserve it for the remainderman.[457] The act of a life tenant in permitting a large part of his estate to be forfeited for unpaid taxes is voluntary waste. That the land forfeited was unproductive woodland, that there remained belonging to the estate sufficient wood to supply its wants indefinitely, that the land had been overvalued by the assessor, and that the life tenant had tried in vain to have the valuation reduced, and that the tax was illegal, afforded no excuse. The life tenant took the estate as a whole, and was bound so to preserve it. He could not segregate the profitable from the unprofitable, nor the sterile from the fertile, by preserving the one at the sacrifice of the other. The taxes were his individual debt.[458] A tenant for life is required to keep the building in which he may have a life estate from going into decay by using ordinary care; but he is not required to expend any extraordinary sums.[459] The obligations of an equitable tenant for life as to keeping buildings in repair are substantially the same as those of a legal life tenant.[460] But although these obligations are imposed upon the life tenant, yet he cannot make improvements at the expense of the remainderman, whether necessary or not.[461] By the strict rules of the old common law, a tenant for life subject to waste could not open a new mine, and if he did so he would be guilty of waste.[462] But he could

Wend. (N. Y.) 104, 107; Jackson v. Andrew, 18 Johns. (N. Y.) 431; Drown v. Smith, 52 Me. 141.

[456] Stetson v. Day, 51 Me. 434; McMillan v. Robbins, 5 Ohio 28; Varney v. Stevens, 22 Me. 331; Prettyman v. Walston, 34 Ill. 175, 192; Phelan v. Boylan, 25 Wis. 679; Parish v. Camplin, 139 Ind. 1, 15, 37 N. E. 607; Crentz v. Heil, 89 Ky. 429, 12 S. W. 926; Cannon v. Barry, 59 Miss. 289; Carter v. Youngs, 42 N. Y. Super. Ct. 418.

[457] Hart v. Hart, 117 Wis. 639, 653, 94 N. W. 890; Phelan v. Boylan, 25 Wis. 679.

[458] Cannon v. Barry, 59 Miss. 289.

[459] Wilson v. Edmonds, 24 N. H. 517; Parish v. Camplin, 139 Ind. 1, 15, 37 N. E. 607; Miller v. Shields, 55 Ind. 71; Carter v. Youngs, 42 N. Y. Super. Ct. 418; Co. Litt. 53a, b; 2 Black. Com. 281.

[460] Schulting v. Schulting, 41 N. J. Eq. 130, 3 Atl. 526; Combes v. Cadmus, 36 N. J. Eq. 382, s. c. 37 N. J. Eq. 264.

[461] Parish v. Camplin, 139 Ind. 1, 15, 37 N. E. 607; Miller v. Shields, 55 Ind. 71; Clark v. Middlesworth, 82 Ind. 240.

[462] Whitfield v. Bewit, 2 P. Williams 240; Hook v. The Garfield Coal Co., 112 Iowa 210, 83 N. W. 963; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411.

operate open ones existing at the commencement of the life estate,[463] even to the point of exhaustion, without making himself responsible to the owner of the reversion.[464] And if the mines have been opened before the tenant's estate began, he can enlarge them and operate them, even though they had been abandoned.[465]

§ 638. When waste is threatened an injunction to prevent it is the proper remedy.[466] But an injunction will not lie for waste already committed when no further waste is threatened.[467] Nor will equity interfere to oust a tenant from year to year because he is a bad manager and insolvent.[468] A lessor may, by injunction, prevent his lessee from converting the demised premises to uses inconsistent with the terms of the lease, and from making material alterations, and committing other kinds of waste.[469] A court of equity has power to protect a reversioner against waste by a tenant in possession. But it will not interfere unless it is shown that a positive injury to the premises, repugnant to the terms of the lease, or their conversion to uses unauthorized is contemplated and reasonably apprehended.[470] Thus a court of equity restrained a tenant under a perpetual lease from tearing down a building on the premises where such removal would impair the security for rent; but so long as the rent is not rendered insecure, the right of the tenant to alter, remodel and reconstruct at his own pleasure ought not to be interfered with.[471] In modern equity practice an injunction to restrain waste will be granted in many instances where no legal action could be maintained, although the interest of the injured party is legal, and also where the estate of the injured party is entirely equitable. An injunction may also be granted to restrain threatened waste, although none has been committed. The common-law remedies for waste were insufficient for, among other

[463] Saunders' Case, 5 Coke 12; Astry v. Ballard, 2 Lev. 185.

[464] Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411; Sayers v. Hoskinson, 110 Pa. St. 473, 1 Atl. 308; Neel v. Neel, 19 Pa. St. 323; Lynn's Appeal, 31 Pa. St. 44. *Contra*, Hill v. Taylor, 22 Cal. 191.

[465] Gaines v. Green Pond &c. Co., 33 N. J. Eq. 603.

[466] Dooley v. Stringham, 4 Utah 107, 7 Pac. 405; Loudon v. Warfield, 5 J. J. Marsh. (Ky.) 196; United States v. Parrott, 1 McAll. (U. S.) 271; Brock v. Dole, 66 Wis. 142, 28 N. W. 334.

[467] Crockett v. Crockett, 2 Ohio St. 180. See also, Smith v. Cooke, 3 Atk. 378, 381.

[468] Blain v. Everitt, 36 Md. 73.

[469] Douglass v. Wiggins, 1 Johns. Ch. (N. Y.) 435; Maddox v. White, 4 Md. 72; Barret v. Blagrave, 5 Ves. 555; Klie v. Von Broock, 56 N. J. Eq. 18, 37 Atl. 469.

[470] McDaniel v. Callan, 75 Ala. 327.

[471] Crowe v. Wilson, 65 Md. 479, 5 Atl. 427.

reasons, they did not stop the injury that was going on; hence courts of equity interposed by injunction to restrain the defendant from continuing to commit waste; and its remedy has been found so simple and so effective that it has to a great extent superseded the common-law action.[472] It is not ordinarily necessary to the issuing an injunction restraining waste that the party in possession should be shown to be insolvent.[473] It has been declared to be the rule that courts of equity will take no jurisdiction of permissive waste by a life tenant, because their constant interference in such matters would render the enjoyment of the life estate impossible.[474] Yet, where the neglect and omissions of the lessees to perform their obligations under a lease resulted in waste, which, if permitted to continue, must eventually result in the ruin and destruction of its subject-matter, to the irreparable damage of the lessor, a court of equity did interfere and canceled the lease to prevent such waste and destruction.[475]

In ordinary cases, the account for waste already committed is merely incidental to the relief by injunction against future waste, and is directed upon the principle of preventing a needless multiplication of suits; it is not in itself a substantive ground of equitable relief, as the remedy at law is adequate.[476]

§ 639. Forfeiture of the place wasted and treble damages were the punitive measures provided by the statute of Gloucester[477] upon the conviction of a tenant for committing waste;[478] but the action on the case in the nature of waste, which superseded the writ of waste, entitles the landlord to recover actual damages only, and does not involve the forfeiture of the estate. This ground of forfeiture, just like any other, may be waived by the person entitled to claim it; so where the landlord lies by till the waste committed by the tenant has been repaired, he cannot subsequently insist on a forfeiture.[479] By statute in Indiana, judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion against the

[472] Palmer v. Young, 108 Ill. App. 252.

[473] Williams v. Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611.

[474] Cannon v. Barry, 59 Miss. 289.

[475] Anderson v. Hammon, 19 Ore. 446, 24 Pac. 228.

[476] Winship v. Pitts, 3 Paige (N. Y.) 259; Crockett v. Crockett, 2 Ohio St. 180; Parrott v. Palmer, 3 My. & K. 632.

[477] 6 Edw. I, ch. 5.

[478] Crowe v. Wilson, 65 Md. 479, 5 Atl. 427; Sackett v. Sackett, 8 Pick. (Mass.) 309; Stetson v. Day, 51 Me. 434; McMillan v. Robbins, 5 Ohio 28; Prettyman v. Walston, 34 Ill. 175, 192.

[479] Jackson v. Andrew, 18 Johns. (N. Y.) 431.

tenant in possession when the injury to the estate in reversion shall be adjudged in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done in malice.[480] It seems that under this statute a general finding in an action for waste and judgment for the possession of lands is not sufficient. The court will not, in the face of the statute, indulge in any presumptions as to what the jury may have believed or what the evidence may have been upon the subject of the injury.[481]

In Wisconsin it has been held that, since the local statutes made full regulations on the subject of waste, without providing for forfeiture, there could be no forfeiture in that state on this ground, and that the statute of Gloucester had not been adopted there as part of the common law.[482]

VI. *Actions Relative to Possession.*

§ 640. The common law rule is that actual or constructive possession is necessary to support an action of trespass quare clausum, and, a tenant for a definite term being in possession, the landlord has not such constructive possession as will entitle him to maintain such action. The old action of trespass *quare clausum fregit,* as its name imports, was based upon an alleged invasion of possession, and in such action could be litigated only the injury to the possession, and damages recovered only by the party in or entitled to the possession.[483] So, a long line of authorities lay down the doctrine that, while land is in the possession of a lessee for years, an injury to the possession, which is not of a permanent character, entitles the lessee to maintain an action of trespass *quare clausum* but does not entitle the lessor to maintain such an action.[484] It has been declared to be a well-recog-

[480] Bollenbacker v. Fritts, 98 Ind. 50; R. S. 1881, § 286.

[481] Sullivan v. O'Hara, 1 Ind. App. 259, 27 N. E. 590.

[482] Phelan v. Boylan, 25 Wis. 679.

[483] Arneson v. Spawn, 2 S. D. 269, 49 N. W. 1066; Hersey v. Chapin, 162 Mass. 176, 38 N. E. 442; Bascom v. Dempsey, 143 Mass. 409, 9 N. E. 744; Gooding v. Shea, 103 Mass. 360; Woodman v. Francis, 14 Allen (Mass.) 198; Gibbons v. Dillingham, 10 Ark. 9.

[484] Indiana: Boyce v. Graham, 91 Ind. 420; Chicago &c. R. Co. v. Linard, 94 Ind. 319. Kentucky: McCloskey v. Doherty, 97 Ky. 300, 30 S. W. 649. Maine: Little v. Palister, 3 Me. 6. Massachusetts: Geer v. Fleming, 110 Mass. 39. Missouri: Lindenbower v. Bentley, 86 Mo. 515. New Hampshire: Anderson v. Nesmith, 7 N. H. 167; Robertson v. George, 7 N. H. 306; Wentworth v. Portsmouth &c. Ry., 55 N. H. 540. Ohio: Miller v. Fulton, 4 Ohio 433. South Carolina: Davis v. Clancy, 3 McCord (S. Car.) 422. Tennessee: McNairy v. Hicks, 3 Baxt. (Tenn.) 378. Texas: Reynolds v. Williams,

nized rule that the owner himself cannot maintain trespass *quare clausum* unless he is in possession at the time of the alleged trespass, for the gist of the action is the injury to the possessory right.[485] Therefore, a landlord, out of possession, cannot maintain trespass as long as the tenant is in possession.[486]

§ 641. However, a qualification of the foregoing rule permits the landlord, while a tenant is in possession, to maintain trespass on the case for an injury to the freehold, or, in case a statutory form of action has superseded the common law writs, to maintain the statutory action corresponding to an action on the case.[487] If such a suit under a code, by whatever name it may be called, is for a damage sustained by the owner, it is properly brought by him.[488] In Kentucky[489] and in Wisconsin[490] an owner out of possession is, by express statute, given a right to maintain an action of trespass for an injury to the freehold. It is well settled that for a permanent injury to the freehold, the landlord may sue in an appropriate form of action, even though his tenant be in possession of the premises.[491] While a lessor cannot maintain an action for injury to the legal rights of the lessee,[492] he may sue for an actual damage to the reversion.[493]

But this qualification has been said to apply only in cases where there has been a trespass. So, if the injury to the freehold was unaccompanied by any trespass, the owner of the reversion could not

1 Tex. 311; Railway v. Smith, 3 Tex. Civ. App. 483, 23 S. W. 89. Vermont: Catlin v. Hayden, 1 Vt. 375; Weston v. Gravlin, 49 Vt. 507. English: Baxter v. Taylor, 4 B. & Ad. 72.

[485] Chadbourne v. Straw, 22 Me. 450; Jones v. Leeman, 69 Me. 489; Kimball v. Hilton, 92 Me. 214, 42 Atl. 394.

[486] Bartlett v. Perkins, 13 Me. 87; Carroll v. Rigney, 15 R. I. 81, 23 Atl. 46.

[487] Lachman v. Deisch, 71 Ill. 59; Hersey v. Chapin, 162 Mass. 176, 38 N. E. 442; Ashley v. Ashley, 4 Gray (Mass.) 197; Lienow v. Richie, 8 Pick. (Mass.) 235; Davis v. Nash, 32 Me. 411; Lawry v. Lawry, 88 Me. 482, 34 Atl. 273; Ray v. Ayers, 5 Duer (N. Y.) 494; Bobb v. Syenite Granite Co., 41 Mo. App. 642; Jackson v. Pesked, 1 M. & S. 234; Carroll v. Rigney, 15 R. I. 81, 23 Atl. 46; Cannon v. Hatcher, 1 Hill (S. Car.) 260; Brown v. Bridges, 31 Iowa 138; Fitch v. Gosser, 54 Mo. 267; Ridge v. Railroad Trans. Co., 56 Mo. App. 133; Gibbons v. Dillingham, 10 Ark. 9.

[488] Fitch v. Gosser, 54 Mo. 267.

[489] McCloskey v. Doherty, 97 Ky. 300, 30 S. W. 649.

[490] Wis. St. 1898, § 2198.

[491] Parker v. Shackelford, 61 Mo. 68; Austin v. Huntsville &c. Co., 72 Mo. 535, 543; Cramer v. Groseclose, 53 Mo. App. 648; Bobb v. Syenite Granite Co., 41 Mo. App. 642; Stoltz v. Kretschmar, 24 Wis. 283, 285; Watson v. Harrigan, 112 Wis. 278, 87 N. W. 1079.

[492] Stark v. Miller, 3 Mo. 470.

[493] Fitch v. Gosser, 54 Mo. 267.

maintain such an action against the tort-feasor. A person entering on leased premises by the consent of the tenant cannot be considered a trespasser, even though he causes an injury to the reversion; for an abuse of an authority to enter upon land does not make the party entering a trespasser.[494] On the other hand a mere license from a lessor for a third person to enter on leased premises does not confer any right to enter except by the consent of the lessee. If the licensee enter by force he is a trespasser and the lessor is not liable for his conduct.[495]

§ 642. In determining whether the landlord or tenant or both may recover damages for injury to real estate, the general rule applies that wherever a legal right is violated the owner of such right is entitled to action therefor. If possession only is disturbed, the owner of the right of possession may have the right of action. If the freehold, independent of and beyond its use and enjoyment by the tenant, is injured, the owner of the freehold in like manner has his action.[496] The tenant, and not the landlord, has the exclusive right of action for any injury to the possession of the rented premises; and this is true whether he retains the possession or not, since it is his exclusive right of possession that gives him the exclusive right of action.[497] The possession of a tenant is as complete for all purposes of redress against wrong-doers as is the possession of an owner in fee simple.[498] So far as regards any injury to the use of the land during the term, no distinction exists between the rights of a tenant for years and an owner in fee in possession.[499] Where a tenant in possession of land has been evicted by a stranger, he alone is entitled to bring an action to recover possession.[500] A tenant in possession of premises affected by a nuisance, under a lease made during the continuance of the nuisance, can maintain an action to abate it and recover damages.[501] But an in-

[494] Perry v. Bailey, 94 Me. 50, 46 Atl. 789; Dingley v. Buffum, 57 Me. 379. See also, Watson v. Harrigan, 112 Wis. 278, 87 N. W. 1079.

[495] McKenzie v. Hatton, 141 N. Y. 6, 35 N. E. 929.

[496] Arneson v. Spawn, 2 S. D. 269, 49 N. W. 1066; George v. Fisk, 32 N. H. 32; Bannon v. Mitchell, 6 Ill. App. 17.

[497] Walden v. Conn, 84 Ky. 312, 1 S. W. 537.

[498] Strohlburg v. Jones, 78 Cal. 381, 20 Pac. 705.

[499] Grand Rapids &c. Co. v. Jarvis, 30 Mich. 308; Heilbron v. King's River &c. Co., 76 Cal. 11, 17 Pac. 933.

[500] Maxwell v. Jones, 90 N. Car. 324.

[501] Bly v. Edison &c. Co., 172 N. Y. 1, 64 N. E. 745, reversing 54 App. Div. 427; Lockett v. Fort Worth &c. R. Co., 78 Tex. 211, 14 S. W. 564; Walker v. Walker, 51 Ga. 22; Central Ry. v. English, 73 Ga. 366; Rabaud v. Frank, 7 Mo. App. 64.

junction to restrain a nuisance is granted only where the right to be protected is a permanent one, or where its enjoyment has been of long duration.[502] The interest of a tenant from month to month is not such a right, although he may have been long in the enjoyment of the premises by such a tenure.[503] However, it has been held that a tenant of an upper story was entitled to a perpetual injunction against the tenant of the floor below, restraining him from interfering with the common passageways in the building.[504] A tenant may also recover from a third person for a tortious interference with the business conducted on the premises.[505] Under a statute providing that "the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover," it has been held that a lessee may sue for injuries to his leasehold without making the lessor a party. The words "party aggrieved" refer only to the plaintiff in the action. The object of the law is to prevent a multiplicity of suits by him, and not to deprive him of his lawful remedy, or to render a resort thereto both difficult and hazardous. If the tenant suffered substantial damages to his crops and to his leasehold, he should not be compelled to make every one a party to the action who may have some vested or contingent interest in the fee, when his claim is in no way adverse to them. The landlord and tenant may bring separate actions for injuries to their respective interests.[506]

Title in fee in the lessor is not necessary to sustain a lease against trespassers; it is sufficient to show *bona fide* possession on his part under a claim of right.[507]

§ 643. If a tenant be deprived of his leasehold interest in consequence of the appropriation by the public to public uses of the property upon which his leasehold estate rests, it cannot be doubted that he is deprived of his property. Therefore, the holder of a lease has such an interest in premises as will enable him to maintain an action for damages resulting to his leasehold estate, sustained in consequence of the construction of a duly authorized public improvement whether such damage results from the negligence of the municipal

[502] Van Bergen v. Van Bergen, 3 Johns. Ch. (N. Y.) 282; Porter v. Witham, 17 Me. 292; Jordan v. Woodward, 38 Me. 423.

[503] Clarke v. Thatcher, 9 Mo. App. 436.

[504] Miller v. Fitzgerald &c. Co., 62 Neb. 270, 86 N. W. 1078.

[505] Brunswick &c. Ry. Co. v. Hardey, 112 Ga. 604, 37 S. E. 888.

[506] Dale v. Southern R. Co., 132 N. Car. 705, 44 S. E. 399; Williams v. Canal Co., 130 N. Car. 746, 41 S. E. 1030.

[507] Kellogg v. King, 114 Cal. 378, 46 Pac. 166.

authorities or otherwise.[508] The measure of the damages is the injury to the leasehold property which is injuriously affected by the public improvement; in arriving at that damage, neither the profits in the business conducted on the premises, nor the cost to the tenant of the fixtures and improvements placed therein, nor the articles purchased for the purpose of enabling the lessee to conduct the business, nor diminution in the value of fixtures, improvements, or articles such as are removed by the lessee, can be recovered as damages. But the increased value of the premises for rent in consequence of the putting in of such fixtures and improvements may properly be considered in computing the damages to the leasehold estate. The tenant cannot prove that he had an option upon the premises for a longer term of years, if such option was not to be exercised at his will alone but was dependent upon the concurrence of the landlord.[509]

§ 644. **According to common law rules of pleading, not only must the fact that the plaintiff is a reversioner appear, but the extent of the reversion, whether it is for years or for life or in fee**; and it must be furthermore specifically alleged, according to the old practice that the injury to was to the revision.[510] But, according to later cases arising after the rules of pleading had been relaxed, it was declared that no advantage would be gained by requiring the complaint to state formally and explicitly that the reversion was injured, when the facts pleaded as the cause of action are of such a nature as necessarily to work such injury. Where a complaint shows a permanent and substantial injury to the freehold itself, for which an owner asks damages, a court cannot say that the action is for injury to the possession merely, and so cannot be maintained by an owner out of possession.[511] However, a plaintiff's right being in reversion, he is bound to show, in order to maintain his action, an invasion of this right. For an injury to the possesion, the tenant only has his remedy; for an injury to the reversion, the right of action is in the owner. It is essential that this distinction should be called to the attention of the jury, because injuries to the reversion are hard to estimate and great caution is always to be taken that the fact of damage to such interest is clearly established.[512] Cutting trees and carrying away the timber

[508] Pause v. City of Atlanta, 98 Ga. 92, 26 S. E. 489; Bentley v. City of Atlanta, 92 Ga. 623, 18 S. E. 1013.

[509] Pause v. City of Atlanta, 98 Ga. 92, 26 S. E. 489.

[510] Davis v. Jewett, 13 N. H. 88.

[511] Arneson v. Spawn, 2 S. D. 269, 49 N. W. 1066; Beavers v. Trimmer, 25 N. J. L. 97.

[512] Hastings v. Livermore, 7 Gray (Mass.) 194.

made from them would clearly be an injury to the reversion for which an action would lie;[513] but the cutting up of a lawn by driving coal teams over it was not damage of so substantial and permanent a character as to justify a finding that it was an injury to the inheritance.[514] The owner of the reversion may maintain an action against a stranger to recover damages for breaking and entering the premises, and removing a blind and breaking a pane of glass.[515] However a lessor has no right of action against a third person for use and occupation for a portion of the leased premises during the time the lessee was entitled to possession. If there has been no injury to the freehold, the right of action against such an occupant is in the lessee.[516] Furthermore, a lessor could not enjoin a third person from interfering with the lessee's enjoyment of the premises or with an easement connected with them. The right of action for such interference would be in the lessee, as he was the only person who was injured by it.[517] In furtherance of this principle it has been declared that the wrongful ouster of a tenant by a stranger is not of itself a legal ground of recovery by the landlord. To authorize recovery by him it must appear that he has sustained a loss of his rents or that he has sustained damages in the destruction of the premises or in the dilapidation of them, injurious to the reversion.[518] Whether diverting water from leased premises is an injury to the inheritance depends on circumstances. By the diversion of water from a mill while it was under lease, the lessees were the sufferers not the lessor. If the rent is paid without diminution, the lessor has no cause of complaint.[519] On the other hand the water of a natural stream cannot be taken away from land for a great number of years and then turned back, without a permanent injury to the land. The right to use water flowing over land is identified with the realty and is a real and corporeal hereditament. On this ground it has been held that a reversioner may maintain an action for interfering with natural water, although the land be in the actual possession of a tenant for years.[520] The converse is true that flowing land may be an injury to the reversion.[521]

[513] Gulf &c. R. Co. v. Settegast, 79 Tex. 256, 15 S. W. 228.

[514] Watson v. Harrigan, 112 Wis. 278, 87 N. W. 1079.

[515] Cushing v. Kenfield, 5 Allen (Mass.) 307; Ridge v. Railroad Trans. Co., 56 Mo. App. 133.

[516] Southern R. Co. v. Georgia, 116 Ga. 276, 42 S. E. 508.

[517] Coney v. Brunswick &c. Co., 116 Ga. 222, 42 S. E. 498; Walker v. Clifford, 128 Ala. 67, 29 So. 67.

[518] Walden v. Conn, 84 Ky. 312, 1 S. W. 537.

[519] Moody v. King, 74 Me. 497.

[520] Heilbron v. Last Chance &c. Co., 75 Cal. 117, 17 Pac. 65; Cary v. Daniels, 5 Metc. (Mass.) 236; Hart v. Evans, 8 Pa. St. 13.

[521] Noyes v. Stillman, 24 Conn. 15.

The true rule of damages in an action on the case, brought by a reversioner on account of an injury done to the premises, is the amount of the injury done to the estate in reversion.[522]

§ 645. A landlord has no such interest in the growing crops of his tenant as to enable him to maintain an action against a person who injures the crop.[523] This is true, even though it is provided by statute that crops shall be deemed to be vested in the landlord, for that is only to protect the landlord in respect to the collection of his rent.[524] In a suit brought for damages to a growing crop, a tenant, who is to pay one-third of the crop as rent, is nevertheless entitled to recover all the damages and not merely a proportionate share to his ultimate interest.[525] After a landlord had recovered damages for the condemnation of land for a right of way for a railway, the tenant was allowed to recover damages for injury to the crop raised on the shares caused by the negligent pulling down of fences. In the case where this decision was made the tenant had agreed to be responsible to the landlord for all injury to the crop.[526] On the other hand, it has been held that a landlord entitled by the terms of the lease to a share of the crop as rent may maintain an action for damage to the crop; and if no objection is made for non-joinder of the tenant as co-plaintiff, he may sue alone and his recovery will be apportioned according to his interest in the crop.[527] The conflicting results reached in the two preceding cases can be explained on the ground that in the latter, the court considered the landlord and tenant as tenants in common of the crop, while in the former the tenant was the owner and the landlord merely entitled to a lien. This distinction is made in Illinois, the law in that state being that, where a tenant leases premises, the rent to be paid by part of the crop, when matured, and a wrong-doer injures or destroys the crops, whereby the landlord is prevented from receiving his rents as he otherwise might, he may have his action therefor.[528] But where the crops are to be marketed by the tenant and the proceeds divided among the parties, an allegation of ownership of the crop by

[522] Dutro v. Wilson, 4 Ohio St. 101.

[523] St. Louis &c. R. Co. v. Trigg, 63 Ark. 536, 40 S. W. 579; Drake v. Chicago &c. R. Co., 70 Iowa 59, 29 N. W. 804; Townsend v. Isenberger, 45 Iowa 670; Kentucky &c. R. Co. v. Higgins, 9 Ky. L. R. 649.

[524] Bridgers v. Dill, 97 N. Car. 222, 1 S. E. 767.

[525] Texas &c. R. Co. v. Bayliss, 62 Tex. 570.

[526] L. St. L. & T. R. Co. v. Barrett, 13 Ky. L. R. 232.

[527] Van Hoozier v. Hannibal &c. R. Co., 70 Mo. 145; Johnson v. Hoffman, 53 Mo. 504.

[528] Ohio &c. R. Co. v. Singletary, 34 Ill. App. 425; Younggreen v. Shelton, 101 Ill. App. 89.

the landlord is not sustained by the proof and the landlord could not therefore maintain his action.[529]

Where fruit trees on leased premises were damaged by third persons, the landlord was held to be entitled to sue for injury to the trees and the tenant for injury to the fruit.[530]

§ 646. **Tenants at will and by sufferance.**—Where grass upon the land in possession of a tenant at will was burned by the negligence of an adjoining owner, it was held that no right of action for such burning accrued to the tenant but that the lessor was entitled to sue.[531] But the rights of a lessor at will to maintain trespass against a stranger for entering upon an estate have been altered by the statutes requiring notice to terminate such estates. Since this change in the law, the possession of a tenant at will before notice, and for three months after, can in no sense be held to be the possession of the landlord. The tenant has not only the possession but the right to possession, and in this respect, he stands on the same footing as a tenant for a term certain.[532] Still a mere tenant at sufferance cannot generally recover for an injury to the premises, for he could only recover for the injury to his possessory right and he held only on the forbearance of the legal owner. The doctrine that proof of possession alone is sufficient to maintain an action of trespass against a wrong-doer, is founded on the fact that possession is *prima facie* evidence of title. But if the title be in another, the right of the possessor to recover is limited to the amount of damage to the possessory interest; if the damage be beyond this, and to the freehold, the possessor or tenant at sufferance cannot maintain an action for its recovery.[533] The intention of the parties is the test whether sufficient possession is transferred by the letting of pasture rights to enable the lessee to maintain a possessory action in regard to the premises. This intention is to be gathered from what was said at the time of letting, from the situation and condition of the land itself, as whether it was capable of any other use consistent with the right of the tenant. The meaning of such a renting might also be controlled by the custom of the country, if there was any on the subject.[534]

Where the owner of a building leases at will the rooms therein,

[529] Ohio &c. R. Co. v. Singletary, 34 Ill. App. 425.

[530] Bedingfield v. Onslow, 3 Lev. 209.

[531] Gulf &c. R. Co. v. Cusenberry, 86 Tex. 525, 26 S. W. 43.

[532] French v. Fuller, 23 Pick. (Mass.) 104.

[533] International &c. R. Co. v. Ragsdale, 67 Tex. 24, 2 S. W. 515.

[534] Noyes v. Stillman, 24 Conn. 15.

though they constitute the chief parts of the building, such owner is not thereby put out of possession, so as to preclude him from suing in trespass for the destruction of the building.[535]

§ 647. An action of trespass by the landlord will not lie against a tenant pending the term, because the wrong which is the gist of the action is an offense against the actual possession and right of possession, and these are in the tenant.[536] The same reasons, which preclude a landlord from bringing trespass against his tenant, entitle the tenant to sue in trespass for a wrongful entry by the landlord; and this right has been held to subsist under a lease reserving to the lessor the right to sell or use for building where the landlord entered for purposes other than the two specified.[537] It was laid down in a very ancient case that a tenant for years could maintain trespass even against his landlord.[538] The contrary is true of a tenant at sufferance or strictly at will where such a holding is determined by the entry of the landlord.[539] But the statutes requiring notice to end a tenancy at will have changed this rule and it is not now competent for a landlord to enter upon the premises, without the notice to quit provided by those statutes. The consequence is that, until the time set by the notice has arrived, the lessee at will has a lawful and exclusive possession, not only as against a stranger, but also against the lessor at will.[540]

In regard to the remedy in equity of a tenant to prevent his landlord from intruding on his possession, it has been held that he cannot maintain a bill in equity to enjoin mere trespassing. Although there is a breach of the covenant for quiet enjoyment in such case, an action at law for breach of the covenant would furnish the tenant adequate relief. It is a universal rule that an injunction will not be granted to restrain a trespasser merely because he is a trespasser. The foundation for the exercise of the jurisdiction of a court of equity in the restraining of threatened trespasses rests on the inadequacy of legal remedies to compensate for probable injuries which may result

[535] Curtiss v. Hoyt, 19 Conn. 154.

[536] Brooks v. Rogers, 101 Ala. 111, 13 So. 386.

[537] Bryant v. Sparrow, 62 Me. 546.

[538] Pomfret v. Ricroft, 1 Saund. 322, *n.* 5.

[539] Hyatt v. Wood, 4 Johns. (N. Y.) 150; Harper v. Charlesworth, 4 B. & C. 574.

[540] Dickinson v. Goodspeed, 8 Cush. (Mass.) 119; Hilbourn v. Fogg, 99 Mass. 11; Cunningham v. Horton, 57 Me. 420. See Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62.

if the commission of the trespass is not restrained.[541] Applying the same principle to a different state of facts it was held that the owner of a building could not enjoin a tenant of rooms in it, from placing on the building a sign to indicate his business, there being no stipulation as to signs in the lease. If the owner were injured by the sign, he had an adequate remedy at law.[542]

[541] Deegan v. Neville, 127 Ala. 471, 29 So. 173.

[542] Goodell v. Lassen, 69 Ill. 145.

CHAPTER IX.

RENT AND ITS RECOVERY.

1. Nature of Rent, §§ 648–649.
2. Actions to Recover Rent, §§ 650–666.
3. Apportionment, §§ 667–671.
4. Set-off and Recoupment, §§ 672–674.
5. Abatement of Rent, §§ 675–681.

I. *Nature of Rent.*

§ 648. Rent has been defined generally to be a return or compensation for the possession of some corporeal inheritance; to be a certain profit, either in money, provisions or labor issuing out of lands and tenements, in return for their use. It may be more specifically defined as the compensation, either in money, provisions, chattels, or labor, received by the owner of the soil from the occupant thereof.[1] Rent is said to be a certain yearly profit arising out of lands and tenements as a compensation for the use thereof and therefore is properly termed an income.[2] In a technical definition it has been declared that rent is a right to a certain profit issuing annually (or rather periodically), out of lands and tenements corporeal in retribution (*reditus*), for the land that passes. Thus the qualities of a rent according to this definition are (1) a right to a certain profit; (2) issuing periodically; (3) out of lands and tenements corporeal; (4) in retribution or return; (5) for the land that passes.[3] Rent is the recompense for the use and occupation of lands; and it signifies nothing how or when that recompense may be rendered or received. Its essential characteristic as rent is that it is a recompense for the use and occupancy of land.[4] Rent is for the use of land only,[5] and if personal chattels are leased with the land, the rent issues out of the land only.[6] There are at common law three manners of rents, rent-service, rent-charge and rent-seck. Rent-service is so called because it has

[1] Bouvier's Law Dict., Rawle's Revision.

[2] State v. McBride, 5 Neb. 102.

[3] 2 Min. Inst. 32.

[4] Constantine v. Wake, 31 N. Y. Super. Ct. 239.

[5] Commonwealth v. Contner, 18 Pa. St. 439.

[6] Fay v. Holloran, 35 Barb. (N. Y.) 295; Armstrong v. Cummings, 58 How. Pr. (N. Y.) 331.

some corporeal service incident to it, as at the least fealty or the feudal oath of fidelity. A rent-charge is where the owner of the rent has no future interest, or reversion expectant in the land; as where a man deeds his whole estate in fee simple, but with a certain rent payable, and adds to the deed a covenant or clause of distress. The land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-charge, because of the manner the land is charged with a distress for the payment of it. Rent-seck, *reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress. These are the general divisions of rents, but the difference between them (in respect to the remedy for recovering them) has long ago been abolished; so that, in the time of Blackstone, all persons could have the like remedy by distress for rent-seck, rents of assize, and chief rents, as in case of rents reserved in a lease.[7]

Rent not due passes with the estate, for, until it is due, it is not a chose in action and the grantor of land is not assignor of the rent as a chose in action.[8] A stipulation in a lease that the rent shall be applied to a specified purpose does not change its character of rent.[9] Yet rent, at common law, is incident to the reversion, and cannot be reserved to a stranger, and though, by the terms of the lease, the lessee covenants to pay rent not to the lessor but to a third party, the sum so covenanted to be paid, is not properly a rent. It is not payable upon the land as rent is, nor can it be recovered by action or distress, for there is neither privity of contract nor privity of estate between the parties.[10]

§ 649. **A fee farm rent arises where the rent is created by deed and the fee is granted.** Lord Coke says that since the statute of *Quia emptores terrarum* there could be no fee farm rent in England on a feoffment in fee, as the purchaser would now hold not of his immediate feoffer, but of the chief lord of the fee.[11] It seems, however,

[7] 2 Bl. Com. 41.

[8] Van Wicklen v. Paulson, 14 Barb. (N. Y.) 654.

[9] Ryerson v. Quackenbush, 26 N. J. L. 236.

[10] Littleton, §§ 345, 346; Co. Litt. 213a, b, 143b; 2 Bl. Com. 41; Oates v. Frith, Hobart 130a; 3 Kent's Com. 463; Ryerson v. Quackenbush, 26 N. J. L. 236.

[11] Coke, Book II, ch. 12, § 215. "But in such case, where a man, upon such a gift or lease, will reserve to him a rent service, it behoveth, that the reversion of the lands and tenements be in the donor or lessor. For if a man will make a feoffment in fee, or will give lands in taile, the remainder over in fee simple, without deed, reserving to him a certain rent, this reservation is void, for that no rever-

that such reservation in a deed, accompanied by a power of distress and reëntry on non-payment, might make a good rent charge; and if there is no such clause in the deed giving a right of distress, then such rent is rent-seck, because the grantor cannot enforce payment of rent by distress, and if he has never been seized of the rent, he is without any remedy at all.[12] In a case arising in 1852 before the Supreme Court of Missouri, it was declared that such reservations were upheld in the United States and text-books were cited to sustain this position. In the deed creating the rent in the Missouri case, there was a right of entry reserved in case of default in payment of rent for six months.[13] It was argued against the validity of a reservation of rent in an estate in fee with a condition for reëntry in case of non-payment, that it was repugnant to the nature of the estate and a restraint on alienation. But the court pointed out that grants of estates in fee on condition have constantly been upheld and writers have always assumed the legality of such conditions. A condition annexed to a conveyance in fee, that the grantee, his heirs and assigns shall pay to the grantor and his heirs an annual rent, and that, in default of payment, the grantor or his heirs may reënter, is a lawful condition. Littleton puts it as an example of a condition in a deed, at the commencement of that part of his treatise which relates to estates on condition.[14] The systematic writers upon the law of real property, from that time to the present, have assumed the legality of such conditions.[15]

Furthermore it has been declared that the rent reserved in a lease in fee, if not strictly an estate in the land, is nevertheless a hereditament, and is descendible and inheritable. The covenant to pay rent runs with the land and the assignees of the grantee or covenantor in such a lease are liable on the covenant to pay rent; nor is there any reason for distinguishing between the assigns of the covenantor and the assigns of the covenantee, in regard to the rights and obligations of such covenants.[16]

sion remains in the donor, and such tenant holds his land immediately of the lord, of whom his donor held."

[12] Coke, Book II, ch. 12, § 217.

[13] Alexander v. Warrance, 17 Mo. 228. Citing 1 Hilliard on Real Property, 4th ed., p. 314; 1 Tucker 15, 16.

[14] Van Rensselaer v. Ball, 19 N. Y. 100, distinguishing De Peyster v. Michael, 6 N. Y. 467. In the principal case it was further held that a statute authorizing the assignment of such rights of reëntry was valid.

[15] 2 Bl. Com. 154; Cruise Dig., Vol. II, ch. 1, § 1, pl. 3, 9; 4 Kent Com. 123.

[16] Tyler v. Heidorn, 46 Barb. (N. Y.) 439.

II. *Actions to Recover Rent.*

§ 650. Remedies for recovering rent.—According to the practice of the ancient common law the most effective means of recovering rent was by distress. It is laid down that this remedy for the recovery of rent was derived from the civil law; for anciently in the feudal law the tenant's neglect to perform his duties caused a forfeiture of the estate; but the feudal forfeitures were afterward turned into distresses. A distress is the taking of a personal chattel out of the possession of a wrong-doer into the custody of the person injured to procure a satisfaction for the wrong committed. To entitle a party to distrain for rent, there must be an actual demise, or a contract for a demise amounting to as much, and a fixed rent agreed upon.[17] In the New England States the right of distress for rent does not exist, being superseded by the practice of attachment on mesne process;[18] and in many other States of the Union, this right has been abolished and other remedies substituted in its stead, or the same nomenclature has been retained and the mode of procedure regulated by statute.[19]

Of the actions at law to recover rent, debt for rent was at all times maintainable whether the demise was by deed, or by writing not under seal, or by word of mouth, both of the latter being included in the common expression "parol demises."[20] But no instance is to be found among the older cases of an action of debt for a *reasonable* remuneration for the occupation of land, which can be accounted for on the ground that the occupation of land, without an agreement to pay a fixed sum for it, is of rare occurrence.[21] So that the better view is that debt for use and occupation would lie at common law and is not defeated by proof of a parol demise reserving a certain rent. According to the accepted English view, the statute of 11 Geo. II, ch. 19, sec. 14, applied only to actions of assumpsit for use and occupation and its effect was to extend this form of action, which could formerly be brought only where no definite sum was due as rent, to cases where

[17] 3 Bl. Com. 6.

[18] 4 Dane's Abr. 126; Aik. Dig. 357; Wait, Ex parte, 7 Pick. (Mass.) 100, 105.

[19] The Remedy by Distress and the Enforcement of Liens has been stated in the author's work on Liens, Vol. I, § 596, *et seq.* In Mississippi distress for rent will lie where produce is agreed to be paid, though the value is not fixed and certain, if the amount is so stipulated as to make it capable of ascertainment by calculation. Brooks v. Cunningham, 49 Miss. 108.

[20] Gibson v. Kirk, 1 Q. B. 850, 41 E. C. L. 807; Trapnall v. Merrick, 21 Ark. 503.

[21] Egler v. Marsden, 5 Taunt. 25; Wilkinson v. Hall, 3 Bing. N. C. 508.

a fixed amount of rent was reserved by the contract. The statute prevented a defendant from defeating recovery by showing a contract for a definite sum as rent, as he could have done before its passage.[22]

In the opinion of some judges in this country it has been declared that, at common law, assumpsit for use and occupation could not be maintained, and had its existence in the statute 11 Geo. II, ch. 19, sec. 14.[23] Yet by the better view the right of action by assumpsit for use and occupation, did exist prior to 11 Geo. II, as a common-law remedy. Judge Tucker, in the case of *Epps* v. *Cole*,[24] controverts the correctness of the contrary declaration and traces the action as far back as James I, and again reaffirms his opinion in the case of *Sutton* v. *Mandeville*.[25] Kentucky and Connecticut, mainly on the research and opinion of this learned judge, have also held that assumpsit for use and occupation was a common-law remedy. In the Virginia case first referred to the court says: "The action for use and occupation was not given by the statute of George; it has been used at least from the time of James the first as the case of *Dartual* v. *Morgan*[26] clearly proves; and the case of *How* v. *Norton*[27] shows it in use in the time of his son, Charles II, and a variety of other cases might be shown to prove the same thing."

In the United States the action of assumpsit for use and occupation or some code proceeding of a similar nature is generally recognized as the proper method to recover rent under certain circumstances, and the English statute, in relation to such action, has either been expressly reënacted or adopted as a part of the common law. In North Carolina, in 1849, the statute of 11 Geo. II was held to be not in force and therefore an action of use and occupation would not lie against an intending purchaser who had been let into possession, occupied for a while, and then failed to carry out the contract of purchase;[28] but this rule has been changed by statute since then and an assumpsit could now be maintained under similar circumstances.[29]

[22] Gibson v. Kirk, 1 Q. B. 850, 41 E. C. L. 807. The common count in debt for use and occupation is good, though the holding be under a written lease, and in such count it is not necessary to allege the character in which the plaintiff sues, whether as assignee of the reversion or otherwise. Armstrong v. Clark, 17 Ohio 495.

[23] Fitzgerald v. Beebe, 7 Ark. 305; Byrd v. Chase, 10 Ark. 602, citing Johnson v. May, 3 Lev. 150, Bull. N. P. 138. See Lankford v. Green, 52 Ala. 103.

[24] 4 H. & M. (Va.) 167.

[25] 1 Munf. (Va.) 407.

[26] Cro. Jac. 598.

[27] 1 Lev. 179.

[28] Long v. Bonner, 11 Ired. L. (N. Car.) 27.

[29] Such an action will now lie—see Rev. Code, ch. 63, § 2.

Covenant and debt frequently cover the same causes of action; it is said that covenant is a remedy for the recovery of damages for the breach of a contract under seal; while debt lies whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty. Where there is a contract under seal for the payment of a specific sum of money, the distinction between these forms of action may be considered as purely technical; covenant and debt being concurrent remedies for the recovery of any money demand, where there is an express or implied contract in an instrument under seal to pay it.[30] If the lessee assign the term, with the assent of the lessor, after this, debt does not lie against the lessee,[31] but after a third person has received the whole term by assignment, both debt and covenant will lie against such assignee on the privity of estate.[32]

§ 651. The statutory action for use and occupation is of the nature of assumpsit at common law on an implied promise and is not an action ex delicto. It is therefore subject to a constitutional exemption as a debt by contract.[33] The action for use and occupation of lands is one arising upon contract and rests on the agreement to pay rent, express or implied.[34] The action for mesne profits differs from an action for use and occupation in this, that the latter is founded upon a promise, express or implied, while the former springs from a trespass, an entry, *vi et armis,* upon premises and a tortious holding. The action to recover mesne profits being trespass *quare clausum fregit* cannot be maintained without proof of the trespass. And a petition which, stating the defendants were in possession of the land at the time the suit was brought, fails to state a cause of action for trespass for mesne rents and profits.[35] But in the ordinary case where the occupation of land is without the owner's consent, his remedy against the occupant is trespass *quare clausum fregit;* if with consent, the proper remedy is an action for use and occupation.[36]

[30] Outtoun v. Dulin, 72 Md. 536, 20 Atl. 134; 1 Chitty Pleading (16th Am. ed.), star page 121, 131, 132.

[31] Dartmouth College v. Clough, 8 N. H. 22; Auriol v. Mills, 4 Term R. 94, 98; 1 Saunders 241, *n.* 5; 1 Chitty Plead. 106.

[32] Dartmouth College v. Clough, 8 N. H. 22; Howland v. Coffin, 12 Pick. (Mass.) 125.

[33] St. Louis &c. R. Co. v. Hart, 38 Ark. 112.

[34] Dalton v. Laudahn, 30 Mich. 349.

[35] Thompson v. Bower, 60 Barb. (N. Y.) 463, 477, per Johnson, J.; Young v. Downey, 145 Mo. 261, 46 S. W. 962; Peters v. Elkins, 14 Ohio 344.

[36] Anderson v. Critcher, 11 Gill & J. (Md.) 450; Espy v. Fenton, 5 Ore. 423.

For a trespass itself in taking a thing, or for the enjoyment of it by the trespasser, assumpsit will not lie, as no contract, express or implied, exists between the parties. So, with respect to land, if the trespasser let it and receive rents, he might be liable for them as money had and received to the use of the owner. But for the injury of illegally entering upon the land of another, and keeping him out, the remedy is by action of trespass for the mesne profits after the owner regains the possession. No action *ex contractu* lies, as there is nothing from which a contract can be implied.[37] A person put in as tenant by an adverse claimant in possession of land cannot be sued by the true owner in use and occupation, even though he had notice that his lessor's title was in dispute.[38] Privity of contract between the parties is indispensable to the maintenance of this action. A trespasser cannot be converted into a tenant without his consent. The theory of waiving a tortious entry and occupation and suing on an implied contract to pay for use and occupation does not apply to this kind of case.[39] An action *ex contractu* has sometimes been maintained against a mere trespasser; but these are cases where the avails of the trespass or occupation, as money had and received to the plaintiff's use, and not the trespass or occupation itself is the gist of the action. In such cases, a party may waive the tort, and sue in assumpsit for money had and received.[40]

The amount of recovery in an action for use and occupation would be the fair rental value of the property,[41] and, if it was held on an

[37] Long v. Bonner, 11 Ired. L. (N. Car.) 27; Butler v. Cowles, 4 Ohio 205.

[38] Hardy v. Williams, 9 Ired. L. (N. Car.) 177; Lankford v. Green, 52 Ala. 103; Kieth v. Paulk, 55 Iowa 260, 7 N. W. 588; Roxbury v. Huston, 39 Me. 312.

[39] Hurley v. Lamoreau, 29 Minn. 138, 12 N. W. 447; Edmonson v. Kite, 43 Mo. 176; Peters v. Elkins, 14 Ohio 344; Richey v. Hinde, 6 Ohio 371; Rogers v. Libbey, 35 Me. 200; Richardson v. Richardson, 72 Me. 403; Munroe v. Luke, 1 Metc. (Mass.) 459, 464. See also, Espy v. Fenton, 5 Ore. 423. Where one enters adversely upon land assumpsit for mesne profits may be maintained up to the time when the demise in the ejectment suit is laid, but not after that. To recover profits subsequently accruing trespass for mesne profits must be brought. Sinnard v. McBride, 3 Ohio 264.

[40] Lindon v. Hooper, Cowp. 414, 419, per Lord Mansfield; Scales v. Anderson, 26 Miss. 94. Assumpsit for use and occupation will not lie at the suit of a purchaser of mortgaged premises, sold under decree against a tenant in possession under the mortgage. The proper remedy would be trespass for mesne profits. Peters v. Elkins, 14 Ohio 344.

[41] Cohoon v. Kineon, 46 Ohio St. 590, 22 N. E. 722; Shiner v. Abbey, 77 Tex. 1, 13 S. W. 613.

uncertain tenure, would cover only the time of actual occupation. Evidence of the value of the estate for sale is not competent as bearing upon the question of rental value.[42] If the holding has been under a void lease, the writing may be given in evidence to show the value of the rents, or the plaintiff may avail himself of an agreement which has not been declared upon, whereby a rent certain is fixed.[43]

§ 652. The statute providing a remedy for the recovery of rent, by action of assumpsit for use and occupation, limits it to cases where the agreement is not by deed.[44] "Nor is it easy," said Justice Wilde, of the Massachusetts Court, "to discern any good reason why it should not be thus limited; since where the demise is by deed, another remedy is provided, applicable to the contract."[45] According to common-law rules of pleading, a general count for use and occupation was proper for the recovery of rent due from a tenant, occupying under a parol demise; but where there was a lease under seal, it was necessary to declare either in debt or covenant upon the lease.[46] To maintain an action for use and occupation it was necessary to prove a tenancy under a parol demise;[47] in law a count for use and occupation, and one

[42] Cohoon v. Kineon, 46 Ohio St. 590, 22 N. E. 722.

[43] Marr v. Ray, 151 Ill. 340, 37 N. E. 1029; Williams v. Sherman, 7 Wend. (N. Y.) 109; Wilson v. Trustees of No. 16, 8 Ohio 174.

[44] Beverly v. Lincoln &c. Co., 6 A. & E. 829, 839. Before the statute an action for use and occupation might be maintained, unless an actual demise were shown; but proof of such a demise was held (though not uniformly) to be fatal to the action, either on the ground of its showing a *real* contract or because the demise, having passed an interest, the defendant could not be said to occupy by the plaintiff's permission. In some instances an exception was allowed where an express promise could be proved or intended. The alteration introduced by the statute was that proof of a demise, unless by deed, was no longer fatal to the action; but the terms of the demise might be used as evidence of the quantum of damages. To same effect see Kiersted v. Orange &c. R. Co., 69 N. Y. 343; West v. Cartledge, 5 Hill (N. Y.) 488; Wood v. Wilcox, 1 Denio (N. Y.) 37.

[45] Codman v. Jenkins, 14 Mass. 93.

[46] Warren v. Ferdinand, 9 Allen (Mass.) 357; Richards v. Killam, 10 Mass. 239, 243; Codman v. Jenkins, 14 Mass. 93; 1 Chit. Pl. 117, 377; Smiley v. McLauthlin, 138 Mass. 363.

[47] Boston v. Binney, 11 Pick. (Mass.) 1. The Massachusetts practice act abolishes the distinction between actions of assumpsit, covenant and debt, but requires the plaintiff to set forth the substantive facts necessary to constitute the cause of action. If a claim for rent under a parol demise is his cause of action, it is well described by a count for use and occupation; but if the cause of action is a claim for rent upon a lease under seal, he

for a breach of covenant for non-payment of rent constitute different causes of action.[48] Where the relation of landlord and tenant is not created by deed but is established by a contract, express or implied, the landlord has two remedies against the tenant for non-payment of rent: first, an action on the contract for the rent reserved; secondly, an action for use and occupation of the premises.[49]

In Michigan the rule is settled that an action for use and occupation can be maintained on a written lease under seal.[50] The reason for refusing the action upon a sealed demise is that assumpsit will never lie at common law on a sealed instrument, but the Michigan statute authorizing actions of assumpsit extends to "all cases arising upon contracts under seal or upon judgments, when an action of covenant or debt may be maintained." The plain purpose of this statute is to remove the purely technical distinction formerly existing, and to put all contracts upon the same footing where parties desire to sue in assumpsit. The only difference in substance between an action directly on the terms of a lease, and an action for use and occupation, is that in one the declaration is special, and in the other general. The purpose of both actions are the same and both are actions arising upon contract.[51]

§ 653. The whole action of trespass for mesne profits is a contrivance of awkward construction. It is founded on a recovery in ejectment, and the record is evidence of the trespass; but the recovery of damages in ejectment is no bar for mesne profits for the same trespass. The recovery in ejectment is then mere evidence of a right established.[52] The action of trespass for the mesne profits lies upon the fiction of law that the disseisee after entry has been in continuous possession during the period of the disseisin. A disseisee who

must set forth the lease or the legal effect thereof with proper averments to describe the cause of action. Gen. Stats., ch. 129, § 2. It is apparent, therefore, that if in an action for use and occupation he were to offer in evidence a tenancy under such lease, there would be a variance between his allegation and his proof, and he could not recover. Warren v. Ferdinand, 9 Allen (Mass.) 357, 358. See also, Burnham v. Roberts, 103 Mass. 379.

[48] Mann v. Brewer, 7 Allen (Mass.) 202, 204.

[49] Edmunds v. Missouri &c. Co., 76 Mo. App. 610; Aull Sav. Bank v. Aull, 80 Mo. 199; Edmonson v. Kite, 43 Mo. 176; McLaughlin v. Dunn, 45 Mo. App. 645.

[50] Dalton v. Laudahn, 30 Mich. 349; Conkling v. Tuttle, 52 Mich. 630, 18 N. W. 391; Beecher v. Duffield, 97 Mich. 423, 56 N. W. 777.

[51] Dalton v. Laudahn, 30 Mich. 349.

[52] Richey v. Hinde, 6 Ohio 371.

has recovered possession of the premises by any lawful means may maintain trespass for mesne profits against a party who has occupied the premises as a tenant of the disseisor, although he was ignorant of the disseisee's claim of title and has in good faith paid rent to the disseisor.[53]

§ 654. An action for use and occupation cannot be maintained except where the relation of landlord and tenant exists. Unless there has been an agreement, express or implied, from which an obligation to pay rent can be inferred, some other remedy than an action for rent or for use and occupation must be resorted to.[54] The bare proof of use

[53] Trubee v. Miller, 48 Conn. 347; Gould v. Stanton, 16 Conn. 12, 20; Morgan v. Varick, 8 Wend. (N. Y.) 587, 592; Jackson v. Stone, 13 Johns. (N. Y.) 448; Emerson v. Thompson, 2 Pick. (Mass.) 473, 486; Washington Bank v. Brown, 2 Metc. (Mass.) 293, 295; Storch v. Carr, 28 Pa. St. 135; Bradley v. McDaniel, 3 Jones L. (N. Car.) 128; Green v. Biddle, 8 Wheat. (U. S.) 1, 75; Doe v. Whitcomb, 8 Bing. 46. In Liford's case, 11 Coke 46, 51 (1615) there is a dictum of Lord Coke, C. J., to the effect that the disseisee after reentry cannot recover in an action for mesne profits against the feoffee or lessee, or disseisor of the first disseisor, giving as reasons that "this fiction of the law that the freehold continued always in the disseisee shall not have relation to make him who comes in by title a wrong-doer *vi et armis*." Buller, in his Nisi Prius, 87, speaking of the doctrine of Liford's case says: "It may admit of doubt, for there are cases to the contrary, and the reason of the law seems to be with them." In Emerson v. Thompson, 2 Pick. (Mass.) 473, 486, Wilde, J., says: "So far, therefore, from feeling myself bound by Liford's case as an authority, I am of opinion that the weight of authority is opposed to the decision in that case; and that this is also the opinion of the English courts may be inferred from their well-known practice in relation to the action for mesne profits consequent to a recovery in ejectment.

[54] Indiana: Pittsburgh &c. R. Co. v. Thornburgh, 98 Ind. 201; Tinder v. Davis, 88 Ind. 99; Nance v. Alexander, 49 Ind. 516; Newby v. Vestal, 6 Ind. 412. Colorado: Hennessey v. Hoag, 16 Colo. 460, 27 Pac. 1061. Maryland: Stoddert v. Newman, 7 H. & J. 251. Florida: Ward v. Bull, 1 Fla. 271, 278. Georgia: Barnes v. Shinholster, 14 Ga. 131; Gould v. Kerr, 52 Ga. 619. Kentucky: Cooper v. Bramel, 14 Ky. L. R. 399. Maine: Porter v. Hooper, 11 Me 170; Fox v. Corey, 41 Me. 81; Eastman v. Howard, 30 Me. 58. Mississippi: Scales v. Anderson, 26 Miss. 94. Missouri: Cohen v. Kyler, 27 Mo. 122; Aull Sav. Bank v. Aull, 80 Mo. 199. New Hampshire: Barron v. Marsh, 63 N. H. 107. New Jersey: Brewer v. Craig, 18 N. J. L. 214. New York: Bancroft v. Wardwell, 13 Johns. 489, 491. Pennsylvania: McCloskey v. Miller, 72 Pa. St. 151. Ohio: Richey v. Hinde, 6 Ohio 371. Oregon: Espy v. Fenton, 5 Ore. 423. Vermont: Blake v. Preston, 67 Vt. 613, 32 Atl. 491; Clark v. Clark, 58 Vt. 527, 3 Atl. 508; Moore v. Harvey, 50 Vt. 297; Chamberlin v.

and occupation by the vendor, after conveyance of the premises granted, is not sufficient to support an action for compensation in the nature of rent. The purchaser's remedy in such cases is trespass or ejectment and for the recovery of mesne profits.[55] The continued occupation of an execution debtor does not charge him with rent for the premises unless he expressly agrees to pay it.[56] For the same reason a debtor, after redeeming land sold on execution, cannot recover from the lessee of the creditor for use and occupation prior to the redemption.[57] As a general rule it may be stated that no action for rent, *eo nomine,* can be maintained, unless the relation of landlord and tenant exists between the parties.[58] It follows that use and occupation cannot be maintained against a person who holds adversely[59] or against a trespasser.[60] Being an action *ex contractu,* it necessarily follows that no action of that nature can be supported where there is no pretense of a contract, and certainly not where the possession is claimed adversely.[61] However, the action for use and occupation does not necessarily suppose any express demise.[62] In a case where an action of this nature on an implied promise was sustained the court said: "There was no express contract between the parties and none was necessary. The law will imply a contract to pay rent from the mere fact of occupation, unless the character of the occupancy be such as to negative the existence of a tenancy. An action for use and occupation does not necessarily suppose any demise."[63]

§ 655. While the law will imply the relation of landlord and tenant from the fact of the occupancy of the premises with the consent of the owner,[64] this implication may be rebutted by proof of a con-

Donahue, 44 Vt. 57; Stacy v. Vermont &c. R. Co., 32 Vt. 551. **Wisconsin:** De Pere Co. v. Reynen, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155. **England:** Lindon v. Hooper, Cowp. 414, 419; Winterbottom v. Ingham, 7 A. & E. (N. S.) 611, 53 E. C. L. 611.

[55] Preston v. Hawley, 139 N. Y. 296, 34 N. E. 906; Boston v. Binney, 11 Pick. (Mass.) 1; Greenup v. Vernor, 16 Ill. 26; Tew v. Jones, 13 M. & W. 12; §§ 29–36.

[56] Miller v. Buchanan, 2 Baxt. (Tenn.) 390.

[57] Dakin v. Goddard, 32 Me. 138.

[58] Warnock v. Harlow, 96 Cal. 298, 31 Pac. 166.

[59] Inman v. Morris, 63 Miss. 347; Barron v. Marsh, 63 N. H. 107; Richardson v. Richardson, 72 Me. 403; Bigelow v. Jones, 10 Pick. (Mass.) 161.

[60] Edmonson v. Kite, 43 Mo. 176; Brewer v. Craig, 18 N. J. L. 214.

[61] Scales v. Anderson, 26 Miss. 94.

[62] Dean &c. v. Pierce, 1 Camp. 467; Hull v. Vaughan, 6 Price 157.

[63] Chambers v. Ross, 25 N. J. L. 293.

[64] Where one occupies land by the consent of the owner the presump-

tract or any other fact that is inconsistent with that relation.[65] Thus a contract to purchase which is ultimately carried out and occupation under it,[66] a contract or other fact inconsistent with the relation of landlord and tenant,[67] a suit and judgment in ejectment,[68] occupation in the right of the wife and refusal to acknowledge the owner as landlord,[69] occupation when the plaintiff denies the existence of any contract for the use of the premises,[70] have each been held not to raise but to rebut the implication of a tenancy or the right to recover rent. No rent could be recovered from one who was put into possession under a void conveyance.[71]

However, it has been held that after a purchaser in possession makes a default in his contract of purchase, an implied promise to pay rent will be raised from his continued occupation of the premises and an action of assumpsit for use and occupation can be maintained against him.[72] A widow left in possession of the homestead beyond the time allotted to her by statute cannot be sued in assumpsit for use and occupation by the heirs. There is no privity of contract between them and her. She has not been their tenant and they cannot compel her to be. There is no relation from which an implied contract to pay rent can be inferred.[73] And obviously the occupation of a house by a woman after the death of husband does not render his estate liable for the rent of the house.[74] Where a tenant who is to pay rent by making repairs, neglects to do so, the landlord has been allowed to treat the

tion of law is that he was to pay reasonable rent. The onus of proving that no rent was to be paid is on the one who seeks to be relieved of the burden. Sterrett v. Wright, 27 Pa. St. 259.

[65] Blake v. Preston, 67 Vt. 613, 32 Atl. 491; Stacy v. Vermont &c. R. Co., 32 Vt. 551; Chamberlin v. Donahue, 44 Vt. 57; Moore v. Harvey, 50 Vt. 297.

[66] Dakin v. Allen, 8 Cush. (Mass.) 33; Newby v. Vestal, 6 Ind. 412; Miles v. Elkin, 10 Ind. 329; Hoffar v. Dement, 5 Gill (Md.) 132; Wyman v. Hook, 2 Me. 337; Lapham v. Norton, 71 Me. 83; Dennett v. Penobscot &c. Co., 57 Me. 425; Woodbury v. Woodbury, 47 N. H. 11; Hough v. Birge, 11 Vt. 190; Bancroft v. Wardwell, 13 Johns. (N. Y.) 489; Smith v. Stewart, 6 Johns. (N. Y.) 46, 49.

[67] Stacy v. Vermont &c. R. Co., 32 Vt. 551; Strong v. Garfield, 10 Vt. 502.

[68] Chamberlin v. Donahue, 44 Vt. 57.

[69] Moore v. Harvey, 50 Vt. 297.

[70] Clark v. Clark, 58 Vt. 527, 3 Atl. 508.

[71] Jewell v. Harding, 72 Me. 124.

[72] Lapham v. Norton, 71 Me. 83; Patterson v. Stoddard, 47 Me. 355; Gould v. Thompson, 4 Metc. (Mass.) 224.

[73] Emery v. Emery, 87 Me. 281, 32 Atl. 900.

[74] Carter v. Tippins, 113 Ga. 636, 38 S. E. 946.

contract as rescinded and recover, for the use and occupation, in assumpsit.[75]

In the absence of an express agreement, or of actual possession, only the owner of the legal estate can maintain an action for use and occupation. A *cestui que trust* cannot maintain an action for use and occupation where the letting is by the trustee.[76]

Since a plaintiff cannot recover in an action of use and occupation unless the relation of landlord and tenant exists between the parties, and if it does the defendant cannot controvert the title, it is not necessary for the complaint in such an action to allege title in the plaintiff.[77]

§ 656. Recovery of crop rents.—Where a tenant failed to carry out his agreement to pay rent by delivering a certain number of bushels of grain raised on the premises on a certain day, it was held that the landlord could recover the market value of the grain at the time it should have been delivered in an action for use and occupation.[78] Where land is leased for a crop rent, the tenant should not allow the land to lie idle, and it has been declared that the landlord is entitled to demand for rent such portion of the crop raised as his share would amount to, if proper industry had been bestowed upon the land.[79] Objection has been made that it would give rise to interminable litigation, if landlords leasing on shares could claim all that would have inured to their benefit, if the tenant had exercised ordinary industry and judgment in the cultivation of the crops and that the amicable adjustment of rents would be almost exceptional.[80] But such disputes could be settled in an action of account, and in Vermont a landlord letting on shares can maintain an action of account against his tenant after demand and refusal.[81]

The rule has been declared to be well settled that when land is leased in consideration of a part of the crop that may be raised thereon, and the lease does not contain any stipulation as to when such share is payable, it is due when the crop is harvested, or within a reasonable time thereafter.[82] Crops planted one year and harvested the next are

[75] Tate v. McClure, 25 Ark. 168.

[76] Couch v. McKellar, 33 Ala. 473; Grady v. Iback, 94 Ala. 152, 10 So. 287; Balls v. Westwood, 2 Camp. 13 *n*; Harris v. Booker, 12 Moore 283.

[77] Hood v. Mathis, 21 Mo. 308. But see Stevens v. Andrews, 10 Colo. 402, 15 Pac. 616.

[78] Butler v. Baker, 5 Ohio St. 584.

[79] Wheat v. Watson, 57 Ala. 581.

[80] Patton v. Garrett, 37 Ark. 605.

[81] Stedman v. Gassett, 18 Vt. 346.

[82] Spicer v. Spicer, 5 Harr. (Del.) 106; Toler v. Seabrook, 39 Ga. 14; Jones v. Adams, 37 Ore. 473, 59 Pac. 811; Long v. Seavers, 103 Pa. St.

reckoned part of the profits and income of the year when they are harvested,[83] and it has been expressly held that rent in kind cannot become due until the crops are ripe and deliverable.[84] Under a provision that the crop rent for a farm planted with corn and oats was to become due "when the crop matures or any portion of it is fit for market," the rent was held to be payable as soon as the oats were in stack and the corn all ripe.[85] Under the North Carolina statute enabling a landlord to recover rent in kind before division, there must be an agreement in writing as to the amount which shall belong to the landlord in order to entitle him to recover under the statute.[86]

§ 657. If there is no actual ouster, or eviction, of one tenant in common by the other, neither is liable to the other for mere use and occupation, unless there was a special contract or agreement to pay rent, or unless, upon a letting of the premises, one tenant in common actually realized, in rents collected, an undue proportion of the use and occupation and rents.[87] Nor can one of two tenants in common sue alone for use and occupation of the premises owned in common, when the lessee was let into possession by both,[88] or when the lessee was let into possession by another tenant.[89] Under the statute 4 and 5 Anne, ch. 16, which is regarded as a part of the common law in Maine and in Massachusetts, it has been held in both those states that *indebitatus assumpsit,* in place of the old action of account, would lie by one tenant in common against another, as bailiff, for receiving more than his proportion of the rents and profits. The statute constitutes the receiver bailiff to his co-tenant, without special appointment, and all that is requisite to bring a party within it is to allege and prove that he is tenant in common, and that his co-tenant has received more than his just share of rents.[90] However, one tenant in common may be disseised by another; and when this has been done, as to the rents received during the period of disseisin, assumpsit is no longer the proper remedy at common law, nor under any statute.[91] And as long as one

517; Lamberton v. Stouffer, 55 Pa. St. 284; Brown v. Adams, 35 Tex. 447.

[83] Lamberton v. Stouffer, 55 Pa. St. 284.

[84] Spicer v. Spicer, 5 Harr. (Del.) 106.

[85] Hull v. Stogdell, 67 Iowa 251, 25 N. W. 156.

[86] Foster v. Penry, 76 N. Car. 131.

[87] Terrell v. Cunningham, 70 Ala. 100; Hutton v. Powers, 38 Mo. 353; Gowen v. Shaw, 40 Me. 56.

[88] Dorsett v. Gray, 98 Ind. 273.

[89] Whitaker v. Allday, 71 Tex. 623, 9 S. W. 483.

[90] Munroe v. Luke, 1 Metc. (Mass.) 459, 464; Richardson v. Richardson, 72 Me. 403.

[91] Richardson v. Richardson, 72 Me. 403; Thomas v. Pickering, 13 Me. 337, 353; Bracket v. Norcross,

of the tenants in common himself occupies the premises no implied promise to pay rent arises upon which use and occupation may be maintained.[92] For it is a general principle that though occupation is with the consent of the owner, attendant circumstances may be such that no promise to pay rent can be inferred.[93]

§ 658. That rent is an incident to the reversion and that whoever is entitled to the reversion at the time the rent becomes payable is of right entitled to it, unless it is reserved in the grant, is a proposition firmly established in the law.[94] "Both assignees in deed and assignees in law shall have the rent," says Lord Coke, "because the rent being reserved of inheritance to him and his heirs is incident to the reversion and goeth with the same."[95] Attornment by a tenant is not necessary to enable an assignee of the reversion to recover rent,[96] and rent which does not become due till after a conveyance by the landlord, goes to the grantee entire.[97] A lessor who has assigned his reversion cannot sue the lessee on the covenants to pay rent in the lease. To such an action it is a full answer that the plaintiff had assigned before the rent accrued.[98] As soon as the privity of estate is transferred, the remedy by debt is transferred also, and passes to the grantee of the reversion, so the original lessor cannot sue in debt for the rent under a parol lease after he has assigned the reversion.[99]

As a general rule, however, an action of covenant does not lie without some privity of contract, while debt or a distress lies on mere privity of estate.[100] Furthermore, at common law choses in action were not assignable and none but parties or privies to express covenants were bound by them or could take advantage of them. This rule seems to have been well settled in England, and to avoid its effect and enable the assignee of the reversion to maintain an action in his own name upon the express real covenants, those running with the land, the statute, 32 Hen. VIII, ch. 34, was enacted. After the passage of

1 Me. 89; McClung v. Ross, 5 Wheat. (U. S.) 124; Willison v. Watkins, 3 Pet. 43, 52; Barnard v. Pope, 14 Mass. 434, 438.

[92] Gowen v. Shaw, 40 Me. 56.

[93] Mitchell v. Pendleton, 21 Ohio St. 664.

[94] Tubb v. Fort, 58 Ala. 277; Pope v. Harkins, 16 Ala. 321; English v. Key, 39 Ala. 113; Steed v. Hinson, 76 Ala. 298; Bank &c. v. Wise, 3 Watts (Pa.) 394; Biddle v. Hussman, 23 Mo. 597, 602. See § 460.

[95] 2 Coke, p. 215; § 348.

[96] Wise v. Falkner, 51 Ala. 359.

[97] Dixon v. Niccolls, 39 Ill. 372.

[98] Markland v. Crump, 1 Dev. & B. L. (N. Car.) 94, 100; Walker's Case, 3 Coke 22.

[99] Mixon v. Coffield, 2 Ired. L. (N. Car.) 301.

[100] Adams v. French, 2 N. H. 387.

this act, the assignee of the reversion could maintain his action upon the express real covenants. It enabled the lessor and reversioner successively to transfer from one to the other the privity of contract.[101] This statute of Henry Eight is generally held to be a part of the common law in this country.[102] Although the statute was regarded as not in force in Ohio, it was nevertheless held that an assignee of a reversion had a right of action on a lessee's covenant to pay rent under the code in that state, because the covenant, though not made with the assignee, was made for his benefit.[103]

Whatever doubt may have originally existed upon the point, it is now well settled that an assignee of rent, without the reversion, may have debt for the rent against the lessee.[104] A lessor may assign the rent to become due upon a lease without assigning the reversion and the assignee in such case may maintain an action for the rent in his own name.[105] But an assignment not under seal, of a lease under seal, does not transfer to the purchaser the legal title to the instrument, so as to enable him to maintain an action on its covenants. An assignment should be by an instrument of as high a nature as the instrument it purports to transfer. The purchaser of the lease by the written transfer, not under seal, becomes its equitable owner, but he has not such legal title as to enable him to maintain an action for rent in his own name.[106]

Under a cropping contract, where no estate in the land passes to the occupant, the contract for payment for the use of the land should be enforced by the administrator of a deceased landlord who died before the contract was performed, there being a distinction in this re-

[101] Platt on Cov. 527–533; Crawford v. Chapman, 17 Ohio 449.

[102] Harrison v. Steele, 4 H. & McH. (Md.) 218. But see Wells v. Cowles, 4 Conn. 182.

[103] Smith v. Harrison, 42 Ohio St. 180. Where a house and lot and furniture were leased and the lessee covenanted to pay rent for the *house* and furniture, an assignment of the house and lot alone without the furniture will not entitle the assignee to bring an action in his own name for the rent. For there is not privity of estate when the furniture is not assigned. Jones v. Smith, 14 Ohio 606.

[104] Kendall v. Carland, 5 Cush. (Mass.) 74; Patten v. Deshon, 1 Gray (Mass.) 325; Hunt v. Thompson, 2 Allen (Mass.) 341; Vin. Abr. "Estate" B, b, 18 pl. 10; Bacon Abr. "Rent" M; Gilbert on Rents, 165–6; 4 Cruis. Dig. Tit. 28, ch. 3, §§ 19, 20, 21, 31; Allen v. Bryan, 5 B. & C. 512; Farley v. Craig, 11 N. J. L. 262, 273; Ryerson v. Quackenbush, 26 N. J. L. 236; Demarest v. Willard, 8 Cow. (N. Y.) 206; Willard v. Tillman, 2 Hill (N. Y.) 274.

[105] Wineman v. Hughson, 44 Ill. App. 22; Crosby v. Loop, 13 Ill. 625.

[106] Bridgham v. Tileston, 5 Allen (Mass.) 371.

spect between such a contract and one for the payment of rent.[107] For ordinarily rent is a chattel real and goes to the heir and not to the administrator in case of a landlord's death.[108]

§ 659. A sub-tenant is not answerable to the original lessor for the rental, as there is neither privity of estate nor privity of contract between them, and therefore such sub-tenant is not subject to an action of assumpsit for use and occupation by the original lessor.[109] An undertenant is not liable to the landlord directly for rent in any form of action, but an assignee of the term is liable either in debt or on covenant.[110] As long as a valid joint lease remained in force and had not been assigned, the lessor could not recover in an action for use and occupation of the leased premises, brought against one lessee and a third party jointly for rent during the period covered by the lease. The premises were held under the written lease and, until that instrument was cancelled, no implied contract by other parties to pay rent would arise.[111]

It is a reasonable rule of the law, and well settled, that a tenant, for a certain term, or for life, who has underlet, has no right to surrender his lease to the prejudice of the sub-tenant.[112] A landlord could, however, recover from a sub-lessee for injury done to the reversion by removing a building from the premises.[113] The surrender of the main term of a leasehold estate totally extinguishes it, and with it any sub-terms; or rather such surrender would extinguish any sub-term as a necessary result of the extinction of the main term, but for another rule of law which has been raised for the protection of undertenants, to wit: that their rights will not be destroyed or impaired by a surrender of the main lease; and yet the surrenderee may not sue the undertenant for rent or on any other covenant. This rule is both ancient and technical but has been laid down by all text-writers and

[107] Autrey v. Autrey, 94 Ga. 579, 20 S. E. 431.

[108] Dixon v. Niccolls, 39 Ill. 372.

[109] Kiersted v. Orange &c. R. Co., 69 N. Y. 343; Way v. Holtan, 46 Vt. 184; Holmin v. DeLin, 30 Ore. 428, 47 Pac. 708; Campbell v. Stetson, 2 Metc. (Mass.) 504; Shattuck v. Lovejoy, 8 Gray (Mass.) 204; Pierce v. Minturn, 1 Cal. 470; Giddings v. Felker, 70 Tex. 176, 7 S. W. 694; Knight v. Old, 2 Civ. Cas. Ct. App., § 77.

[110] Dartmouth College v. Clough, 8 N. H. 22.

[111] Doty v. Gillett, 43 Mich. 203, 5 N. W. 89.

[112] 1 Shep. Touch. 301; Adams v. Goddard, 48 Me. 212; Eten v. Leyster, 60 N. Y. 252; Hessel v. Johnson, 129 Pa. St. 173, 18 Atl. 754, 15 Am. St. 716; Brown v. Butler, 4 Phila. (Pa.) 71; McDonald v. May, 96 Mo. App. 236, 69 S. W. 1059; see § 552.

[113] Winston v. President &c., 28 Miss. 118.

followed in all old judgments on the subject.[114] Both judges and commentators have deplored its hardship as to landlords, because it sometimes operates to cut them out of their rent, while permitting a subtenant to retain the premises, and it has been corrected by statute in England.[115] In a Pennsylvania case an attornment by the sub-tenant to the original lessor on the terms of the sub-lease, after the surrender by the mesne tenant, was presumed in order to enable the owner to get his rent, thus repudiating the old doctrine that the undertenant may keep possession without rendering rent.[116]

§ 660. Where the fact of an agency is not disclosed at the time an agent enters into a contract of lease for his principal, if the lease is not under seal, it is the ordinary case of a contract not under seal, made by an agent in his own name on behalf of an undisclosed principal; and it is not to be doubted that an action can be maintained upon it for rent in the name of the principal.[117] The rule is well settled, that if the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself as agent or not, or whether the principal be known or unknown, his principal will be made liable and will be entitled to sue thereon.[118]

But the rule that an unnamed and unknown principal shall stand liable for the contract of his agent, does not apply to a demise under seal. The relation between the owner of land and those who occupy it is of a purely legal character; and the fact that a lessee takes a lease under seal for an unnamed principal, but in his own name, will not render the unnamed principal liable for the rent.[119] Such a lease would not be binding on the principal, although the fact of the agency was recited in it, and although it appeared by extrinsic evidence that the lessee acted as agent, and if the principal occupied during the term without an assignment, he would be presumed to have entered as subtenant.[120] It was held in one case that if the recital of the agency itself shows that it was not merely descriptive of the person, it will

[114] McDonald v. May, 96 Mo. App. 236, 69 S. W. 1059; Webb v. Russell, 3 Term R. 393, 403; Krider v. Ramsay, 79 N. Car. 354.

[115] McDonald v. May, 96 Mo. App. 236, 69 S. W. 1059.

[116] Hessel v. Johnson, 129 Pa. St. 173, 18 Atl. 754, 15 Am. St. 716.

[117] Bryant v. Wells, 56 N. H. 152; Huntington v. Knox, 7 Cush. (Mass.) 371; Fenly v. Stewart, 5 Sandf. (N. Y.) 101.

[118] Nicoll v. Burke, 78 N. Y. 580; Briggs v. Partridge, 64 N. Y. 357.

[119] Sheldon v. Dunlap, 16 N. J. L. 245; Borcherling v. Katz, 37 N. J. Eq. 150; Nicoll v. Burke, 78 N. Y. 580; Elwell v. Shaw, 16 Mass. 42.

[120] Kiersted v. Orange &c. R. Co., 69 N. Y. 343, 1 Hun 151.

be regarded as the lease of the principal, who is chargeable upon it.[121] Where a lease was taken in trust for a corporation thereafter to be formed, and the corporation was formed and received an assignment of the lease, a liability in equity, on the part of the corporation, to pay rent to the lessor arose.[122]

If an agent makes a lease in his own name, and executes it in his own name, though the rent is reserved to his principal, and all the covenants purport to be made with his principal, the principal cannot maintain an action upon it, for the reason that on a deed *inter partes* no person can maintain an action except a party to it.[123]

In Illinois there is a statute the effect of which is, so far as it relates to the form of action and who may have the benefit of covenants, to take the seals off a lease. The rule that where one person, for a valuable consideration, makes a promise to another for the benefit of a third person, such third person may maintain an action upon it, is by the statute extended to cases where the contract is under seal.[124]

§ 661. A covenant to pay rent creates no debt or legal demand for rent till the time stipulated for payment arrives.[125] Although there be a lease which may result in a claim for rent, which will constitute a debt, yet no debt accrues until such enjoyment has been had.[126] Yet if the action for rent be special assumpsit on an express agreement to pay rent, the occupancy of the defendant is immaterial, and such an action may be maintained at common law,[127] in place of the action of assumpsit for use and occupation.

In case a tenant has not entered into possession at all, under his lease or agreement, either in person or by an undertenant or agent, assumpsit for use and occupation will not lie against him, but the remedy, generally, is upon the lease or agreement.[128] But under a

[121] Avery v. Daugherty, 102 Ind. 443.

[122] Van Schaick v. Third Ave. R. Co., 8 Abb. Pr. (N. Y.) 380, 30 Barb. 189, 49 Barb. 409, 38 N. Y. 346.

[123] Borcherling v. Katz, 37 N. J. Eq. 150; Sheldon v. Dunlap, 16 N. J. L. 245; Berkeley v. Hardy, 5 B. & C. 355.

[124] Adam v. Arnold, 86 Ill. 185; Dean v. Walker, 107 Ill. 540; Harmes v. McCormick, 30 Ill. App. 125.

[125] Russell v. Fabyan, 28 N. H. 543; Perry v. Aldrich, 13 N. H. 343; Countess of Plymouth v. Throgmorton, 1 Salk. 65.

[126] Bordman v. Osborn, 23 Pick. (Mass.) 295; Wood v. Partridge, 11 Mass. 488.

[127] Stier v. Surget, 10 S. & M. (Miss.) 154.

[128] Tully v. Dunn, 42 Ala. 262; Wood v. Wilcox, 1 Denio (N. Y.) 37; Beach v. Gray, 2 Denio (N. Y.) 84; Croswell v. Crane, 7 Barb. (N. Y.) 191.

joint lease the occupation of one is enough to make both lessees liable in an action of debt for use and occupation.[129] And after the lessee has occupied the demised premises he cannot set up the invalidity of the lease under which he held as a defense to an action for the rent.[130]

In the absence of a covenant to pay rent, as where a plaintiff in an action of use and occupation relies on an oral promise, the liability of the tenant must depend upon the actual use and occupation of the premises, and there can be no recovery except for what was actually used.[131] But if the lease be valid, the lessee cannot escape his liability for rent by relinquishing or abandoning the premises.[132] A tenant from year to year would be liable for a full year's rent although he did not occupy for a full year.[133]

In the absence of an express agreement in the lease or a local custom to the contrary, rent is not due till the end of the term, and this means, in the case of a tenancy from year to year, that the annual rent is not payable till the end of the year of occupancy.[134] This rule that rent is not due and payable until the end of the term, in the absence of agreement to the contrary, is well established, resting on the principle that rent is not due till it is earned.[135] Rent payable under a lease on the twentieth of every month would ordinarily be rent for the past month, and not rent in advance.[136] Specifying cer-

[129] Kendall v. Carland, 5 Cush. (Mass.) 74.

[130] Mayor &c. v. Huntington, 114 N. Y. 631, 21 N. E. 998, 23 N. Y. St. 912, 2 Silv. 272, affirming 1 N. Y. St. 785.

[131] Herrmann v. Curiel, 3 N. Y. App. Div. 511.

[132] Andreon v. Hawkins, 4 H. & J. (Md.) 319.

[133] Lofland v. Emory, 2 Harr. (Del.) 297. The removal of a tenant, after notice to quit his yearly tenancy, at improper time does not make due rent which would not be due then by the terms of the lease, there being no surrender of the premises by the defendant. Amsden v. Atwood, 67 Vt. 289, 31 Atl. 448, s. c. 69 Vt. 527, 38 Atl. 263.

[134] Elmer v. Sand Creek Tp., 38 Ind. 56; Indianapolis &c. R. Co. v. First Nat. Bank, 134 Ind. 127, 33 N. E. 676; Edwards v. Clemons, 24 Wend. (N. Y.) 480; Bordman v. Osborn, 23 Pick. (Mass.) 295; Menough's Appeal, 5 W. & S. (Pa.) 432; Boyd v. McCombs, 4 Pa. St. 146; McFarlane v. Williams, 107 Ill. 33; Bell v. Norris, 79 Ky. 48; Duryee v. Turner, 20 Mo. App. 34; Ridgley v. Stillwell, 27 Mo. 128; Ostner v. Lynn, 57 Mo. App. 187; Gray v. Chamberlain, 4 C. & P. 260; Coomber v. Howard, 1 C. B. 440, 50 E. C. L. 440. In action for rent on a monthly letting, landlord can only recover that amount due at the end of a monthly term prior to the service of the writ. Stanley v. Turner, 68 Vt. 315, 35 Atl. 321.

[135] Castleman v. Du Val, 89 Md. 657, 43 Atl. 821; Cameron v. Little, 62 Me. 550; Tignor v. Bradley, 32 Ark. 781.

[136] Castleman v. Du Val, 89 Md. 657, 43 Atl. 821.

tain time for payment does not affect the nature of the rent as an annual income. It does not change an annual into a semi-annual rent that it is payable in two instalments at periods of six months.[137] A clause in a lease requiring the rent to be paid in monthly instalments, the first to be paid on the first day of the term, does not require payment in advance for each succeeding month. Unless it is clearly provided that rent shall be paid in advance, the general rule as to time of payment would govern.[138]

If by the terms of a lease rent is due on certain days, the time of payment is not extended nor the right to sue in case of non-payment postponed by the provision that the landlord may take possession of the premises after sixty days' default of payment.[139] Where the computation of time ending in a holiday and the payment of rent falling due on a holiday was covered by statute, but the matter of rent and its payment was unaffected by legislation, it was held that rent falling due on a legal holiday other than Sunday was payable on the day it fell due, in spite of its being a holiday.[140]

A tenant has the entire rent day during which to pay rent, so that he cannot be in default till after that day has passed.[141] So, where rent is made payable at stated intervals, in advance, the tenant has the whole of the first day of each succeeding interval of time in which to make the payment.[142] A lease demised a term of years "from the first day of September now next ensuing," and reserved a rent payable "by equal quarter-yearly payments," the first payment "to be made on the first day of December now next ensuing." Under such a provision it was held that rent, though payable December first, was not legally due till midnight of that day, and could not be garnisheed until then.[143]

§ 662. An undertaking in writing, attached to a lease between landlord and tenant, by which a third person, without expressing any consideration, agrees to become surety for the prompt payment of rent, is void as within the statute of frauds. The relation of landlord and tenant is not established between the surety and the lessor, so the

[137] Irving v. Thomas, 18 Me. 418.

[138] Liebe v. Nicolai, 30 Ore. 364, 48 Pac. 172.

[139] Rowe v. Williams, 97 Mass. 163; Van Rensselaer v. Jewett, 5 Denio (N. Y.) 121, 131; Clun's Case, 10 Coke 127, 129a.

[140] Walton v. Stafford, 162 N. Y. 558, 53 N. E. 92, affirming 14 App. Div. 310.

[141] Dalton v. Laudahn, 27 Mich. 529.

[142] Sherlock v. Thayer, 4 Mich. 355.

[143] Ordway v. Remington, 12 R. I. 319.

contract is to answer for the debt of another, and if there is no consideration expressed, it is void by the statute of frauds.[144] If by the terms of a guaranty the liability of a guarantor is primary and for all the rent, he is not entitled to notice of default by the lessee. In any event, it is necessary to show loss or injury by a want of notice. If the guarantor could not have profited by notice, and has lost nothing for the want of notice, there is no reason why he should complain.[145] The general rule is that one entering into a contract of guaranty must perform all its stipulations, unless he can show the obligee has been guilty of some *laches* by which he has been injured.[146]

A lease and a guaranty indorsed upon it must be taken as one entire instrument. Where the word "within" is used in the guaranty, it is fairly inferable that it was written on the outside page of the lease, else there could be no application of the word "within." Technically there are two instruments, but practically there is but one. So, if the covenantee is sufficiently designated, this enables him to maintain the action.[147]

By the terms of a lease, in one case, the lessee promised to pay the rent of eight hundred dollars for the term of one year, and also the rent as above stated for such further time as the lessee may hold the same. Upon the back of the lease, and before the delivery thereof, a third person guaranteed to the lessor the payments of the rent therein stipulated. This guaranty was held to include the payments which became due after the expiration of the term of one year. The holding over was continuous, and without any new contract between the lessor and lessee; no change was made to take the case out of what was provided for in the lease.[148] But the surety's obligation is only coextensive with that of the lessee, and as soon as the occupation ceased the liability of the surety, along with that of the lessee himself, would come to an end.[149]

§ 663. Alterations in amount of rent and mode of payment.—Payment of a money rent may be by services rendered, on an express agreement to that effect; and it does not alter this result that a parol promise to accept services in payment of rent is made before the lease is executed. Such a promise would not be binding while executory,

[144] Hutson v. Field, 6 Wis. 407.

[145] Voltz v. Harris, 40 Ill. 155. But see White v. Walker, 31 Ill. 422, 438.

[146] Rhett v. Poe, 2 How. (U. S.) 457; Farmers' &c. Bank v. Kercheval, 2 Mich. 505.

[147] Otto v. Jackson, 35 Ill. 349.

[148] Rice v. Loomis, 139 Mass. 302, 1 N. E. 548.

[149] Kendall v. Moore, 30 Me. 337.

but if the services are rendered and accepted in satisfaction, that concludes the lessor.[150] Where a lease for one year, providing for the payment of the entire rent on a day during the term, also provided for the performance of certain work by the lessee at a fixed rate of compensation, and for the application of the earnings therefrom on the rental, the lessee was entitled to the deduction of compensation for all labor performed by him during the term, whether before or after the date fixed for the payment of the rent.[151]

A clause reserving rent reckoned by profits made would be liberally construed, and under a lease of a dam, reserving as rent one-half of all tolls and money that may be earned by the use of said dam, the lessor was held to be entitled to one-half of all earnings in running and driving logs which could fairly be traced to the benefits of the dam.[152]

An alternate provision in a lease of a farm for a cash rental, that in case of injury to crops by wind the lessee may pay a crop-rent of one-third of the crops grown, must be availed of by a tender of the crops at the proper time; and after the lessee has put this out of his power by sub-letting for a cash rent, he loses the benefit of the provision. A tender of the crop-rent would have discharged the lessee's liability on his rent notes, but he did not make such tender, and never had it in his power to make it.[153]

In a letting for a series of years, the leading idea as to rent is the yearly rental. Its subdivision into frequent payments is a matter of mathematics, and a secondary subject of thought, it being common knowledge that in the great majority of leases and in negotiations for them the rent stated and talked about is the yearly rent. Thus, in case a lease is made paying a gross yearly sum, and the tenant covenants to pay in quarterly instalments, the unnecessary addition of the quarterly sums payable would not control if it differed from the sum first stated, such difference being manifestly a clerical error.[154]

In a lease of rooms in a building at a stipulated rental, it was agreed that if any rooms in the building were rented for a less amount than at that time "such reduction shall also be made to lessee for term of this lease." It was urged that there would not be a reduction

[150] Oliver v. Phelps, 21 N. J. L. 597.

[151] Crawford v. Armstrong, 58 Mo. App. 214.

[152] Rayburn v. Mason Lumber Co., 57 Mich. 272, 23 N. W. 811.

[153] Dassance v. Cold, 101 Iowa 610, 70 N. W. 719.

[154] Smith v. Blake, 88 Me. 241, 33 Atl. 992.

"for term of this lease," according to the covenant, unless the lessees were paid back a portion of the rent previously collected. But this suggestion failed, because there was no covenant to refund any portion of the rent paid, and the covenant relied upon had reference to rent to accrue during the remainder of the term, after other rooms had been rented for a less amount.[155]

§ 664. A power of attorney contained in a lease to confess judgment for rent due and interest is valid, and though it is forbidden to include an attorney's fee, such a judgment would be valid for the balance after the amount allowed as attorney's fee had been remitted.[156] The use of the singular number, *"party* of the second part," when there are two lessees, does not invalidate a power to confess judgment when the lease proceeds to authorize any attorney to enter *"their"* appearance and confess judgment.[157]

One who leases a place for the practice of prostitution, and afterwards receives rent therefor and permits the house to be so used, is guilty of a violation of the statute in Illinois, and, on principles of public policy, ought not to be permitted to invoke or obtain the aid of the courts to enforce stipulations in the contract of letting which will enable him to secure a judgment by confession for rent due for such use of the house. The lessee, in such case, even though *in pari delicto* with the lessor, ought not to be denied or deprived of the privilege of presenting the defense that the lease was illegal because of its being in violation of the public law of the state. Such a defense is not allowed on the ground that the person presenting it is entitled to relief, but upon principles of public policy and to conserve the public welfare.[158]

§ 665. The only defenses against an action for rent reserved in a valid lease are, eviction, release, and surrender of the term. The landlord's failure to allow lessee to continue to occupy under a lease is not a defense to an action by the landlord for rent previously accrued. At most the tenant can only claim a set-off to the extent he was injured by the landlord's breach of agreement.[159] In an action

[155] Copeland v. Goldsmith, 100 Wis. 436, 76 N. W. 358.

[156] Fields v. Brown, 188 Ill. 111, 58 N. E. 977, reversing 89 Ill. App. 287; Agnew v. Sexton, 86 Ill. App. 274.

[157] Frank v. Thomas, 35 Ill. App. 547.

[158] Fields v. Brown, 188 Ill. 111, 58 N. E. 977, reversing 89 Ill. App. 287; Goodrich v. Tenney, 144 Ill. 422, 33 N. E. 44.

[159] Hutchins v. Hodges, 98 N. Car. 404, 4 S. E. 46.

for rent, the defense of surrender accepted by the landlord is not inconsistent with the defense of constructive eviction. It is quite possible for the lessee to have abandoned or surrendered possession of the premises because of their untenantable condition, and for the landlord to have accepted the surrender and resumed possession. The idea that there is any inconsistency in the defenses arises from the use of the term "constructive eviction."[160]

An early statute in Illinois permitting the defense of want of consideration to be set up in actions on certain instruments was held not to permit such a defense to be made in a suit on a written lease. A plea of no consideration in an action on a sealed instrument is bad in Illinois unless it is such an instrument as is entitled negotiable under the statute.[161]

Such possession of the leased premises by the lessor as would sustain the lease is *prima facie* established by its introduction in evidence. In the absence of proof to the contrary, it will be presumed that the lease, when executed, is valid and binding upon the parties. The burden of showing facts which would avoid the lease is upon the lessee. It is not necessary for the lessor to allege he was in possession at the time the lease was executed. After showing that the lease was in fact executed and that the rent due had not been paid, he has made out a *prima facie* case.[162]

§ 666. **Interest is recoverable as of right upon contracts in writing to pay money upon a day certain**; as upon bonds, bills of exchange, or promissory notes, though there be no express reservation of interest. Applying this principle to a covenant for the payment of a specific sum of rent upon a particular day, it is right that the jury calculate interest on the same up to the time of rendering their verdict.[163] It is, indeed, true that interest on rent in arrear cannot be distrained for—the distress can only be for the rent itself; but the rule is different in regard to an action of debt.[164]

[160] Minneapolis Coöp. Co. v. Williamson, 51 Minn. 53, 52 N. W. 986.

[161] Hallberg v. Brosseau, 64 Ill. App. 520.

[162] Collins v. Hall, 5 Wash. 366, 31 Pac. 972.

[163] Dennison v. Lee, 6 G. & J. (Md.) 383; Newson v. Douglass, 7 H. & J. (Md.) 417; Elkin v. Moore, 6 B. Mon. (Ky.) 462; Honore v. Murray, 3 Dana (Ky.) 31; Gutherie v. Stockton, 5 Harr. (Del.) 123, 204; Clark v. Barlow, 4 Johns. (N. Y.) 183; Crane v. Hardman, 4 E. D. Smith (N. Y.) 448; Dorrill v. Stephens, 4 McCord (S. Car.) 59; Gill v. Patton, 1 Cranch C. C. 188, 10 Fed. Cas. No. 5430; Obermyer v. Nichols, 6 Binn. (Pa.) 159; McQuesney v. Hiester, 33 Pa. St. 435. See Wise v. Ressler, 2 Cranch C. C. 199, 30 Fed. Cas. No. 17912.

[164] White v. Walker, 31 Ill. 422.

Interest on rent is recoverable as damages only, except when provided for in the bond or agreement, and consequently in case the postponement was by consent of the lessor, no interest could be recovered, for no damage would result to the consenting party.[165] Where rent is payable in kind, interest may be recovered during the time the lessee is in default in paying, provided the amount of produce and the day for delivery were stipulated in the agreement.[166]

In the absence of statute in regard to the allowance of interest, a party who sues for the arrearages of rent is not entitled, as a matter of course, to interest on the sum found to be due. It is, however, understood to be the general practice to allow interest on open accounts, when by the usual course of dealings or by express agreement a certain time is fixed for payment; and generally in all cases where there has been an unjust detention of money of another against his will. In these cases the interest allowed by the jury is regarded as compensation for the damage sustained by the plaintiff in consequence of the breach of contract by the defendant. But the allowance is not as a matter of strict legal right, as in the cases expressly provided for by statute. A similar rule may be adopted in equity, giving a discretion to the chancellor to allow or disallow interest, according to the circumstances of the case.[167] Where instalments of rent fell due weekly, interest has been allowed on each instalment from the date it was payable.[168]

The Virginia Supreme Court considered the question of allowing interest on rent at great length in 1808, delivering opinions seriatim, with the result that two judges held that interest could not be allowed in the absence of special circumstances, while the third judge thought the giving of interest was in the discretion of the jury as an assessment of damages. The reason assigned by the majority was that no man shall take advantage of his own laches or neglect; therefore the landlord shall not have interest for rent arrear, because he had the effectual remedy of distress whenever he chose to use it. The argument of the dissenting judge was that interest is but a fixed measure of damages; and damages are defined to be a compensation given by

[165] Lush v. Druse, 4 Wend. (N. Y.) 313.

[166] Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643; Van Rensselaer v. Platner, 1 Johns. (N. Y.) 276; Van Rensselaer v. Jewett, 5 Denio (N. Y.) 121, 135.

[167] Howcott v. Collins, 23 Miss. 398.

[168] Oliver v. Moore, 53 Hun (N. Y.) 472, 6 N. Y. S. 413.

a jury for an injury or wrong, so the withholding of rent, being an injury done to the landlord, ought to be recompensed in damages.[169]

By statute in Illinois, interest is properly allowable where an account has been liquidated between the parties, and, by an agreement to pay a fixed and stipulated sum for rent, the amount thus stipulated becomes liquidated by the terms of the agreement itself, and nothing further is necessary.[170] In Kentucky, also, it is provided by statute that all debts founded on any specialty, bill or note in writing ascertaining the demand, shall carry interest in the same manner as interest due on a bond or bill with a penalty, and this has been held to include rent reserved by a written instrument.[171]

Though rents and profits recoverable from a mortgagee on redemption do not usually bear interest until the filing of a bill to redeem or an account be demanded, yet where the possession of the mortgagee was *mala fide* from the beginning, the profits became a debt from the time of their accrual, and therefore bear interest.[172]

III. *Apportionment.*

§ 667. By the general rule of the common law, rent may be apportioned as to estate but not as to time.[173] While there may be an apportionment of rent as to estate,[174] there can be none as to time,[175] for the contract is entire—the rent for the period of time agreed upon is regarded as an indivisible item. The rule that rent cannot be apportioned as to time applies only in the absence of a statute or an express agreement to the contrary;[176] and a stipulation that in case of destruction by fire accrued rent only should be paid, is equiv-

[169] Cooke v. Wise, 3 H. & M. (Va.) 463, 483.

[170] West Chicago &c. Works v. Sheer, 8 Ill. App. 367. See Maltman v. Williamson, 69 Ill. 423; Ditch v. Vollhardt, 82 Ill. 134.

[171] Downing v. Palmateer, 1 T. B. Mon. (Ky.) 64.

[172] Benzein v. Robinett, 2 Dev. Eq. (N. Car.) 67.

[173] Anderson v. Robbins, 82 Me. 422, 19 Atl. 910; Cameron v. Little, 62 Me. 550; Cheairs v. Coats, 77 Miss. 846, 28 So. 728; Dexter v. Phillips, 121 Mass. 178, 23 Am. R. 261; Nicholson v. Munigle, 6 Allen (Mass.) 215; Russell v. Fabyan, 28 N. H. 543; Perry v. Aldrich, 13 N. H. 343; Zule v. Zule, 24 Wend. (N. Y.) 76; Page v. Culver, 55 Mo. App. 606; Countess of Plymouth v. Throgmorton, 1 Salk. 65.

[174] Salmon v. Matthews, 8 M. & W. 825; Boston &c. R. Co. v. Ripley, 13 Allen (Mass.) 421.

[175] Smith, Ex parte, 1 Swanst. 4, *n.* A; 2 Greenl. Cruise, tit. xxviii, ch. 111.

[176] Mayor &c. v. Ketcham, 67 How. Pr. (N. Y.) 161.

alent to an agreement for apportionment, which overrides the common-law rule.[177]

Where a term expires before the day on which rent is payable, whether by the eviction of the tenant from the land or because the lease determines before the legal time of payment, no rent shall be paid, for there shall never be an apportionment in respect of part of the time.[178] This rule has been constantly and repeatedly recognized, and is the settled rule of law.[179] The landlord cannot maintain assumpsit for use and occupation for such time as the tenant is actually in occupation, because where the parties have come to an express contract, none can be implied, this principle being so firmly established as to be called an axiom of the law.[180] The only possession of the lessee has been under the lease, and according to the terms of the lease no rent has ever become due which remains unpaid. As the lease terminates by its own provisions upon the happening of an event which the parties have foreseen, and which they have stipulated should have that effect, such termination cannot be treated as a mutual rescission of the express contract, by which an implied contract should be substituted.[181] To reach this result it is not necessary to deny that, under the modern notions of the rescission of contracts, and implied assumpsit for use and occupation, work, labor and materials, actions may now be brought in many cases after part performance of the contract. But an implied assumpsit is general, and supposes the special contract out of the way, under circumstances which raise an equitable demand for rent.[182]

A mortgagor cannot maintain a *quantum meruit* for use and occupation enjoyed by his lessee under a parol demise prior to the mortgagee's entry; for the tenancy between the mortgagor and his lessee, being junior to the mortgage, is completely determined by the mortgagee's entry and the lessee's attornment to him, which is equivalent to eviction by paramount title.[183]

[177] Hecht v. Heerwagen, 14 Misc. (N. Y.) 529, 2 N. Y. Ann. Cas. 339.

[178] Robinson v. Deering, 56 Me. 357; Anderson v. Robbins, 82 Me. 422, 19 Atl. 910; Cameron v. Little, 62 Me. 550; Zule v. Zule, 24 Wend. (N. Y.) 76; Nicholson v. Munigle, 6 Allen (Mass.) 215; Fuller v. Swett, 6 Allen (Mass.) 219; Clun's Case, 10 Co. 127.

[179] Jenner v. Morgan, 1 P. Williams 392; Hay v. Palmer, 2 P. Williams 501; Wood v. Partridge, 11 Mass. 488; Burden v. Thayer, 3 Metc. (Mass.) 76; Nicholson v. Munigle, 6 Allen (Mass.) 215.

[180] Cutter v. Powell, 6 Term R. 320, 324; Hall v. Burgess, 5 B. & C. 332; Grimman v. Legge, 8 B. & C. 324

[181] Nicholson v. Munigle, 6 Allen (Mass.) 215; Fuller v. Swett, 6 Allen (Mass.) 219.

[182] Zule v. Zule, 24 Wend. (N. Y.) 76.

[183] Anderson v. Robbins, 82 Me. 422, 19 Atl. 910.

Furthermore, where a tenancy at will is terminated between two rent days by a conveyance of the premises by the landlord to a third person, the tenant is not liable to his landlord for use and occupation of the premises from the first rent day to the date of the conveyance, and the reason is that rent cannot be apportioned as to time.[184] If the landlord is entitled to an apportionment of the rent, he may maintain an action of use and occupation; but if he is not entitled to apportionment, he has no remedy at all.[185]

Apportionment of rent, in cases where it is permitted, is for the benefit of the owners of the rent, and the omission to apportion is not a matter of which the tenant can complain, unless something has transpired to relieve him from liability to pay the whole rent.[186]

§ 668. When part of a reversion is sold, the law will apportion the rent, under the rule that rent may be apportioned as to estate, and the right of apportionment attaches the moment the sale is made.[187] On the death of a lessor, rent has to be apportioned among the heirs on whom the estate is cast, and in such case it is the duty of the tenant to pay each party the proportion of rent to which he is entitled,[188] or the lessor may create the necessity for apportionment by grant, as where he grants a part to one or the whole to several different persons.[189]

However, the law will not apportion rent in favor of a wrong-doer; but the owner of a reversion has the right to sell the whole or any part of it. The exercise of this right is not wrongful, and therefore, in the case of a sale of a part of the reversion, the law will apportion the rent.[190]

On the transfer of an undivided interest, rent should be apportioned, as where leased premises are owned by tenants in common and one of the joint lessors conveys his interest in the reversion to the

[184] Emmes v. Feeley, 132 Mass. 346.

[185] Baker v. Jeffers, 4 Cranch C. C. 707, 2 Fed. Cas. No. 772.

[186] People v. Dudley, 58 N. Y. 323.

[187] Linton v. Hart, 25 Pa. St. 193, 64 Am. Dec. 691; Reed v. Ward, 22 Pa. St. 144; Crosby v. Loop, 13 Ill. 625; Leitch v. Boyington, 84 Ill. 179; Newall v. Wright, 3 Mass. 138, 3 Am. Dec. 98; Keay v. Goodwin, 16 Mass. 1; Montague v. Gay, 17 Mass. 439; Dreyfus v. Hirt, 82 Cal. 621, 23 Pac. 193; Worthington v. Cooke, 56 Md. 51; Biddle v. Hussman, 23 Mo. 597, 602; Cheairs v. Coats, 77 Miss. 846, 28 So. 728; Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285; Shultz v. Spreain, 1 Civ. Cas. Ct. App. (Tex.), § 916.

[188] Crosby v. Loop, 13 Ill. 625.

[189] Crosby v. Loop, 13 Ill. 625.

[190] Cheairs v. Coats, 77 Miss. 846, 28 So. 728; Linton v. Hart, 25 Pa. St. 193, 196.

lessee.[191] The result would be the same where two owners of separate but adjoining tracts executed a lease covering both parcels, and one subsequently conveyed his reversionary interest to the lessee.[192] In both these cases the covenant to pay rent would be extinguished to the extent that the obligor and obligee were the same person.

Where rent is apportioned by a transfer of part of a reversion, the transferee may sue in covenant for the whole rent, although his recovery will be limited to the portion to which he is entitled,[193] the general principle being that, after an apportionment, the tenant is liable to separate actions and distresses.[194] This doctrine of apportionment has even been applied where the lease covered both real and personal property, and the real property had been sold on an execution against the lessor.[195]

If made without the concurrence of the tenant, the apportionment of rent between different holders of parts of a reversion should be made by a jury, and it has been declared that this was the only mode for apportionment in such case.[196] But where all the parties entitled to the rent join in making a demand, it seems that the tenants must pay or refuse to do so at their peril, they not being entitled to resist payment till the apportionment has been made by a jury. Such a doctrine was applied by the New York court to a testamentary division of rents between heirs and executors.[197]

§ 669. Where a lessee assigns part of his interest, the rent may be apportioned between the parties holding the premises, and the lessor may sue the assignee in covenant for his proportion. This necessarily follows from a general provision that the assignee shall be liable in

[191] Hill v. Reno, 112 Ill. 154.

[192] Higgins v. California &c. Co., 109 Cal. 304, 41 Pac. 1087.

[193] Worthington v. Cooke, 56 Md. 51; Dreyfus v. Hirt, 82 Cal. 621, 23 Pac. 193; Walter v. Maunde, 1 J. & W. 181.

[194] De Coursey v. Guarantee Trust &c. Co., 81 Pa. St. 217.

[195] Buffum v. Deane, 4 Gray (Mass.) 385.

[196] Nellis v. Lathrop, 22 Wend. (N. Y.) 121; Oakley v. Schoonmaker, 15 Wend. (N. Y.) 226; Bliss v. Collins, 5 B. & Ald. 876, 4 Mad. 235.

[197] People v. Stuyvesant, 3 Thomp. & C. (N. Y.) 179, in which case it is said: "Nor can it be maintained that S. by the terms of his will apportioned the rent, in the sense claimed by . . . counsel, between his son and his executor, by devising to the former the lots Nos. 158, 160 Third avenue, and bequeathing to the latter the leasehold interest in the lots Nos. 152, 154 Third avenue. The rent remained an entirety and unapportioned so far as the tenants were concerned. The fact that it was to be divided or distributed, after payment, between the heir at law and the executor was a matter which in no way affected" the tenants.

debt for the rent; for, if the rent could not be apportioned, the right of the lessor to the rent could be defeated by conveying the estate to two or more persons.[198] It is settled that a landlord may declare against an assignee of his lessee for a share of the rent reserved in the lease proportioned to the relative value of the part held by assignment.[199] Where a lessee surrenders part of the leased premises to the lessor, the rent may, upon the same principle, be apportioned.[200] Lord Coke lays it down that such rent services as were not within the statute *Quia emptores* were apportionable at common law; "as, if a man maketh a lease for life or years, reserving a rent, and the lessee surrender a part to the lessor, the rent shall be apportioned."[201]

Furthermore, where there is an eviction by paramount title from a part of the demised premises, it has been held that the rent should be apportioned.[202] Thus, in a case where a part of land covered by a lease was recovered in ejectment against the lessor, and the lessee took a lease from the plaintiff in the ejectment suit, and continued to occupy the whole tract, it was held that the lessee was entitled to an apportionment of the rent reserved in the first lease.[203] The same principle would seem to apply where the tenant never obtained possession of the entire premises. But the failure of a landlord to give possession of the whole premises leased, as he had agreed to do, deprives him of the right which the law conceded to him of distraining for the rent of that portion of the premises actually occupied, and the only remedy the landlord has is by an action for use and occupation for such portion. The landlord himself has put it out of the tenant's power to tender the amount due.[204]

The apportionment of rent reserved in a lease or grant among sev-

[198] Daniels v. Richardson, 22 Pic. (Mass.) 565; Montague v. Gay, 17 Mass. 439; Demainville v. Mann, 32 N. Y. 197, 88 Am. Dec. 324; Van Rensselaer v. Bradley, 3 Denio (N. Y.) 135, 45 Am. Dec. 451; Astor v. Miller, 2 Paige (N. Y.) 68, 78; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643; Main v. Davis, 32 Barb. (N. Y.) 461; Stevenson v. Lombard, 2 East 575.

[199] Pingrey v. Watkins, 15 Vt. 479; Van Rensselaer v. Bradley, 3 Denio (N. Y.) 135, 45 Am. Dec. 451.

[200] Ehrman v. Mayer, 57 Md. 612.

[201] Coke Litt. 148a.

[202] Fillebrown v. Hoar, 124 Mass. 580; Fitchburg &c. Mfg. Co. v. Melven, 15 Mass. 268; Halligan v. Wade, 21 Ill. 470, 74 Am. Dec. 108; Hegeman v. McArthur, 1 E. D. Smith (N. Y.) 147; Carter v. Burr, 39 Barb. (N. Y.) 59; Collins v. Karatopsky, 36 Ark. 316; Tunis v. Grandy, 22 Gratt. (Va.) 109; McFadin v. Rippey, 8 Mo. 738.

[203] Poston v. Jones, 2 Ired. Eq. (N. Car.) 350, 38 Am. Dec. 683.

[204] Hatfield v. Fullerton, 24 Ill. 278; Lawrence v. French, 25 Wend. (N. Y.) 443.

eral assignees of the lessee must be according to the value of the several parts held by each, and not according to the quantity or number of acres.[205] But if there is no proof of the relative value, the premises will be presumed to be of equal value, and the rent will be apportioned according to the quantity of land held by each.[206] The liability of the assignee of the lease is measured by the extent of his possessory right, and not by the extent of his possession. Thus, if he was assigned by one of two lessees an undivided half interest, he is only liable for half the rent reserved in the lease, although he has had exclusive occupation of the whole premises.[207] In New York, however, a contrary rule seems to prevail, and consequently an assignee of an undivided two-thirds interest of a term, created by lease reserving rent, in possession of the entire premises, is liable to the owners of the reversion in fee for the entire rent.[208] Where assignments of undivided interests are made by separate instruments, the assignees are not jointly liable for the whole rent, but each is severally liable for a part only, according to his interest in the premises.[209]

Where a lease covers both land and chattels, and the chattels are destroyed, the right of the lessee to apportionment depends on whether the lessor is responsible for the loss in any way. Where the lands are recovered against the lessor, the lessee shall hold the goods to the end of the term, and the rent shall be apportioned; likewise, where a negro slave included in the lease of a mill as miller had been previously emancipated by the lessor, rent should be apportioned, and the lessee could show these facts under a plea of *nil debet*.[210] But where sheep included in a lease of a farm die without fault on the part of either the lessor or lessee, it would seem, both on principle and the weight of authority, that rent in such a case should not be apportioned in the face of an express covenant to pay. The reason for this is that there has been no eviction by an elder title.[211]

[205] Van Rensselaer v. Gallup, 5 Denio (N. Y.) 454; Newton v. Wilson, 3 H. & M. (Va.) 470.

[206] Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643.

[207] St. Louis Pub. Schools v. Boatmen's Ins. &c. Co., 5 Mo. App. 91; Babcock v. Scoville, 56 Ill. 461.

[208] Damainville v. Mann, 32 N. Y. 197, 88 Am. Dec. 324. Of this case it has been said that, in so far as it holds that an entry into possession is necessary to create a liability to pay rent on the part of an absolute assignee, it is a departure from the common law. Babcock v. Scoville, 56 Ill. 461.

[209] Babcock v. Scoville, 56 Ill. 461.

[210] Newton v. Wilson, 3 H. & M. (Va.) 470, 479; Year Book 12, H. VIII, ch. 11, pl. 5; Brooke's Abr., tit. Apportionment, pl. 24. *Contra* Gilbert Rents, p. 176.

[211] Scott v. Scott, 18 Grat. (Va.) 150–176. See also, Newton v. Wilson, 3 H. & M. (Va.) 470, 479; Taverner's Case, 1 Dyer 56a.

If a person other than the lessee is in possession, not in his own right as a sub-lessee or assignee, but simply as an agent to manage the property, he will not be charged with his proportionate part of the rent, even though apportionment was provided for by statute.[212]

§ 670. The rent, which follows the reversion as an incident, is the rent which falls due subsequent to the transfer. If the lessor dies before rent is payable, it descends to his heirs, who are the reversioners; but if he dies after it is due, it goes to his personal representative, as part of his personal estate. It seems to have been long and well settled that a general grant of the reversion does not pass the rent past due. Such rent is a debt, due to the lessor and a part of his personalty.[213] Where land subject to a lease is sold, the seller is entitled to all rents past due at the time of sale; the purchaser, to all that fall due afterward. This is the rule of law where there is no different understanding entered into by the parties.[214]

A quitclaim deed from a lessor to his lessee of the leased premises does not operate to release and discharge claims for rent already accrued, simply by reason of the legal effect of the conveyance of the property out of which the rent has arisen. The prior rental of the property is not an appurtenance connected with it or belonging to it, but an entirely independent debt. It makes no difference if it happens that the grantee in the deed had himself been the tenant of the property. It is difficult to see why a deed should be effective to convey more, if one person is named in it as grantee, than if another is so named.[215] The converse of this rule is equally applicable, and therefore, in the absence of special agreement, an assignee of a leasehold in possession of the premises upon a rent day, is under obligation to pay the entire instalment of rent which falls due then.[216] In accordance with the rule that rent cannot be apportioned as to time, the owner of the reversion at the time rent becomes due is entitled to the entire sum then accruing, although his ownership has not extended over the whole period for which the rent is paid.[217] Where a lease is

[212] Stewart v. Perkins, 3 Ore. 508.

[213] Perkerson v. Snodgrass, 85 Ala. 137, 4 So. 752; Burden v. Thayer, 3 Metc. (Mass.) 76; Bank of Pennsylvania v. Wise, 3 Watts (Pa.) 394; Van Wicklen v. Paulson, 14 Barb. (N. Y.) 654; King v. Anderson, 20 Ind. 385.

[214] Page v. Lashley, 15 Ind. 152; Johnson v. Muzzy, 42 Vt. 708.

[215] Johnson v. Muzzy, 42 Vt. 708.

[216] Martineau v. Steele, 14 Wis. 272.

[217] English v. Key, 39 Ala. 113; Perkerson v. Snodgrass, 85 Ala. 137, 4 So. 752; Martin v. Martin, 7 Md. 368, 61 Am. Dec. 364; Dixon v. Niccolls, 39 Ill. 372; Hearne v. Lewis, 78 Tex. 276, 14 S. W. 572.

granted by a life tenant, who dies during the term, the rents which accrued previous to the death of the lessor are collectible by his personal representative, but those that accrued afterward under an implied agreement for continued occupation between the lessee and remainderman would go to the remainderman.[218] Without deciding whether a lessee of a life tenant is liable to the estate of the life tenant for rent after the determination of the life estate, if he recognized his promise to pay rent as binding and paid the full rent reserved to the administrator of the life estate, it is clear that the reversioner has no claim against the estate of the life tenant for this rent or for any part of it. The contract between the life tenant and his lessee is not made for or in behalf of the reversioner, nor is he a party to the contract. The lessee did not pay the money to the administrator of the life tenant for the use of the reversioner. If the lessee has any claim against the estate of the life tenant by reason of having paid rent for a full term which failed, the reversioner has not succeeded by assignment, or otherwise, to that claim, nor is he entitled to be subrogated to the rights of the lessee against the estate of the life tenant.[219] In California protection against double liability has been given by statute, and in that state a tenant, against whom conflicting claims for rent have been made, may file a bill of interpleader against the several claimants to determine their respective rights to the rent.[220]

Modern rules regarding the transfer of land dispense with attornment and the grant is at once effectual and complete. But, though the grantee of a reversion is entitled to rent without attornment, the tenant is protected in the payment of rent to the original landlord until he has actual notice of a transfer. Such protection has been held to apply to a payment of rent made in advance of the time it fell due, although the reversion had been granted over before the time for payment under the terms of the lease.[221]

A law providing that the purchaser is entitled to receive from the tenant in possession the rents of the property sold, has no application, the South Dakota court held, to sales made at a mortgage foreclosure, either by advertisement or by action.[222] A mortgagee, having pur-

[218] Lowrey v. Reef, 1 Ind. App. 244, 27 N. E. 626; Hoagland v. Crum, 113 Ill. 365; Wright v. Roberts, 22 Wis. 161, 165; Guthmann v. Vallery, 51 Neb. 824, 71 N. W. 734.

[219] Guthmann v. Vallery, 51 Neb. 824, 71 N. W. 734.

[220] Schluter v. Harvey, 65 Cal. 158, 3 Pac. 659.

[221] Dreyfus v. Hirt, 82 Cal. 621, 23 Pac. 193; Stone v. Patterson, 19 Pick. (Mass.) 476; Farley v. Thompson, 15 Mass. 18.

[222] Rudolph v. Herman, 4 S. Dak. 283, 56 N. W. 901.

chased the premises at such foreclosure sale and having, without the consent of the mortgagor, collected rents from tenants thereon, is liable to the mortgagor for the amount collected.[223]

§ 671. In most states of the United States there are statutes providing for apportionment in case the estate of the lessor is determinable on a life or on any contingency and is so determined. In the construction of such a statute by the Massachusetts court, it was contended that the words "or any contingency" were broad enough to cover a case where a mortgagee, whose mortgage was senior to a lease, entered for condition broken during the quarterly rent period. But the court held that these words, taken in the connection in which they are used, clearly referred to the happening of some event affecting the nature and character of the estate itself, and an essential and necessary part of it, upon which the continuance of the estate depends. The estate of a mortgagor, or of an owner of an equity of redemption, is not determined by the happening of any such event or contingency; it can only be determined by his own neglect to perform his contract, or to pay the debt which the mortgage is given to secure. In fact, the mortgagor's estate is not absolutely determined by the entry of the mortgagee; he still has a right to redeem, and if he redeems, he could collect the entire rent.[224] Under a similar statute in North Carolina it was held that a foreclosure was not such an uncertain event as to entitle the mortgagor lessor to an apportionment of a crop which is planted after the sale, and on which he has made advances with knowledge of the foreclosure decree.[225] In Kentucky a statute of this nature was held to apply to a letting on the shares, the executor of the life tenant being entitled to recompense for seed grain supplied before the crop rent was apportioned between him and the remainderman.[226] Under the New York law making the right to rent follow the ownership of the estate, the common law rule is changed, and the vendor and purchaser are each entitled to the rent earned during their respective ownerships.[227] So if a lessee, after receiving an assignment of the lease, pays rent for a full month under protest, he is entitled to restitution of such portion as was earned after the transfer.[228]

[223] Siems v. Pierre Sav. Bank, 7 S. D. 338, 64 N. W. 167.

[224] Adams v. Bigelow, 128 Mass. 365; Knowles v. Maynard, 13 Metc. (Mass.) 352.

[225] Spruill v. Arrington, 109 N. Car. 192, 13 S. E. 779.

[226] Redmon v. Bedford, 80 Ky. 13, 3 Ky. L. R. 511.

[227] Eddy, In re, 10 Abb. N. C. (N. Y.) 396.

[228] Eddy, In re, 10 Abb. N. C. (N. Y.) 396.

IV. *Set-off and Recoupment.*

§ 672. The cost of repairs made by a tenant with the consent of the landlord and for which the landlord agreed to pay may be set off against the rent account by the tenant,[229] but in the absence of agreement the tenant has no right to deduct the cost of repairs from the rent, since the landlord is under no obligation to make the repairs.[230] The same is obviously true where the lease places the burden of making repairs on the lessee.[231] But when the lessor has bound himself to make repairs by an express contract to that effect, the lessee may make the needed repairs himself and charge the expenditure to the landlord; or when sued for rent he may recoup for damages caused by the lack of repair in diminution of rent;[232] but the tenant is under no obligation to make the repairs and his recovery is not limited to the amount of the expenses which he would thereby incur.[233] In that case the amount of recovery would be the sum by which the rental value of the premises have been lessened;[234] the tenant is entitled to recover for all damage which is the natural and proximate result of the breach,[235] being such damages as are traceable solely to a breach of the contract.[236] Thus, in an action for rent under a lease of a farm, defendant set up a counter-claim for damages for plaintiff's failure to perform an agreement to construct ditches. The proper amount of recovery for such breach would be the defendant's loss by having to work an undrained instead of a drained farm; the measure of damages would not be limited to the cost of putting in a drain.[237]

The California statute, requiring a landlord to keep premises in a habitable condition, and allowing a tenant to expend one month's rent in making repairs which the landlord has neglected to make, is not equivalent to a covenant to repair by the landlord, and does not give the tenant the right to recoup that amount in damages after he has remained in possession and failed to make the repairs.[238]

[229] Trathen v. Kipp, 15 Colo. App. 426, 62 Pac. 962.

[230] Bonaparte v. Thayer, 95 Md. 548, 52 Atl. 496.

[231] Hovey v. Walker, 90 Mich. 527, 51 N. W. 678.

[232] Ross v. Stockwell, 19 Ind. App. 86, 49 N. E. 50; Kimball v. Doggett, 62 Ill. App. 528.

[233] Vandegrift v. Abbott, 75 Ala. 487; Culver v. Hill, 68 Ala. 66.

[234] Taylor v. Lehman, 17 Ind. App. 585, 46 N. E. 84, 47 N. E. 230.

[235] Culver v. Hill, 68 Ala. 66.

[236] Stewart v. Lanier House Co., 75 Ga. 582.

[237] Spencer v. Hamilton, 113 N. Car. 49, 18 S. E. 167.

[238] Moroney v. Hellings, 110 Cal. 219, 42 Pac. 560.

In order to recoup for damages because a leased building was not completed in a proper and suitable manner to meet the purposes for which it was intended to be used and occupied, the indenture of lease must contain some specification of manner of completion, so that on comparing the building as completed with the terms as to manner it may be shown that it did not fulfil the covenant of the lessor.[239]

§ 673. The extent of the right of a tenant entering or remaining in possession of the premises after the failure of the landlord to repair is to recoup the demand for rent because of the depreciation of the value of the rent by reason of the breach of agreement to repair. The right to abandon for such cause must be availed of at once, and if the tenant remains in possession under the lease for any length of time, he cannot abandon the possession because of the breach of covenant to repair.[240] As long as the lessee remains in possession the failure to put in improvements as agreed would not relieve the lessee from his liability to pay rent; at most, such failure gives him only a claim for damages.[241] However, it has been held that if there is a defect in construction, which prevented a leased house from being used, and this defect is unknown to the lessees, they may show in answer to a claim for rent, that notwithstanding they took possession and expressed themselves satisfied with the condition of the premises, they were not in fact fit for occupation, and that therefore the term did not commence with their possession. If the defect were an obvious one, taking possession would be a waiver of objection on account of it.[242]

A lessee may, by suing for breach of a covenant to complete a building, elect to treat the covenant to pay rent as an independent covenant. It then becomes unnecessary to decide whether the covenant to pay the rent was dependent upon the covenant to complete the building at the time agreed, so as to make such failure a defense to an action for rent.[243] If lessees enter and occupy premises before the completion of stipulated repairs, they thereby waive their right to performance as a condition precedent to the beginning of the term.[244]

[239] Rutland &c. Co. v. King, 51 Vt. 462.

[240] Kiernan v. Germain, 61 Miss. 498; § 324. See Kimball v. Doggett, 62 Ill. App. 528.

[241] Long v. Gieriet, 57 Minn. 278, 59 N. W. 194.

[242] Clarke v. Spaulding, 20 N. H. 313.

[243] Knapp v. Anderson, 71 N. Y. 466.

[244] Bonaparte v. Thayer, 95 Md. 548, 52 Atl. 496.

But payment of rent under threat of ejectment is not a waiver of the right to insist on having the repairs, stipulated for in a parol lease, made, and the tenant can recoup in damages for the failure to repair when subsequently sued for rent,[245] the cases holding that payment of rent for the greater part of the term will not deprive him of the right to counter-claim his damages for the entire term.[246] In an early Illinois case, however, it was held that a lessor could not recover on the special agreement of leasing unless he had performed his part.[247]

But according to the general rule of the common law, a covenant to pay rent and a covenant to make proper repairs are independent of each other, and the failure of the lessor to keep his covenant does not relieve the lessee from his obligation to pay the rent while he remains in possession. It is familiar law that the breach on the part of the landlord by failing to make repairs does not furnish any ground for the tenant to resist the payment of rent while he occupies the premises.[248] But the liability of the lessee to pay the rent is subject to a deduction of any damage he sustained from the failure to repair[249] or he may elect to bring a separate action for the recovery of damages.[250] The mode in which such a defense is availed of in an action for rent is by a plea of recoupment, which is more restricted than a set-off, in that it must arise from the same contract upon which the original claim is based, but more elastic in that the damages claimed need not be liquidated. The most familiar case in which recoupment is allowed in suits between landlord and tenant is where a landlord, suing for rent, has failed to perform his covenant to repair, and the general doctrine in such case is that the tenant may recoup for damages caused by breach of the landlord's covenant.[251] While the non-ob-

[245] Breese v. McCann, 52 Vt. 498.

[246] McAlester v. Landers, 70 Cal. 79, 11 Pac. 505; Cook v. Soule, 56 N. Y. 420.

[247] Baird v. Evans, 20 Ill. 29.

[248] Young v. Burhans, 80 Wis. 438, 50 N. W. 343; Allen v. Culver, 3 Denio (N. Y.) 284; Nichols v. Dusenbury, 2 N. Y. 283.

[249] Young v. Burhans, 80 Wis. 438, 50 N. W. 343.

[250] McAlester v. Landers, 70 Cal. 79, 11 Pac. 505; Kelsey v. Ward, 38 N. Y. 83.

[251] Culver v. Hill, 68 Ala. 66; Rowe v. Baber, 93 Ala. 422, 8 So. 865; Horton v. Miller, 84 Ala. 537, 4 So. 370; Murphy v. Farley, 124 Ala. 279, 27 So. 442; McAlester v. Landers, 70 Cal. 79, 11 Pac. 505; Livingston v. L'Engle, 27 Fla. 502, 8 So. 728; Stewart v. Lanier House Co., 75 Ga. 582; Reno v. Mendenhall, 58 Ill. App. 87; Reeves v. Hyde, 14 Ill. App. 233; Kimball v. Doggett, 62 Ill. App. 528; Clark v. Ford, 41 Ill. App. 199; Ross v. Stockwell, 19 Ind. App. 86, 49 N. E. 50; Taylor v. Lehman, 17 Ind. App. 585, 46 N. E. 84, 47 N. E. 230; Pioneer Press Co. v. Hutchinson, 63 Minn. 938, 65 N. W. 938; Long v. Gieriet, 57 Minn. 278, 59 N.

servance of covenants to repair may not be the subject of set-off in an action for rent, yet the breach of these covenants constitutes a good defense by way of recoupment. This principle is understood to be that in actions of assumpsit to recover damages for the breach of an agreement, the defendant may set up by way of recoupment, under a proper notice, that the plaintiff has violated the same agreement, and thus defeat a recovery for more than the balance. The rule is one of obvious equity, and is susceptible of ready and convenient application on the trial. It adjusts, by one action, mutual and adverse claims growing out of the same contract, and thus prevents the needless multiplication of suits.[252] Although a lessee has covenanted absolutely to pay rent, he can recoup for damages caused by the lessor's failure to perform his covenant to rebuild after a destruction by fire.[253] The important limitation on the doctrine of recoupment is that the damages must arise out of a breach of the same contract.[254] An attempt to recoup damages for breach of a verbal agreement to repair, the lease being under seal, failed and the reason assigned was that a lease under seal could not be varied by parol.[255] On the other hand, recoupment has been allowed for breach of a collateral agreement to repair, entered into at the time of making the contract of renting. The two demands spring out of the same transaction, and there is a natural equity that the one should compensate the other, and that only the balance should be recoverable.[256]

§ 674. Furthermore, a lessee sued for rent may recoup in damages for a false allegation of the landlord.[257] A lessee, after accepting a lease and entering into possession of the premises, upon discovering a fraudulent representation by the lessor of a material fact, is not compelled to give up the premises and rescind the lease, but he may bring an action against the lessor for deceit, there being nothing in the rela-

W. 194; Kiernan v. Germain, 61 Miss. 498; Kelsey v. Ward, 38 N. Y. 83; Breese v. McCann, 52 Vt. 498.

[253] Nichols v. Dusenbury, 2 N. Y. 283; Wright v. Lattin, 38 Ill. 293; Lunn v. Gage, 37 Ill. 19; Whitbeck v. Skinner, 7 Hill (N. Y.) 53; Westlake v. DeGraw, 25 Wend. (N. Y.) 669, 672; Batterman v. Pierce, 3 Hill (N. Y.) 171; Fowler v. Payne, 49 Miss. 32, 73.

[254] Fowler v. Payne, 49 Miss. 32.

[254] Livingston v. L'Engle, 27 Fla. 502, 8 So. 728.

[255] Reeves v. Hyde, 14 Ill. App. 233.

[256] Vandegrift v. Abbott, 75 Ala. 487.

[257] Dennison v. Grove, 52 N. J. L. 144, 19 Atl. 186; Maywood v. Logan, 78 Mich. 135, 43 N. W. 1052; Wilkinson v. Clauson, 29 Minn. 91, 12 N. W. 147; McCoull v. Herzberg, 33 Ill. App. 542.

tion of landlord and tenant, or in the rules of law which control that relation, to preclude him from so doing. Aside from the common law rule, which bound parties who solemnly contracted by deed to the presumption of full consideration, there would seem to be no reason why a reduction of damages for partial failure of consideration, or recoupment should not be allowed. And where, by statute, a seal is no longer of its former conclusive force, a suit on a contract for rent, like ordinary parol agreements, should be subject to that course of defense, as it avoids circuity of action.[258] Thus, for damages caused by the landlord's false statement in regard to the purity of water in a well, the tenant could recoup in damages when sued for rent.[259]

But the landlord is not an insurer unless an express clause in the lease makes him so, and therefore he is not subject to recoupment if he acts in good faith,[260] or where the injury was caused by an unusual storm which flooded the premises through a sewer adequate in ordinary weather.[261] Injury to premises by a freshet is not a ground for set-off in an action on an express covenant.[262]

V. *Abatement of Rent.*

§ 675. The destruction by fire of buildings upon leased premises does not relieve the lessee from his obligation upon an express covenant to pay rent, according to the well-settled rule of the common law.[263] "We think it may safely be said," remarked the New York

[258] Dennison v. Grove, 52 N. J. L. 144, 19 Atl. 186; Lord v. Brookfield, 37 N. J. L. 552. Prior to the statute New Jersey followed the common-law doctrine in regard to actions on sealed instruments and did not allow recoupment. Hunter v. Reiley, 43 N. J. L. 480.

[259] Maywood v. Logan, 78 Mich. 135, 43 N. W. 1052.

[260] McCoull v. Herzberg, 33 Ill. App. 542.

[261] Wilkinson v. Clauson, 29 Minn. 91, 12 W. N. 147.

[262] Niedelet v. Wales, 16 Mo. 214.

[263] Chamberlain v. Godfrey, 50 Ala. 530, 533; Cook v. Anderson, 85 Ala. 99, 4 So. 713; Warren v. Wagner, 75 Ala. 188; Fleeming v. King, 100 Ga. 449, 28 S. E. 239; Mayer v. Morehead, 106 Ga. 434, 32 S. E. 349; Buerger v. Boyd, 25 Ark. 441; Cowell v. Lumley, 39 Cal. 151; Smith v. McLean, 123 Ill. 210, 14 N. E. 50; Harris v. Heackman, 62 Iowa 411, 17 N. W. 592; Womack v. McQuarry, 28 Ind. 103; Vale v. Trader, 5 Kan. App. 307, 48 Pac. 458; Redding v. Hall, 1 Bibb (Ky.) 536; Helburn v. Mofford, 7 Bush (Ky.) 169; Liebertha v. Montgomery, 121 Mich. 369, 80 N. W. 115; Fowler v. Bott, 6 Mass. 63; Lanpher v. Glenn, 37 Minn. 433, 33 N. W. 10; Taylor v. Hart, 73 Miss. 22, 18 So. 546; Fowler v. Payne, 49 Miss. 32, 79; Coles v. Celluloid Mfg. Co., 39 N. J. L. 326; Davis v. George, 67 N. H. 393, 39 Atl. 979; Hallett v. Wylie, 3 Johns. (N. Y.) 44; Austin v. Field, 7 Abb.

court in 1808, "that there is not a case in the books where the destruction of the demised premises by fire has been held to excuse the tenant from the payment of the rent on an express covenant; but in every case where a defense on that ground has been attempted, it has failed."[264] At common law a tenant is bound to pay rent although the premises are destroyed by inevitable casualty and can have no abatement for such destruction without an express provision to that effect. The reason assigned for this rule are twofold, (1) it is said to rest on the express covenant to pay rent; (2) it is because the tenant is entitled to casual profits and therefore must stand casual losses. But of these two, the first is the better reason.[265]

In *Paradyne* v. *Jayne*[266] an action of debt was brought for rent upon a lease for years, and the defendant pleaded by way of excuse for the non-payment of rent, that he had been driven from the premises by the public enemies. The case was fully and ably argued before the King's Bench during the time of the civil wars and the reign of Charles I. It was insisted that by the law of reason a man ought not to pay rent when he could not enjoy, without any default on his part, the land demised to him, and that the civil and canon law exempted the party in such a case. But Rolle—author of the abridgment—overruled the plea and held that neither the hostile army nor an inundation would exempt the tenant from paying rent. The same doctrine has been held to this day and it is well settled, that upon an express covenant to pay rent, the loss of the premises by fire or inundation, or external violence, will not exempt the party from his obligation to pay rent.[267] For where the law creates a duty or charge, and the party is disabled from performing it without fault on his part,

Pr. N. S. (N. Y.) 29; Linn v. Ross, 10 Ohio 412; Harrington v. Watson, 11 Ore. 143, 3 Pac. 173; Bussman v. Ganster, 72 Pa. St. 285; Dyer v. Wightman, 66 Pa. St. 425; Magaw v. Lambert, 3 Pa. St. 444; Coogan v. Parker, 2 S. Car. 255; Hicks v. Parham, 3 Hayw. (Tenn.) 224; Banks v. White, 1 Sneed (Tenn.) 614; Diamond v. Harris, 33 Tex. 634; Thompson v. Pendell, 12 Leigh (Va.) 591; Richmond Ice Co. v. Crystal Ice Co., 99 Va. 239, 37 S. E. 851; Porter v. Tull, 6 Wash. 408, 33 Pac. 965, 36 Am. St. 172, 22 L. R. A. 613; Doe v. Sandham, 1 Term R. 705; Paradine v. Jane, Aleyn 27; Carter v. Cummings, 1 Cha. Ca. 83; § 404.

[264] Hallett v. Wylie, 3 Johns. (N. Y.) 44.

[265] Redding v. Hall, 1 Bibb (Ky.) 536; Diamond v. Harris, 33 Tex. 634. Where there was a lease of an iron bank with the exclusive right to mine iron ore therefrom, lessee is bound on an absolute covenant to pay rent whether there is any ore or not. Clark v. Midland &c. Co., 21 Mo. App. 58.

[266] Aleyn Rep. 26.

[267] Robinson v. L'Engle, 13 Fla. 482; Coy v. Downie, 14 Fla. 544.

a different rule prevails. In the absence of an express covenant to pay, a tenant is not liable for rent, after the destruction of the premises. So leased property having been destroyed by the public enemy in time of war, and the lessees having been deprived of its use and enjoyment without their fault, they ought to that extent to be released from their liability to pay rent.[268]

It does not matter whether the lease is under seal or not, so long as the promise is an express one to pay rent, and the expression "for $300 per year payable annually" and signed by the lessee is an express promise to pay rent.[269] Injustice or hardship to the lessee is not a ground for altering the rule, and the tenant has been held for rent, although he could not replace a frame building, which was destroyed, because of a fire ordinance in the city which required brick or stone buildings.[270]

A tenant is not excused from his express covenant to pay rent by the destruction of the premises by tempest, in the absence of an excepting clause.[271] Where a warehouse became untenantable by reason of high water, but the lease contained no stipulation for abatement of rent in such contingency, the entire rent could be recovered.[272] The failure of a right to take water from a spring included in a lease did not release a lessee from his unconditional covenant to pay a certain sum as rent.[273]

For a landlord to pull down walls and erect an enclosure around burned premises pursuant to municipal directions does not amount to an eviction of the lessee, who continues liable on his express covenant to pay rent.[274] The same principle applies where a lessee enters to repair premises injured by a flood, being under no obligation to do so.[275]

"Until the term commences and possession is given of the demised premises, the lease is only an executory contract on the part of the lessor; for the breach of which he may be prosecuted in the same manner as upon any other executory contract. And so it is on the part of the lessee. Before the term commences he has only an *interesse termini* and no estate; a right to a term at a future day; but there is no priv-

[268] White v. Stuart, 76 Va. 546.

[269] Linn v. Ross, 10 Ohio 412.

[270] Harris v. Heackman, 62 Iowa 411, 17 N. W. 592.

[271] Peterson v. Edmonson, 5 Harr. (Del.) 378.

[272] Jemison v. McDaniel, 25 Miss. 83; Galveston City R. Co. v. Gulf Land Co., 2 Tex. Civ. App. 326, 21 S. W. 959.

[273] Jones v. Springfield &c. Co., 65 Mo. App. 388.

[274] Fleming v. King, 100 Ga. 449, 28 S. E. 239.

[275] Peterson v. Edmonson, 5 Harr. (Del.) 378.

ity of estate between parties until the term commences and possession is given." Hence the lessee is not liable for rent when buildings demised burn before he enters into possession.[276]

§ 676. **When premises have burned down and the landlord has collected insurance, a court of equity will not prevent him from collecting the rent** even though he refuses to rebuild, if he should be under no covenant to repair.[277] It does not affect the application of the common law rule that the lessor has insured the buildings against fire and collected the insurance on them.[278] Furthermore, a provision that, in case of destruction by fire, the lessee shall be relieved from his covenant to repair does not prevent him from continuing liable for rent. It was not agreed that the destruction should amount to a termination of the lease.[279] A statutory obligation on the landlord to repair, not extending to rebuilding, would not change the rule as to continued liability for rent after destruction of the premises.[280]

A covenant by a lessor to build on land included in the leased premises does not bind him to rebuild in case of the destruction of the premises by fire, and in spite of the destruction the lessee would continue liable on his express covenant to pay rent.[281]

[276] Wood v. Hubbell, 5 Barb. (N. Y.) 601.

[277] Gluck v. Baltimore, 81 Md. 315, 32 Atl. 515; Leeds v. Cheetham, 1 Sim. 146; Loft v. Dennis, 1 E. & E. 474, 102 E. C. L. 472; Belfour v. Weston, 1 Term R. 310; Holtzapffel v. Baker, 18 Ves. 115. In Kansas a different rule seems to prevail. Justice Brewer says: "Insurance, now so common, works a change in the relative position of the parties. Formerly the landlord was, to a great extent, at the mercy of the tenant, who could put an end to his liability by firing the building without probability of detection. The burden of such a loss would fall upon him who had so little means of prevention or detection; hence one source of protection was to continue the liability for rent. But today the rule is insurance. By this, fire only changes the character of the owner's property from buildings to money—often a welcome change. And if the landlord gets the value in money, which he may put at interest, he certainly ought not to receive rent for that which has ceased to exist, and thus double his profits, especially where the insurance premiums are paid by the tenant." Whitaker v. Hawley, 25 Kan. 674.

[278] Kingsbury v. Westfall, 61 N. Y. 356; Sheets v. Selden, 7 Wall. (U. S.) 416; Magaw v. Lambert, 3 Pa. St. 444; Bussman v. Ganster, 72 Pa. St. 285.

[279] Ward v. Bull, 1 Fla. 271; Hill v. Wilson, 15 Ky. L. R. 814; Belfour v. Weston, 1 Term R. 310; Haltzapffel v. Baker, 18 Ves. 115; Davis v. George, 67 N. H. 393, 39 Atl. 979; Beach v. Farish, 4 Cal. 339.

[280] Mayer v. Morehead, 106 Ga. 434, 32 S. E. 349.

[281] Cowell v. Lumley, 39 Cal. 151.

§ 677. The general rule of the common law as stated above is predicated upon the assumption that an interest in the land or soil upon which the burned buildings stood passed under the lease. The rule is limited in that the destruction must not be of the entire premises leased. There must be something of the subject-matter of the lease remaining. For if the estate is gone, and the subject-matter or thing leased no longer exists, the liability for rent ceases. For rent is a certain profit, issuing out of lands and tenements corporeal, in compensation for its use and occupation. When the land or tenement ceases to exist, the rent which issues out of it, and is but an incident to it, of necessity must cease.[282] "We understand the law to be," remarks the Supreme Court of Arkansas, "that where a lessee takes an interest in the soil upon which a building stands, and the building should be destroyed by fire, he will be held for the rent of the entire property, unless he stipulates against casualties; but if he takes no interest in the soil, and the building is destroyed, the rule would be otherwise."[283] When the subject-matter of an alleged lease is destroyed, the estate of both lessor and lessee ends, the relation of landlord and tenant can no longer survive, so that an instruction which in effect informed the jury that the leasehold estate of the tenant continued after destruction of the subject-matter of the lease is erroneous.[284]

In regard to when an interest in the land passes, the general rule is well settled that the grant of a house, store, mill, or other building carries with it the land under the building.[285] If a lessee has an estate in land for a term for years, though the lessor is not bound to rebuild after a destruction by fire, yet any building which he might erect would become a part of the realty and would inure to the benefit of the lessee during the term.[286] A demise of the basement rooms of

[282] Chamberlain v. Godfrey, 50 Ala. 530; McMillan v. Solomon, 42 Ala. 356, 94 Am. Dec. 654; Warren v. Wagner, 75 Ala. 188; Cook v. Anderson, 85 Ala. 99, 4 So. 713; Ainsworth v. Ritt, 38 Cal. 89; Buerger v. Boyd, 25 Ark. 441; Womack v. McQuarry, 28 Ind. 103; Shawmut Nat. Bank v. Boston, 118 Mass. 125; Lieberthal v. Montgomery, 121 Mich. 369, 80 N. W. 115; Austin v. Field, 7 Abb. Pr. N. S. (N. Y.) 29; Graves v. Berdan, 26 N. Y. 498, 29 Barb. 100; Harrington v. Watson, 11 Ore. 143, 3 Pac. 173; Beham v. Ghio, 75 Tex. 87, 12 S. W. 996; Porter v. Full, 6 Wash. 408, 33 Pac. 965; Smith v. McLean, 123 Ill. 210, 14 N. E. 50.

[283] Buerger v. Boyd, 25 Ark. 441.

[284] Utah Optical Co. v. Keith, 18 Utah 464, 56 Pac. 155.

[285] Blake v. Clark, 6 Me. 436; Forbush v. Lombard, 13 Metc. (Mass.) 109; Oliver v. Dickinson, 100 Mass. 114; Rogers v. Snow, 118 Mass. 118.

[286] Rogers v. Snow, 118 Mass. 118.

a building of several stories in height, without any stipulation, by lessor or lessee, for rebuilding in case of fire or other casualty, gives the lessee no interest in the land, though he pays all the rent in advance, and if the whole building is destroyed by fire his interest in the rooms is terminated.[287] The lessee would have no right to erect a new building, within the compass of the rooms formerly occupied by him,[288] or to move another house on the land.[289]

A case is not brought within the exception under consideration, if it appears that the whole building is not destroyed, and there is no such destruction of the leased room as to deprive the tenant of the right of occupancy for the purpose of repairing it so as to make it tenantable. There is then no question of rebuilding the whole structure; but simply a matter of internal repairs. The lessor would have no right to enter to make such repairs without the consent of the lessee.[290]

If an advance payment of rent is a voluntary one, and there is no covenant in the lease to repay the rent in case of fire, the lessee cannot recover prepayments though he can resist subsequent claims.[291] But the case seems different under a contract for payment in advance. Such a contract does not apportion the risk or settle that the tenant assumes the risk of losing the rent paid in advance, and the landlord assumes the risk of losing subsequent payments and the building. It cannot be presumed that because a lessee pays in advance he has in mind a different degree of liability in case of the destruction of the leased premises by fire. It is simply a prudential requirement on the part of the lessor to secure the rent. There is no difference in principle, so far as fixing liability is concerned, whether the contract is to pay the rent monthly in advance or monthly at the end of the term.[292]

In Kentucky no exception to the general common-law rule as to liability for rent after destruction by fire has been recognized, and so, in a case arising in that state, the tenant of one room or apartment in a building containing several rooms was held liable for the rent of his room for the entire term, although the entire building was destroyed by fire seven months before the expiration of his term.[293]

[287] Stockwell v. Hunter, 11 Metc. (Mass.) 448; Kerr v. Merchants' Exch. Co., 3 Edw. Ch. (N. Y.) 315.

[288] Winton v. Cornish, 5 Ohio 477.

[289] Harrington v. Watson, 11 Ore. 143, 3 Pac. 173.

[290] Lieberthal v. Montgomery, 121 Mich. 369, 80 N. W. 115.

[291] Lieberthal v. Montgomery, 121 Mich. 369, 80 N. W. 115.

[292] Porter v. Tull, 6 Wash. 408, 33 Pac. 965.

[293] Helburn v. Mofford, 7 Bush (Ky.) 169.

§ 678. In Nebraska there has been a vigorous protest against the common-law rule of continued liability on express covenants after the destruction of the premises. It was argued by the Supreme Court of that state that a lease is not a bargain and sale for a given time of the lessor's interest, but is rather a hiring or letting of property for a certain time. The promise to pay a stated sum of money as rent for leased premises for a certain term is based upon the presumption that the leased premises shall exist for the term. Neither party had in mind the possibility that the leased premises might be destroyed; they did not contract with reference to such a casualty. There was an offer and a promise on the part of the lessor to furnish the hired property for the entire time, and a covenant upon the part of the lessee to pay rent for the right to use and occupy the hired property if it existed. It was not a proposition on the part of the lessor to quitclaim his right to the use and occupancy of the leased premises. The rule of construction of the common law is a harsh and technical one and the common-law rule is not in force in Nebraska, but the rule is as follows: Where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to an apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction.[294] Decisions of similar import are to be found in South Carolina, in a case where a building was rendered untenantable by a hurricane,[295] and in Kansas, where the leased buildings were burned.[296] In South Carolina the law as finally settled seems to be that destruction of leased premises by fire does not relieve a lessee from his express covenant to pay rent, as that could reasonably be considered as within the contemplation of the parties; but where the destruction of the subject-matter, out of which rent is reserved, is by an act of God or public enemies, the tenant may elect to rescind, and by surrendering benefits under the lease shall be discharged from the payment of rent. Unless the tenant surrendered the premises he would be liable for rent during the entire term.[297] The same distinction between destruction by fire and by the public enemies prevails in Mississippi, and it is there declared to be the common-law rule.[298] In Kansas the doctrine has been announced that where, by a single instrument, real

[294] Wattles v. South Omaha &c. Co., 50 Neb. 251, 69 N. W. 785.

[295] Ripley v. Wightman, 4 McCord (S. Car.) 447.

[296] Whitaker v. Hawley, 25 Kan. 674.

[297] Coogan v. Parker, 2 S. Car. 255; Bayly v. Lawrence, 1 Bay. (S. Car.) 499.

[298] Taylor v. Hart, 73 Miss. 22, 18 So. 546.

and personal property are leased for a gross rental, and the personalty is a substantial part of the leased property, upon a total destruction by accidental fire, the lessee is entitled to an abatement of the rent equal to the proportionate rental value of the personalty.[299]

§ 679. A provision that, if premises are destroyed by fire, rent shall be suspended until they are put in proper condition for use, by the lessor, implies that the lease is to continue though the building should be destroyed.[300] A provision of this nature, that in case the premises are destroyed the lessee shall not be liable for rent till they have been put in order again, is not an ordinary covenant in a lease, however.[301] Such a stipulation does not have the effect of putting an end to the lease or bringing the term to a close. The lease containing no provision that the liability for the taxes shall either be terminated, or subject to any apportionment, a promise to pay the taxes during the term is absolute and unconditional, and so long as the term continues the lessees continue liable for their payment. Taxes are not a part of the rent where the lease distinguishes between rent and taxes.[302] Although there is no express provision that the suspension of rent is limited to the time when the premises are untenantable, if the building is repaired in a proper manner, and with reasonable diligence and at once tendered to the lessee, he is bound to continue the term. The lessor by virtue of the clause in the lease, and his general ownership of the property, has a legal interest in the speedy repair of the building; and, after the lessee waives his right to repair and repudiates the lease *in toto,* the lessor has the right to go forward and make the repairs in a proper manner and with reasonable expedition and hold the lessee to his contract subject to suspension of rent for the time the building is untenantable.[303]

Under a stipulation that in case the premises are damaged by fire, no rent shall be paid *"while* they are unfit for occupancy," damages by fire are not to terminate the lease, but to stop the payment of rent merely, while the premises are unfit for occupancy. The duty to repair, then resting on the landlord, carries with it the right of entry and of reasonable temporary occupancy for the purpose of repairing, and it must be done within a reasonable time.[304] But if the provision

[299] Whitaker v. Hawley, 25 Kan. 674; Vale v. Trader, 5 Kan. App. 307, 48 Pac. 458.

[300] Rogers v. Snow, 118 Mass. 118.

[301] Eaton v. Whitaker, 18 Conn. 222, 223.

[302] Minot v. Joy, 118 Mass. 308.

[303] Phillips &c. Mfg. Co. v. Whitney, 109 Ala. 645, 20 So. 333.

[304] Smith v. McLean, 123 Ill. 210, 14 N. E. 50; Kellenberger v. Foresman, 13 Ind. 475. If the lessor fails

is that rent shall cease altogether upon the destruction of the premises by fire, the lessee must surrender the premises, on the occurrence of such event. Any other construction would work injustice and contravene the plain purpose and design of the parties.[305]

A clause relating to the suspension of rent refers to such injury to the premises as cannot be repaired, but necessitates a rebuilding of the premises; when covenants by the lessee to repair are considered in conjunction with a provision for the suspension of rent, it seems evident that such provision was intended solely to relieve the lessees from this common-law liability to pay rent in case of the destruction of the leased premises by fire. Mere injury to scenery and fixings by smoke and water, rendering occupation unpleasant, does not bring a case within the terms of a lease relating to the suspension of rent.[306] Upon the setting up of such a defense, it is proper to consider the condition of the premises, their situation, the business for which they are used, or intended to be used, and whether they were occupied at the time of the fire, or whether any business then being carried on was interrupted, and all the surrounding existing circumstances in regard to the premises at the time of the fire. If the lessee had no right to sub-let, the question whether the premises were unfit for occupancy by a sub-lessee is not available as a defense. That injuries which can be repaired for a few dollars do not justify a jury in finding that there was such substantial and material damage as to render the premises unfit for occupancy is common sense and common knowledge. A large portion of the business of the country is carried on through rented premises, and it would be a dangerous precedent to hold that a valuable lease could be nullified for a trifling injury.[307]

A finding that the lessees, by the payment of rent, elected to consider the premises not untenantable, and that they were not untenantable as to them, is sustained by the evidence, if it shows that they remained in possession after a fire and continued to occupy them and conduct their business and pay rent as usual, without claim that the premises were untenantable, or notice to the lessor to repair.[308]

The explosion of a boiler occurring without any negligence on the

to repair within the specified time in a case where time for repairs was specified, the lease is terminated. Florsheim v. Dullaghan, 58 Ill. App. 626.

[305] Buschman v. Wilson, 29 Md. 553; Gates v. Green, 4 Paige (N. Y.) 355.

[306] Lewis v. Hughes, 12 Colo. 208, 20 Pac. 621.

[307] Wampler v. Weinmann, 56 Minn. 1, 57 N. W. 156.

[308] Tatum v. Thompson, 86 Cal. 203, 24 Pac. 1009.

part of the lessee has been regarded as the happening of a casualty causing damage to the demised building, which was within the terms of a lease suspending rent until repairs were completed by the lessor.[809] But the question whether an overflow caused by an extraordinary flood of water is a casualty within the meaning of the covenants of a lease is one of fact for the jury under proper instructions.[810]

The effect of a covenant by the lessor to repair on the continued liability of the lessee for rent after destruction of the premises is not to suspend the rent but if the lessor fails to perform such a covenant, the damages from such non-performance would exactly offset the rent subsequently becoming due under the lease. Therefore the lessee would have a complete defense when sued for rent.[811] A lease of mills provided that "the tenant was to keep up repairs, except heavy repairs . . . in [which] case it was to be repaired by the landlord in a reasonable time after the injury and he was not to lose the rent if he should go on to do the work according to contract," and the mill was totally destroyed by fire. It was held that if the landlord refused to make the heavy repairs he was to lose the rent. This was a necessary implication from the words used; for it would have been idle to say he was not to lose the rent if he went on with the repairs, if the parties did not understand that his failure to make them should deprive him of the rent.[812]

§ 680. **A case where a leased building is torn down under power of eminent domain to widen a street** is not covered by a provision in a lease that rent shall cease if the premises become untenantable by fire or other casualty. In the eyes of the law such acts are no injury to the tenant because damages are awarded to him for such taking.[813] When there is a leasehold interest in land taken under the power of eminent domain, the lessee is entitled to just compensation for the value of his interest, precisely as the landlord is entitled to compensation for the value of his interest, and the sum of these values must be the full value of the property taken.[814] A taking of part of demised land by condemnation is not an eviction,[815] and the tenant remains liable,

[809] John Morris Co. v. Southworth, 154 Ill. 118, 39 N. E. 1099.

[810] Miland v. Meiswinkel, 82 Ill. App. 522.

[811] Union Water Power Co. v. Pingree, 91 Me. 440, 40 Atl. 333.

[812] Thompson v. Pendell, 12 Leigh (Va.) 591.

[813] Mills v. Baehr, 24 Wend. (N. Y.) 254. See § 362.

[814] New York & B. Bridge v. Clark, 137 N. Y. 95, 32 N. E. 1054; Burt v. Merchants' Ins. Co., 115 Mass. 1; Gluck v. Baltimore, 81 Md. 315, 32 Atl. 515; § 643.

[815] Gluck v. Baltimore, 81 Md. 315,

under his covenant, to pay the rent originally reserved, because nothing short of a surrender, a release, or an eviction will discharge him.[316]

§ 681. In many jurisdictions the rule of the common law as to continued liability for rent after destruction of the premises has been abolished or modified by statutes. Thus, in New Jersey such a change was made in 1874;[317] and in Minnesota in 1883.[318] In Virginia a lessee is not liable on covenants to repair, or to pay rent, after the destruction of the premises unless such was the intention of the parties as evidenced by their written contract.[319] Such statutes would not be retroactive in their effect,[320] following the general rule in this respect.

In New York, Ohio and Minnesota, the acts provide that upon the destruction or injury of leasehold buildings so that they are untenantable, the tenant shall not be liable or bound to pay rent, and that he may thereupon quit and surrender the possession of the premises. The tenancy is not made obsolutely to cease, except at the option of the tenant. He is relieved from his obligation, if he chooses to avail himself of the provisions of the act, or he may perform the covenants of his lease and retain the benefit of it; but he cannot have the benefits of the law and at the same time repudiate its obligations. Such is manifestly the correct interpretation of these statutes. If the tenant elects to be free from his obligations, the statute, by necessary implication, imposes as a condition the surrender of the premises.[321] In the latter jurisdiction it has been suggested that a tenant might resume possession after repairs were made and at the same time be relieved from paying rent while he was deprived of the use of the premises.[322]

32 Atl. 515; Dyer v. Wightman, 66 Pa. St. 425; Emmes v. Feeley, 132 Mass. 346; Stubbings v. Evanston, 136 Ill. 37, 26 N. E. 577, 11 L. R. A. 839; Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212.

[316] Gluck v. Baltimore, 81 Md. 315, 32 Atl. 515. A landlord is not liable to his tenant for damages incurred on the leased building being torn down by city authorities as dangerous or unlawful, unless the landlord procured it to be done. Hitchcock v. Bacon, 118 Pa. St. 272, 12 Atl. 352.

[317] Coles v. Celluloid Mfg. Co., 39 N. J. L. 326.

[318] Lanpher v. Glenn, 37 Minn. 4, 33 N. W. 10.

[319] Richmond Ice Co. v. Crystal Ice Co., 99 Va. 239, 38 S. E. 141.

[320] Coles v. Celluloid Mfg. Co., 39 N. J. L. 326.

[321] Johnson v. Oppenheim, 55 N. Y. 280; Gay v. Davey, 47 Ohio St. 396, 25 N. E. 425; Boston Block Co. v. Buffington, 39 Minn. 385, 40 N. W. 361.

[322] Boston Block Co. v. Buffington, 39 Minn. 385, 40 N. W. 361.

In Connecticut the statute on this topic gives the option to the lessor in place of the lessee. If the lessor would avail himself of the provisions of this act, he must make the necessary repairs with reasonable diligence. The obligation to pay rent after the building is repaired is not a new statutory obligation, but a contract obligation revived by the statute. Furthermore the Connecticut act has been held to apply to the leasing of rooms in a building as well as to a demise of an entire building.[324] In order to have the statute apply, the building must become untenantable by some sudden and unexpected injury and not by mere decay. The statute manifestly has no reference to ordinary repairs, such as the lessee at common law is bound to make. It applies only to cases where the building becomes untenantable by reason of some sudden and unexpected calamity; as where it is wholly or partially destroyed by fire, water, or by a mob, or other like cause. It was designed to relieve the tenant of the burden of paying rent after it had become impossible for him to use and occupy the premises leased.[325]

In conformity with this principle the New York courts have held that the act affording a tenant relief in that state does not apply to a case where the premises were out of repair at the time of letting. It never could have been the intention of the statute that a tenant might hire a dilapidated house for a certain time, and then without any material change in its condition, he should have the right to quit and surrender it whenever he pleased.[326] Nor would the act apply to a case where the occupants of a flat were annoyed by unpleasant and unwholesome odors.[327]

[323] The statute in force in that state is as follows: "The tenant of any tenement which may be, without his fault or neglect, so injured as to be unfit for occupancy shall not be liable to pay rent after such injury so long as such tenement is untenantable, if he continue to occupy, unless it be otherwise expressly provided by written agreement; and in case of such injury he may quit possession of such tenenment; but if the same shall become fit for occupancy during the continuance of his lease, he shall then pay the rent and may again occupy it." Gen. St. of Conn. 1902, § 4045.

[324] Miller v. Benton, 55 Conn. 529, 13 Atl. 678.

[325] Hatch v. Stamper, 42 Conn. 28.

[326] Bloomer v. Merrill, 1 Daly (N. Y.) 485.

[327] Sutphin v. Seebas, 12 Daly (N. Y.) 139. In a lease of an old building the tenant covenanted to repair. He stored extra heavy materials in the building which caused some new floors put in by tenant to settle and a fall of snow caused a further settling. On this state of circumstances, the statute making it unnecessary for tenant to pay rent when premises were damaged by the elements did not apply because

The mere building upon or other improvement of an adjoining lot, by which demised premises are rendered less commodious of occupation or less suitable to the uses of the tenant does not affect the right of the landlord to his rent, or authorize the tenant to terminate the lease and abandon the premises,[328] and a statute of the kind under consideration does not give the tenant relief.[329] Under a statute providing for the two alternatives when the premises are destroyed or injured, the first alternative has reference to a sudden and total destruction, the latter has reference to a case of injury to the premises short of a total destruction. If the legislature had intended to provide that the tenant should cease to be liable for rent when the premises from any cause became untenantable, it would have been easy to have expressed the intent in apt and proper language.[330]

acts of the tenant were partly the cause. The tenant still continued liable to make repairs. McMann v. Autenreith, 17 Hun (N. Y.) 163.

[328] Johnson v. Oppenheim, 55 N. Y. 280; Hazlett v. Powell, 30 Pa. St. 293; Palmer v. Wetmore, 2 Sandf. (N. Y.) 316; Myers v. Gemmel, 10 Barb. (N. Y.) 537; Hilliard v. New York &c. Co., 41 Ohio St. 662.

[329] Hilliard v. New York &c. Co., 41 Ohio St. 662.

[330] Suydam v. Jackson, 54 N. Y. 450; Hilliard v. New York &c. Co., 41 Ohio St. 662. Under act of 1860 releasing lessee of a building from liability for rent after injury to the building making it untenantable, "unless otherwise expressly provided by written agreement," it does not constitute a waiver for a lease to contain a provision that in case the tenant abandons his premises at any time, the rent then due and to become due shall be due and collectable. Van v. Rouse, 94 N. Y. 401.

CHAPTER X.

ESTOPPEL TO DENY LANDLORD'S TITLE.

§ 682. Modern rule of estoppel to deny title between landlord and tenant.—In all possessory actions arising between a landlord and his tenant in respect to the demised premises, the general rule is well established that as long as a tenant remains in possession of the demised premises, he is absolutely precluded from denying the validity of the title under which he entered or agreed to hold.[1] Beside possessory ac-

[1] **Alabama:** Pugh v. Davis, 103 Ala. 316, 18 So. 8; Barlow v. Dahm, 97 Ala. 415, 12 So. 293; Davis v. Williams, 130 Ala. 530, 30 So. 488. **Arkansas:** Vinson v. Flynn, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186; James v. Belding, 33 Ark. 536. **California:** Pierce v. Minturn, 1 Cal. 470; Burgess v. Rice, 74 Cal. 590, 16 Pac. 446. **Colorado:** Milsap v. Stone, 2 Colo. 137. **Florida:** Robertson v. Biddell, 32 Fla. 304, 13 So. 358; Winn v. Strickland, 34 Fla. 610, 16 So. 606. **Georgia:** Smith v. Sutton, 74 Ga. 528. **Illinois:** Baker v. Pratt, 15 Ill. 568; Knefel v. Daly, 91 Ill. App. 321; Sexton v. Carley, 147 Ill. 269, 35 N. E. 471. **Kansas:** Pettigrew v. Mills, 36 Kan. 745, 14 Pac. 170. **Louisiana:** Hanson v. Allen, 37 La. Ann. 732. **Maine:** Longfellow v. Longfellow, 61 Me. 590; Heath v. Williams, 25 Me. 209. **Massachusetts:** Binney v. Chapman, 5 Pick. (Mass.) 124; Gage v. Campbell, 131 Mass. 566; Granger v. Parker, 137 Mass. 228. **Maryland:** Goodsell v. Lawson, 42 Md. 348; Cook v. Creswell, 44 Md. 581. **Michigan:** Lee v. Payne, 4 Mich. 106. **Minnesota:** Morrison v. Bassett, 26 Minn. 235, 2 N. W. 851; Sage v. Halverson, 72 Minn. 294, 75 N. W. 229; Allen v. Chatfield, 8 Minn. 435. **Mississippi:** Wildy v. Doe, 26 Miss. 35; Winston v. President &c., 28 Miss. 118; Frazer v. Robinson, 42 Miss. 121. **Missouri:** Walker v. Harper, 33 Mo. 592; Shepard v. Martin, 31 Mo. 492; Green v. Missouri &c. R. Co., 82 Mo. 653. **Montana:** Alderson v. Marshall, 7 Mont. 288, 16 Pac. 576. **Nebraska:** Carson v. Broady, 56 Neb. 648, 77 N. W. 80. **New Hampshire:** Russell v. Allard, 18 N. H. 222; Plumer v. Plumer, 30 N. H. 558. **North Carolina:** Heyer v. Beatty, 76 N. Car. 28; James v. Russell, 92 N. Car. 194; Shew v. Call, 119 N. Car. 450, 26 S. E. 33; Shell v. West, 130 N. Car. 171, 41 S. E. 65. **North Dakota:** Nearing v. Coop, 6 N. D. 345, 70 N. W. 1044. **Oklahoma:** Hager v. Wikoff, 2 Okla. 580, 39 Pac. 281; Pappe v. Trout, 3 Okla. 260, 41 Pac. 397; Hamill v. Jalonick, 3 Okla. 223, 41 Pac. 139. **Oregon:** Kiernan v. Terry, 26 Ore. 494, 38 Pac. 671. **Pennsylvania:** Kline v. Johnston, 24 Pa. St. 72. **South Carolina:** Syme v. Sanders, 4 Strob. L. (S. Car.) 196; Darby v. Anderson, 1 Nott & M. (S. Car.) 369; Wilson v. Weathersby, 1 Nott & M. (S. Car.) 373. **Tennessee:**

tions, such as ejectment, writ of entry, trespass to try title, and summary proceedings, and actions for rent, or use and occupation, or of replevin, the rule of estoppel has been applied where the lease is entirely distinct from the foundation of the action, and the relation of landlord and tenant can only appear in evidence, as in trover,[2] or in an application for an injunction against waste,[3] or in a suit for specific performance.[4]

The characteristic and vital distinction between the ancient legal estoppel arising from a demise by indenture, and the modern equitable estoppel *in pais* of the tenant is, that the latter need not be pleaded, but is conclusive in evidence in support of a general denial of the case set out or relied on by the opposite party.[5] The existence of the relation of landlord and tenant, as between the plaintiff and defendant in an action of ejectment, is of a vital and controlling importance, because the tenant is estopped from disputing his landlord's title, so long as he continues in possession of the demised primses. After taking possession on the faith of his lease, or being permitted to remain in such possession, in recognition of the landlord's title, the

Campbell v. Hampton, 11 Lea (Tenn.) 440; Rogers v. Waller, 4 Hayw. (Tenn.) 205; Caldwell v. Harris, 4 Humph. (Tenn.) 24; Beaty v. Jones, 1 Coldw. (Tenn.) 486; Elliott v. Lawless, 6 Heisk. (Tenn.) 123, 130. **Vermont:** Tuttle v. Reynolds, 1 Vt. 80; Congregational Society v. Walker, 18 Vt. 600. **Virginia:** Creigh v. Henson, 10 Grat. 231; Dobson v. Culpepper, 23 Grat. 352. **West Virginia:** Campbell v. Fetterman, 20 W. Va. 398. **Wisconsin:** Ricketson v. Galligan, 89 Wis. 394, 62 N. W. 87. **United States:** Willison v. Watkins, 3 Pet. (U. S.) 43, 48. In a case arising in North Carolina there was a conveyance to defendant in 1879, without transfer of possession, a lease to A in 1880, and A sub-let to defendant; it was held on these facts that the doctrine of estoppel did not apply, and the defendant could set up title in himself without surrendering possession of the premises to the landlord. Allen v. Griffin, 98 N. Car. 120, 3 S. E. 837. This case seems clearly wrong; it gives an example of just the sort of case where estoppel should apply.

[2] Plumer v. Plumer, 30 N. H. 558.

[3] Parker v. Raymond, 14 Mo. 535.

[4] Davis v. Williams, 130 Ala. 530, 30 So. 488.

[5] Kiernan v. Sanders, 6 A. & E. 515; Veale v. Warner, 1 William Saund. 323d, 325. In 6 Am. L. R. 1, at page 9, it is stated that "the origin and character of the tenant's estoppel are to be found in the essential features of the ancient action of assumpsit for use and occupation at a period long antecedent to the statute of George II, and far antedating the rule in actions of ejectment. . . . Certainly the estoppel in ejectment is in no way derivable from the statute of George II, and its existence therein further disproves the position of those who look to that statute as the source of that estoppel.

tenant is precluded from setting up an outstanding title with a view of defeating that of the landlord.[6] On becoming tenant of land under another the tenant, in contemplation of law and on grounds of public policy and in maintenance of sound morals and good faith, undertakes to preserve the possession of the landlord and redeliver it and he cannot do otherwise without a violation of faith.[7]

The relation of landlord and tenant, with or without deed, creates an equitable estoppel, mutual in its operation. It arises whenever one person has obtained possession of the land of another under an obligation, express or implied, to restore it. Such is the case of a vendee in possession and the rule applies between mortgagor and mortgagee.[8] The tenant of a demandant in an ejectment suit, entering under a levy, is estopped to deny the regularity of the process under which the levy was made.[9] Thus it has been held that where one takes possession of land under a contract to purchase, he cannot controvert the title of the one who let him into possession.[10] Defendants in an ejectment suit cannot hold possession under a contract of purchase, and at the same time deny that the party with whom the contract was made had title to the property which was the subject of the contract.[11] A person let into possession under such an executory contract of purchase, looking up to his vendor for a title, occupies as *quasi* tenant, and as respects denial of title, the same estoppel exists between such parties as between landlord and tenant.[12] The reason of the rule as to estoppel is that one who goes into possession, under another, shall not be permitted to deny the character in which he went in; and it does not matter whether the conventional relation of landlord and tenant is created between the parties or not.[13]

The estoppel, precluding a denial of the landlord's title, extends

[6] Caldwell v. Smith, 77 Ala. 157; Norwood v. Kirby, 70 Ala. 397; Houston v. Farris, 71 Ala. 570.

[7] Washington v. Conrad, 2 Humph. (Tenn.) 562.

[8] Clemm v. Wilcox, 15 Ark. 102.

[9] Goodenow v. Kilby, 24 Me. 425.

[10] Reese v. Caffee, 133 Ind. 14, 32 N. E. 720; Farmer v. Pickens, 83 N. Car. 549; Dowd v. Gilchrist, 1 Jones L. (N. Car.) 353; Love v. Edmonston, 1 Ired. L. (N. Car.) 152; Winnard v. Robbins, 3 Humph. (Tenn.) 614; Baker v. Hale, 6 Baxt. (Tenn.) 46; Casey v. Haurick, 69 Tex. 44, 6 S. W. 405. *Contra*, Green v. Dietrich, 114 Ill. 636, 3 N. E. 800.

[11] Reese v. Caffee, 133 Ind. 14, 32 N. E. 720; Casey v. Haurick, 69 Tex. 44, 6 S. W. 405.

[12] Sabastian v. Ford, 6 Dana (Ky.) 436; Winnard v. Robbins, 3 Humph. (Tenn.) 614; Baker v. Hale, 6 Baxt. (Tenn.) 46.

[13] Burnett v. Rich, 45 Ga. 211, per McCay, J.

equally to landlord and tenant; so that while the tenant is estopped from denying the landlord's title, the landlord cannot allege that he had no title at the time of the demise.[14]

§ 683. **Where a lessee has had full benefit of his term, he is estopped to deny the capacity or power of the lessor to execute the lease and the mode in which he executed it.**[15] In such a case the lessee has received everything that he bargained for; he has been given possession of the land and held it peaceably until after the expiration of the lease. Having received all the benefits of his contract, he cannot be permitted to dispute the authority of the one leasing him the land and thereby escape paying for what he has received. The lessee's estoppel would extend to a surety for the payment of rent.[16] It may be laid down as a general rule that, besides the prohibition against denying title, a tenant is precluded from controverting the authority of his landlord to execute the lease under which he holds or his capacity to sue on it.[17] In the absence of authority derived from the statute or from the court ordering his appointment, a receiver has no authority to sue in his own name; but after tenants have attorned to a receiver, and so created a tenancy, as between them, the receiver may distrain, in his own name for rent accrued during the tenancy without first obtaining an order so to do.[18] But if possession of the property is wrongfully retained by the tenant, the receiver is entitled to maintain an action to recover possession in his own name without an order of court.[19] In a similar connection it has been declared that there is nothing peculiar in the nature of municipal corporations, to require, against them, any modification of the rule which prevents the tenant from denying his landlord's title.[20]

§ 684. **To allow a tenant to object to the right of joint lessors to maintain a joint action to recover the premises,** for the reason that they do not hold the premises in common, but are seized in severalty of separate and distinct parcels thereof, and cannot, therefore, jointly

[14] Duke v. Harper, 6 Yerg. (Tenn.) 279, 280.

[15] Mayer &c. v. Sonneborn, 113 N. Y. 423, 21 N. E. 121, 22 N. Y. St. 988; Cunning v. Tittabawassee Boom Co., 88 Mich. 237, 50 N. W. 141; Oliver v. Gary, 42 Kan. 623, 22 Pac. 733.

[16] Oliver v. Gary, 42 Kan. 623, 22 Pac. 733.

[17] Helena v. Turner, 36 Ark. 577; Pouder v. Catterson, 127 Ind. 434, 26 N. E. 66; Jamaica v. Hart, 52 Vt. 549; Hall &c. Co. v. Wilbur, 4 Wash. 644, 30 Pac. 665.

[18] Pouder v. Catterson, 127 Ind. 434, 26 N. E. 66.

[19] Kehr v. Hall, 117 Ind. 405, 20 N. E. 279.

[20] Helena v. Turner, 36 Ark. 577.

sue to recover the whole, would be a violation of the elementary principle that a tenant cannot deny his landlord's title. The lease is a conclusive admission that the lessors are so entitled to the premises demanded, as to enable them to sue jointly for their recovery.[21] Where a tenant enters upon land under license from one of several tenants in common, all his subsequent acts must be considered as performed in submission to that title till the contrary is proved.[22]

§ 685. **A tenant at will, equally with a tenant for years or from year to year,** is precluded from denying his landlord's title prior to a surrender or eviction by title paramount.[23] And this has been applied where the landlord was in turn a tenant at will of the owner in fee. Until the owner in fee took steps to terminate the will, the sub-tenant would be bound by estoppel.[24] However, it has been held that a tenant claiming under an oral lease is not estopped to show that his landlord is only a tenant at will and that, therefore, a subsequent written lease from this landlord to one who has sued the tenant for use and occupation as a tenant at sufferance is void. It is not inconsistent with the relations of a tenant to his landlord, to deny the right of the landlord to convey to another a greater estate than that which the tenant himself derived from his lease. Proof that his landlord had not such a title as would entitle him to create an estate for years was not in denial of a title sufficient to sustain the tenant's estate at will.[25]

§ 686. **Occupation under a void or improperly executed lease,** invalid to transfer an estate for years to the lessee, will estop him from denying the landlord's title in an action for rent.[26] This rule is applicable in actions to recover possession and in ejectment by a landlord against a tenant, the latter cannot object to an informality in the lease under which he holds.[27] The doctrine of estoppel applies with equal force though the lease under which the tenant went into possession is void because not put in writing as required by the statute of frauds.[28]

[21] Oakes v. Munroe, 8 Cush. (Mass.) 282.

[22] Bucknam v. Bucknam, 30 Me. 494.

[23] Towne v. Butterfield, 97 Mass. 105; Coburn v. Palmer, 8 Cush. (Mass.) 124.

[24] Coburn v. Palmer, 8 Cush. (Mass.) 124.

[25] Palmer v. Bowker, 106 Mass. 317; Hilbourn v. Fogg, 99 Mass. 11.

[26] Cobb v. Arnold, 8 Metc. (Mass.) 398; Moore v. Beasley, 3 Ohio 294.

[27] Trustees &c. v. Burt, 11 Vt. 632.

[28] Cobb v. Arnold, 12 Metc. (Mass.) 39; Smalley v. Mitchell, 110 Mich. 650, 68 N. W. 978; Adams v. Martin, 8 Grat. (Va.) 107.

Or there has been no express contract of tenancy, and the agreement is implied from the conduct of the parties.[29]

§ 687. **A disability to contract of one who enters upon land by permission of another does not relieve him from the obligation of returning the possession** to such owner as a condition precedent to denying his title. The doctrine of estoppel, as applied between landlord and tenant, does not arise so conclusively out of a contract that it cannot be applied to one who is incapable of binding himself by a contract. If one enter upon land by permission of another, claiming and acknowledged to be the owner, the duty to return the possession to the owner, as a condition precedent to denying his title, is one which the law imposes upon principles of good faith and to prevent fraud. Its violation is essentially a tort and a fraud. Because a tenant could not contract while a slave, is no reason why he should be allowed to commit a fraud after he is free.[30] But the inability of a married woman to lease real estate belonging to her sole and separate estate, has been held to release her lessee from his estoppel to deny her title. The lessee cannot be estopped to deny the lease unless the lessor would also be estopped; for estoppels are mutual. There is no way of escaping the conclusion that such a lease is void, because of the well-recognized doctrine that a married woman is never estopped except in the case of fraud on her part.[31] It has been declared to be a fundamental rule of estoppel that it must be mutual; if one party is not bound neither is. So, if at the time a lease was made one landlord was a married woman and the other was insane, they were not bound by the estoppel and therefore their lessees were not.[32]

§ 688. **A tenant cannot deny his landlord's title while remaining in possession after the expiration of his term,** because the admission of his landlord's title must necessarily extend during the whole time that he remains in the possession first acquired.[33] This estoppel against a tenant in favor of his landlord's title does not, however, en-

[29] Towery v. Henderson, 60 Tex. 291; Word v. Drouthett, 44 Tex. 365, 371.

[30] Wilson v. James, 79 N. Car. 349.

[31] Schenck v. Stumpf, 6 Mo. App. 381.

[32] Crocett v. Althouse, 35 Mo. App. 404.

[33] McKissick v. Ashby, 98 Cal. 422, 33 Pac. 729; Mattis v. Robinson, 1 Neb. 3; Grizzard v. Roberts, 110 Ga. 41, 35 S. E. 291; Clemm v. Wilcox, 15 Ark. 102; Falkner v. Beers, 2 Doug. (Mich.) 117; Kiernan v. Terry, 26 Ore. 494, 38 Pac. 671; Morse v. Goddard, 13 Metc. (Mass.) 177, 46 Am. Dec. 728.

dure longer than the tenant's possession under the lease. After the possession has been restored to the landlord, the tenant is released from the estoppel, and if he has a paramount title he may bring it forward.[34] After the expiration of the term and surrender of possession, a tenant has full liberty to dispute his landlord's title, the general rule simply requiring that while the tenant holds, by permission of the landlord, he shall not question the title of the latter.[35] One or two cases go beyond this and hold, according to the view of the New Hampshire court, that a party may set up his own title at the expiration of his term, without restoring possession, upon the plain and sensible ground that it would be idle to compel a party to go out of possession, when he could turn round and recover it back on the title.[36] The ancient rule laid down by Lord Coke is that, "If a man take a lease of his own land by deed indented, the estoppel doth not continue after the term ended. For by the making of the lease the estoppel doth grow, and consequently by the end of the lease the estoppel determines." Under this rule the estoppel is evidently based on the indenture and not on the possession and so the canon is mistakenly applied to limit the modern doctrine arising from possession; yet such an application was undoubtedly the source of the New Hampshire doctrine just stated. It is, however, almost idle to cite authorities, so numerous and consistent are they, that the estoppel is as conclusive after as during the term, being simply concurrent with possession, not with title. This is the constant definition, and has been so held from the earliest cases, the tenant being bound, not merely not to resist the landlord's title, but to restore possession to him.[37]

However a tenant who surrenders possession at the end of his term or from whom possession is recovered is not concluded, by the exist-

[34] Wilson v. Cleaveland, 30 Cal. 192; Jackson v. Spear, 7 Wend. (N. Y.) 401; Glen v. Gibson, 9 Barb. (N. Y.) 634; Doe v. Smythe, 4 M. & S. 348; James v. Landon, 1 Cro. 36.

[35] Zimmerman v. Marchland, 23 Ind. 474; Campbell v. Campbell, 21 Mich. 438; Smart v. Smith, 2 Dev. L. (N. Car.) 258; Heath v. Williams, 25 Me. 209; Carpenter v. Thompson, 3 N. H. 204.

[36] Page v. Kinsman, 43 N. H. 328, citing Accidental &c. Ins. Co. v. Mackenzie, 10 C. B. (N. S.) 870, 100 E. C. L. 870; Fuller v. Sweet, 30 Mich. 237.

[37] Miller v. Lang, 99 Mass. 13; Bailey v. Kilburn, 10 Metc. (Mass.) 176; Phillips v. Rothwell, 4 Bibb (Ky.) 33; Shelton v. Doe, 6 Ala. 230; Jackson v. Stiles, 1 Cow. (N. Y.) 575; Jackson v. Harper, 5 Wend. (N. Y.) 246; Falkner v. Beers, 2 Doug. (Mich.) 117; Galloway v. Ogle, 2 Binn. (Pa.) 468; Willison v. Watkins, 3 Pet. (U. S.) 43, 48; Doe v. Walker, 3 McLean (U. S.) 431; Doe v. Mills, 2 A. & E. 17; Doe v. Smythe, 4 M. & S. 348.

ence of such tenancy at a former time or by the deed of lease, which he executed, from contesting the title of his former landlord.[38]

If the tenant desires to assert title in himself or another, he must surrender possession of the premises, and give his landlord the advantage of possession in any litigation as to title. Mere leaving possession and resuming it a short time afterward, without notice to the landlord, or giving him an opportunity to take possession, is not sufficient. The tenant must act in good faith and restore the landlord to the same condition in which he was when he accepted possession from him.[39] A temporary absence of the lessee, of which the lessor has no knowledge, does not constitute a restoration of possession, and consequently gives the lessee no right, upon his return, to resist his landlord by setting up an adverse claim of title.[40] Furthermore it is not open to the tenant to say for the purpose of supporting a denial that to return the premises would be to commit a breach of public policy by impeding navigation in a river.[41]

Cancellation of the instrument of demise would not terminate an estoppel resting on possession and a decision that the tender of a lease without surrender of possession does not entitle a tenant to dispute his landlord's title assumes possession to be the basis of the estoppel.[42]

§ 689. **Purchase of adverse title by tenant.**—The general doctrine of estoppel precludes a tenant during the continuance of his possession under a lease from buying in and setting up an adverse title to defeat an action of ejectment or a suit for rent.[43] This rule does not, however, prohibit the tenant, during the tenancy, from purchasing any outstanding title and from asserting the same against the landlord after the expiration of the tenancy and yielding up of possession. There are fiduciary relations where one may not purchase and hold for himself an adverse interest, but the title if acquired will inure to

[38] Smith v. Mundy, 18 Ala. 182; Gable v. Wetherholt, 116 Ill. 313, 6 N. E. 453; Wild v. Serpell, 10 Grat. (Va.) 405.

[39] Littleton v. Clayton, 77 Ala. 571; Longfellow v. Longfellow, 61 Me. 590; Graham v. Moore, 4 S. & R. (Pa.) 467; Boyer v. Smith, 3 Watts (Pa.) 449; Bertram v. Cook, 32 Mich. 518.

[40] Juneman v. Franklin, 67 Tex. 411, 3 S. W. 562.

[41] St. Anthony Falls &c. Co. v. Morrison, 12 Minn. 249.

[42] Mackin v. Haven, 187 Ill. 480, 58 N. E. 448, affirming 88 Ill. App. 434.

[43] Lyles v. Murphy, 38 Tex. 75; Casey v. Hanrick, 69 Tex. 44, 6 S. W. 405; Chambers v. Pleak, 6 Dana (Ky.) 426; Norton v. Doe, 1 Dana (Ky.) 14; Parker v. Nanson, 12 Neb. 419, 11 N. W. 865; Bertram v. Cook, 32 Mich. 518; Cooper v. Smith, 8 Watts (Pa.) 536.

the benefit of the person towards whom he holds the confidential relations. Ordinarily a tenant does not occupy such a relation to his landlord and may purchase an adverse title, and assert it against his former landlord after having surrendered possession to him.[44] As long as the tenant's possession continues, however, he cannot be heard in any court to ask absolution from his duties as tenant because of his outstanding title.[45] The same doctrine has been applied where the tenant received his adverse title by devise,[46] the general rule being that a tenant acquiring rights adverse to his landlord, is bound to surrender the property before he can be allowed to assert them.[47]

The established doctrine is that a tenant for life in possession, in the purchase of an incumbrance upon, or an adverse title to the estate, will be regarded as having made the purchase for the joint benefit of himself and the reversioner or remainderman. The law will not permit him to hold it for his own exclusive benefit if the reversioner or remainderman will contribute his share of the sum paid. If the life tenant in such case pays more than his proportionate share, he simply becomes a creditor of the estate for that amount.[48] In Nebraska a similar doctrine has been applied in the case of a term for years, so that in that state, if a tenant for years in possession purchases an incumbrance on the leased premises, the presumption is, that he did it, for the only purpose permitted by law, that is, to protect his possession, and in such case where the tenancy is for years, the landlord must account to him for what he has paid for the incum-

[44] Gable v. Wetherholt, 116 Ill. 313, 6 N. E. 453; Hodgen v. Guttery, 58 Ill. 431; Brown v. Keller, 32 Ill. 151; Williams v. Garrison, 29 Ga. 503; Hodges v. Shields, 18 B. Mon. (Ky.) 828; Chambers v. Pleak, 6 Dana (Ky.) 426; Higgins v. Turner, 61 Mo. 249; Rives v. Nesmith, 64 Miss. 807, 2 So. 174.

[45] Brewer v. Keeler, 42 Ark. 289.

[46] Hatch v. Bullock, 57 N. H. 15.

[47] Arnold v. Woodard, 4 Colo. 249; Milsap v. Stone, 2 Colo. 137; Williams v. Garrison, 29 Ga. 503; Longworth v. Wolfinger, Wright (Ohio) 216; Hughes v. Watt, 28 Ark. 153. Vermont doctrine. If the tenant has entered into possession under the mortgagor, as his tenant, still he might repudiate that tenancy by purchasing an older mortgage as being a better title and protect himself in his position of the premises from any claims of his former landlord. And whenever, by purchasing such title, he is entitled to the right to possession, it would be an idle ceremony to require the tenant to surrender up the possession and then resort to his action of ejectment, when it is only effect and cannot be to put the lessee in the same position as before. Pierce v. Brown, 24 Vt. 165, citing Doe v. Barton, 11 A. & E. 307.

[48] Daviess v. Myers, 13 B. Mon. (Ky.) 511; Whitney v. Salter, 36 Minn. 103, 30 N. W. 400.

brance, not exceeding what was jointly due thereon with interest.[49] The same presumption has been held in that state to apply to a purchase of the landlord's title at judicial sale.[50]

§ 690. An owner of land or one under obligation to pay taxes thereon, cannot acquire a tax title so as to defeat incumbrancers or others setting up a claim or title adverse to him. This rule has been extended to tenants in common and those holding under the owner of the property.[51] It is the duty of a tenant for life to pay all the taxes assessed during his tenancy, and if he neglects it and suffers the land to be sold for the taxes, and purchases it himself, or suffers a stranger to purchase and then procures a release to himself, he can acquire no right to the estate against the owner in fee.[52] It is a general rule from which there is no dissent that where a tenant is under obligation to pay taxes on the demised premises, he cannot acquire title against the landlord by the purchase of the property at a tax sale.[53] Furthermore, the mere relation of landlord and tenant has been declared to be of such a nature as to disqualify either from acquiring title under a tax deed. Although it is the duty of the landlord to pay the taxes assessed, in the absence of any agreement to the contrary between the parties, yet the tenant will not be permitted to take advantage of the omission of his landlord to pay taxes to terminate the relation between them and obtain title to the land. The presumption of law in such case is that a tenant who takes an assignment of a certificate, or even buys at a tax sale, does so for the protection of his own interest; the result would be that every attempted purchase made by a tenant would operate merely as a payment of the tax, and not as a valid purchase.[54]

According to the doctrine in Arkansas, where land becomes forfeited to the state for non-payment of taxes by neglect of the owner, his tenant may terminate the tenancy by delivery of the possession, or protect himself from eviction by a future purchaser from the state by advancing the taxes and holding a lien for reimbursement, or if

[49] Thrall v. Omaha Hotel Co., 5 Neb. 295; Mattis v. Robinson, 1 Neb. 3.

[50] Lausman v. Drahos, 10 Neb. 172, 4 N. W. 956.

[51] Curtis v. Smith, 42 Iowa 665.

[52] Varney v. Stevens, 22 Me. 331; Hughes v. Young, 5 Gill & J. (Md.) 67; McMillan v. Robbins, 5 Ohio 28; Cairns v. Chabert, 3 Edw. Ch. (N. Y.) 312; Burhans v. Van Zandt, 7 N. Y. 523; Trustees &c. v. Dunn, 22 Barb. (N. Y.) 402; Prettyman v. Walston, 34 Ill. 175, 191.

[53] Duffitt v. Tuhan, 28 Kan. 292; Blake v. Howe, 1 Aik. (Vt.) 306, 15 Am. Dec. 681.

[54] Bailey v. Campbell, 82 Ala. 342, 2 So. 646; Curtis v. Smith, 42 Iowa 665.

the lands are sold for taxes at public sale, during the tenancy without his fault, he may purchase and set up his title thus acquired against that of his landlord. Equity will regard him and all persons holding under him, except purchasers without notice, as trustees for the benefit of the landlord, and will not permit them to speculate on such a purchase.[55]

In Kansas the rule is that a tenant under no duty or obligation to pay taxes on rented land may purchase the land at tax sale, and thus acquire an adverse title as against his former landlord, which enables him to resist the recovery of rent accruing after the tax sale.[56]

The same doctrine prevails in Missouri, resting on the analogy to a sale of the landlord's interest on execution. If a tenant purchases at execution sale, he then becomes vested with his landlord's title, not a hostile or adverse title, and is in possession in his own right. The case is the same when applied to a purchaser at a tax sale. The tax collector, like the sheriff in an execution, is the agent of the debtor to sell his property to satisfy a charge or lien existing against it. The title is acquired indirectly and by operation of law, but it is by the act or neglect of the party and has the same legal effect as if he had made a private conveyance. In such a sale the tenant may purchase equally with any person, and the title that he acquires is the landlord's title, and he may avail himself of it as a defense even against his landlord or lessor.[57]

§ 691. The rule that denies to a tenant the right to dispute his landlord's title cannot be so extended as to take away from him the right to prove exactly what his relationship to the landlord originally was.[58] The tenant may deny the making, or the validity, of the contract by which the tenancy is alleged to have been created. He may deny his sanity at the time the lease was made, and show that it is vitiated by fraud on the part of the lessor.[59] If there is an admitted tenancy, it is the duty of the court to rule out evidence in denial of the landlord's title, the validity of his title not being at issue. Where the evidence is offered to disprove the tenancy, it is the duty of the court to pass upon it in the first instance to determine whether it has

[55] Waggener v. McLaughlin, 33 Ark. 195. But see Bettison v. Budd, 17 Ark. 546.

[56] Smith v. Newman, 62 Kan. 318, 62 Pac. 1011; Weichselbaum v. Curlett, 20 Kan. 709.

[57] Higgins v. Turner, 61 Mo. 249.

[58] Smith v. Smith, 81 Tex. 45, 16 S. W. 637; Uhlig v. Garrison, 2 Dak. 71, 77, 2 N. W. 253; Byrne v. Beeson, 1 Doug. (Mich.) 179.

[59] Byrne v. Beeson, 1 Doug. (Mich.) 179; Wilborn v. Whitfield, 44 Ga. 51.

a proper bearing on that issue, while the weight and truth of testimony is for the jury under proper instructions from the court.[60]

Once the existence of a tenancy is admitted, the tenant is estopped from disputing the landlord's title, but to dispute the existence of such tenancy is allowable, and the tenant may deny the making or validity of the contract by which such tenancy is alleged to have been created.[61] Such was the case where there was a statutory prohibition against leasing the lands in dispute. The tenants denied the existence of the tenancy; there could be no valid contract creating the relation of landlord and tenant in regard to that land.[62] In passing upon the admissibility of evidence the court should decide whether a tenancy exists rather than to leave the decision of that question to the jury.[63]

§ 692. The estoppel upon a tenant only extends to the land included in the lease. Thus a lease of a portion of a tract does not preclude the lessee from setting up an adverse claim to another part which is not included in the lease, or to an undivided interest in the entire tract.[64] If a tenant takes possession under color of title of land adjoining the leased premises and belonging to the landlord, his possession so taken is adverse and will ripen into a fee. A landlord who, by a lease, has restricted the possession and use of his tenant by metes and bounds, to a part of a larger tract, cannot claim that his tenant's possession under such a lease extends to that which, by the terms of the lease, the tenant has no right to possess.[65]

§ 693. The operation of the general rule of estoppel is not affected by the fact that the tenant is in actual possession under a contract of purchase, at the time he accepts the lease. By such act he effectually recognizes the title and possession of the lessor.[66] From the application of the same principle it follows that a person who takes a lease from another, is estopped from showing that such person was but a trustee for him.[67]

[60] Wilborn v. Whitfield, 44 Ga. 51.

[61] Byrne v. Beeson, 1 Doug. (Mich) 179; Uhlig v. Garrison, 2 Dak. 71, 98, 2 N. W. 253.

[62] Uhlig v. Garrison, 2 Dak. 71, 77, 2 N. W. 253.

[63] Reed v. Todd, 1 Harr. (Del.) 138.

[64] Brenner v. Bigelow, 8 Kan. 496; State v. Boyce, 109 N. Car. 739, 14 S. E. 98.

[65] Pharis v. Jones, 122 Mo. 125, 26 S. W. 1032; Read v. Allen, 63 Tex. 154. See Texas Land Co. v. Williams, 51 Tex. 51, 61.

[66] Locke v. Frasher, 79 Va. 409; Emerick v. Tavener, 9 Grat. (Va.) 220; Jordan v. Katz, 89 Va. 628, 16 S. E. 866.

[67] Lucas v. Brooks, 18 Wall. (U. S.) 436; Jordan v. Katz, 89 Va. 628, 16 S. E. 866. In ejectment by land-

Furthermore, the rule that a tenant is estopped to deny his landlord's title applies to a mortgagee of stock who becomes the tenant of his mortgagor's landlord. The mortgagee cannot set up the existing lease to the mortgagor as a defense, even though the mortgagor had not assigned or surrendered his term.[68]

§ 694. The parties may by their agreement waive the rule of law that a tenant cannot deny his landlord's title. The object of such an agreement would be that the question of title should be tried, but that the tenant should derive no benefit from the possession; on the contrary, that the landlord should have all the advantages arising from actual possession, which are that the adverse party shall be obliged to show a better right. The agreement reversed the usual course of proceedings in ejectment, but it gave the tenant full right to controvert his landlord's title.[69] But if the landlord sets up the claim to a fee, his tenant may show that he has a mere possessory right. Where the landlord seeks to recover the possession he can do so under the lease, but if he goes farther and claims the premises in fee the tenant is not estopped from denying any right claimed by the plaintiff greater or further than that of possession. This fully protects the landlord, who regains his possession, and the parties are then in a proper position to litigate the title should they desire to do so.[70]

A tenant is not estopped from denying his landlord's title and setting up title in himself adverse to the landlord, as against a stranger. The reason upon which the rule of a tenant's estoppel depends is manifestly wanting, when a stranger, not the landlord nor a privy of the landlord, seeks to set it up. So the general doctrine would apply that a stranger cannot set up an estoppel, for estoppels must be mutual and can operate only between parties and privies.[71]

A lessee who has never gone into possession under his lease is free to deny the title of the lessor.[72] The mere fact of the execution of a lease by a person would not create an estoppel against him. That

lord against tenant the latter cannot defend by proof that the plaintiff was holding the title in trust for the defendant. Porter v. Mayfield, 21 Pa. St. 263.

[68] Goodman v. Jones, 26 Conn. 264; Phipps v. Sculthorpe, 1 B. & Ald. 50.

[69] Mayor &c. v. Bridge Co., 4 Binn. (Pa.) 283.

[70] Jochen v. Tibbells, 50 Mich. 33, 14 N. W. 690; McKie v. Anderson, 78 Tex. 207, 14 S. W. 576.

[71] Cole v. Maxfield, 13 Minn. 235.

[72] Wright v. Graves, 80 Ala. 416; Andrews v. Woodcock, 14 Iowa 397; Ireton v. Ireton, 59 Kan. 92, 52 Pac. 74; Trustees of Green v. Robinson, Wright (Ohio) 436.

would arise only from the occupancy of the premises under and by virtue of the lease. In order that a lease shall operate to estop a party therein named as lessee, who is in possession of the land therein described, from denying the title of the lessor, it must appear that he has either obtained, or retained, possession under and by virtue of the lease. If controverted the fact of occupancy under the lease should be submitted to the jury.[73]

§ 695. After the expiration of his lease, a tenant may disclaim and disavow his tenancy without first surrendering possession of the leased premises; but in order to make the holding adverse there must be a clear, positive and continued disclaimer and disavowal of the landlord's title brought home to him by distinct notice.[74] The statute of limitations, in the case of an adverse possession by a tenant, runs from the time the landlord receives notice that the occupancy is hostile; and a tenant is not required to yield possession and again enter the premises.[75] But while the term continues a tenant's possession is not adverse to the title of the lessor unless made so by some act of disseisin to which the lessor assents. A disclaimer by the tenant or his attornment to a stranger during the continuance of the term will not make his possession adverse.[76]

§ 696. Some overt act is necessary to make a tenant's holding adverse and his silent determination to hold adversely is ineffectual to accomplish that result without some outward change of possession.[77] Some authorities lay down the rule that the tenant's estoppel continues after the lease expires, until he has surrendered possession or given notice that he does not intend to hold in subordination to the

[73] Ireton v. Ireton, 59 Kan. 92, 52 Pac. 74.

[74] Wilkins v. Pensacola City Co., 36 Fla. 36, 18 So. 20; Whipple v. Earick, 93 Ky. 121, 19 S. W. 237; Holman v. Bonner, 63 Miss. 131; Ross v. McManigal, 61 Neb. 90, 84 N. W. 610; Messley v. Ladd, 29 Ore. 354, 45 Pac. 904; De Jarnette v. McDaniel, 93 Ala. 215, 9 So. 570; League v. Snyder, 5 Tex. Civ. App. 13, 23 S. W. 825; Flanagan v. Pearson, 61 Tex. 302; Stacy v. Bostwick, 48 Vt. 192; Neff v. Ryman, 100 Va. 521, 42 S. E. 314; Voss v. King, 33 W. Va. 236, 10 S. E. 402, s. c. 38 W. Va. 607, 18 S. E. 762; Creekmur v. Creekmur, 75 Va. 430. In Georgia the doctrine seems to be that a possession acquired originally through a tenancy can never become adverse. Dasher v. Ellis, 102 Ga. 830, 30 S. E. 544.

[75] Greenwood v. Moore, 79 Miss. 201, 30 So. 609.

[76] Sutton v. Casselleggi, 5 Mo. App. 111; Flanagan v. Pearson, 61 Tex. 302.

[77] Hogsett v. Ellis, 17 Mich. 351.

title under which he entered."[78] But courts are ready to assume that open and notorious acts of repudiation are brought home to the landlord and to hold the tenant's possession adverse on proof of such facts.[79] A tenant remaining in possession, claiming as owner, after his lease has been surrendered by mutual consent, becomes an adverse holder in respect to his former landlord.[80]

The question whether a tenant holds possession adversely to his former landlord is in every instance one of fact dependent upon the accompanying circumstances, and should be submitted to a jury for determination.[81] The landlord's knowledge that the tenant was holding adversely need not be proved beyond all doubt. Stronger and clearer proof is required in some cases than in others, but the law does not in civil cases require proof beyond all doubt, or all reasonable doubt, and such proof is not required in a case like this.[82] But declarations of the tenant to members of the landlord's family and not coming to the landlord's knowledge are not sufficient notice to make the holding adverse.[83]

A tenant cannot by merely ceasing to pay rent to his lessor and paying it to another person, change the tenancy so as to enable himself to dispute the title of his landlord.[84] Mere non-payment and non-demand for rent, no matter how long continued, are insufficient to bar landlord's title whatever effect they may have on his right to recover rent.[85] But non-payment of rent might raise a presumption that there had been an actual ouster, and in that case the statute of limitations would run.[86]

A tenant at will by claiming to hold in his own right and apprising the landlord of such claim may so far throw off his tenancy as to commence a possession adverse to his landlord.[87] In the absence of statute, a tenant at will may terminate his tenancy at his pleasure, and he may then hold the same premises adversely to his former landlord.[88]

[78] Alderson v. Marshall, 7 Mont. 288, 16 Pac. 576; Jackson v. Ayers, 14 Johns. (N. Y.) 224; Towne v. Butterfield, 97 Mass. 105; Willison v. Watkins, 3 Pet. (U. S.) 43; Lucas v. Brooks, 18 Wall. (U. S.) 436; Quinn v. Quinn, 27 Wis. 168.

[79] Morton v. Lawson, 1 B. Mon. (Ky.) 45.

[80] Meridian Land &c. Co. v. Ball, 68 Miss. 135, 8 So. 316.

[81] Lamme v. Dodson, 4 Mont. 560, 2 Pac. 298.

[82] Reusens v. Lawson, 91 Va. 226, 21 S. E. 347.

[83] Stacy v. Bostwick, 48 Vt. 192.

[84] Den v. Davis, 4 Dev. & B. (N. Car.) 300.

[85] Campbell v. Shipley, 41 Md. 81, 96.

[86] Camp v. Camp, 5 Conn. 291, 303.

[87] Hall v. Dewey, 10 Vt. 593; North v. Barnum, 10 Vt. 220.

[88] Hudson v. Wheeler, 34 Tex. 356.

§ 697. The effect of a possession previous to the acceptance of a lease on the right to dispute the title thus acknowledged has been much discussed and differently ruled. The best opinion is that an anterior possession does not vary the application of the rule; on the ground that although the party asserting the estoppel may not have lost the advantage of parting with possession he may have been led into some omission or conduct prejudicial to his title which otherwise would not have been.[89] It is a well established general rule that a lessee is estopped from denying his lessor's title, although he did not obtain possession originally from such lessor, or enter under such title.[90] Every letting and every acceptance of an attornment involves an implied if not an express undertaking that the tenant shall peaceably enjoy the premises as against the landlord; that is to say, that proceedings for the assertion of the hostile title shall not be instituted. This undertaking to forbear suit, whether express or implied, is as effectual and sufficient a consideration for the promise to pay rent, as an original delivery of possession would be. It is no answer to say that the tenant may be liable to one landlord by virtue of an original lease and to another by virtue of a subsequent attornment; even if this result be assumed in argument, it is still no answer. To avoid the assertion of a hostile title, one may lawfully contract to pay for his own; and if the threatened litigation be foreborne, he is bound by his promise; and so the tenant holding under a lessor where title is unimpeachable may, if he will, undertake to pay rent to every stranger who demands it. Such demand implies the threat of litigation and dispossession if the demand be refused; and if made in good faith, and without fraud, or other improper practices to induce concession, and if the tenant yield to it, with full knowledge of all the facts, it is difficult to see why he should not be bound by his promise.[91]

The doctrine of estoppel applies where a tenant attorns to a landlord who did not originally let him into possession. It is immaterial how he first went into possession except in case of mistake or of fraud, or misrepresentation on the part of the landlord.[92] Where

[89] Farmer v. Pickens, 83 N. Car. 549.

[90] Lyon v. Washburn, 3 Colo. 201; Bowdish v. City of Dubuque, 38 Iowa 341; McConnell v. Bowdry, 4 T. B. Mon. (Ky.) 392, 400; Saunders v. Moore, 14 Bush (Ky.) 97; Parrott v. Hungelburger, 9 Mont. 523, 24 Pac. 14; Jackson v. Ayers, 14 Johns. (N. Y.) 224; Prevot v. Lawrence, 51 N. Y. 219; Hartzog v. Hubbard, 2 Dev. & B. L. (N. Car.) 241; Thayer v. Society &c., 20 Pa. St. 60.

[91] Lyon v. Washburn, 3 Colo. 201.

[92] Tyler v. Davis, 61 Tex. 674; Hamilton v. Pittock, 158 Pa. St. 457, 27 Atl. 1079; Bodkin v. Arnold, 45 W. Va. 90, 30 S. E. 154.

persons, while in possession of land not as tenants to any one and owing no allegiance to any one as landlord, took leases under some one claiming title and held under him, their possession from thenceforward is the possession of the landlord, and they will be estopped to deny his title.[93] Mere payment of rent has been regarded as *per se* less conclusive than express attornment, and more generally open to explanation,[94] and so has a mere acknowledgment[95] or offer to pay rent.[96]

A tenant is estopped to deny his landlord's title even though the execution of the lease was obtained by the landlord's assertion of a title in himself and a threat to evict the tenant who was already in possession.[97]

The tenant is allowed to contest the title of the landlord, when there has been mistake or misrepresentation, and his own title is good at least *quoad* the one he seeks to dispute.[98] Where the mistake was clear it was held that even submitting to a distress,[99] an express agreement[100] or attornment,[101] or even receiving a lease,[102] would not create an estoppel. But if no mistake exists, the estoppel is complete and payment of rent or agreement to hold under the lessor[103] or submitting to a distress[104] is conclusive.

§ 698. In California an exception to the general rule is made in case the tenant did not enter into possession under the landlord's title, but was in possession at the time he took the lease. According to this doctrine the bare possession of the tenant at the time the lease is given is sufficient to take the case out of the operation of the general rule without there being, in addition, some force, fraud, misrepresentation, or mistake induced by the landlord. The doctrine of

[93] Patterson v. Hansel, 4 Bush (Ky.) 654.

[94] Shelton v. Carrol, 16 Ala. 148; Bergman v. Roberts, 61 Pa. St. 497; Doe v. Barton, 11 A. & E. 307; Doe v. Francis, 2 Moo. & R. 57.

[95] Washington v. Conrad, 2 Humph. (Tenn.) 562; Pearce v. Nix, 34 Ala. 183.

[96] Stokes v. McKibbin, 13 Pa. St. 267.

[97] Harrisburg School Dist. v. Long (Pa.), 10 Atl. 769.

[98] Doe v. Brown, 7 A. & E. 447.

[99] Knight v. Cox, 18 C. B. 645, 86 E. C. L. 645.

[100] Ingraham v. Baldwin, 9 N. Y. 45.

[101] Cornish v. Searell, 8 B. & C. 471.

[102] Shultz v. Elliott, 11 Humph. (Tenn.) 183.

[103] Miller v. Lang, 99 Mass. 13; Ingraham v. Baldwin, 9 N. Y. 45; Doe v. Wiggins, 4 A. & E. (N. S.) 367, 45 E. C. L. 365; Hall v. Butler, 10 A. & E. 204.

[104] Cooper v. Blandy, 2 Bing. N. C. 45; Panton v. Jones, 3 Camp. 372.

estoppel is designed to protect the landlord in his actual possession against the trickery or sharp practice of the tenant, not to enable him to impose upon the tenant.[105] At best, the landlord gains a *prima facie* case, and casts upon the tenant the burden of overcoming it, for he has but to prove the lease and rest.[106] Unless the tenant overcomes this presumption by showing paramount title in himself, or in those under whom he claims, the landlord must prevail.[107] The law in Michigan is similar to that in California in this respect.[108]

§ 699. "The relation of landlord and tenant once established attaches to all who may succeed to the possession through or under the tenant, whether immediately or remotely, the succeeding tenant being as much bound by the acts and admissions of his predecessor as if they were his own."[109] Thus, the estoppel which binds a tenant

[105] Tewksbury v. Magraff, 33 Cal. 237; Franklin v. Merida, 35 Cal. 558, 566; Baldwin v. Temple, 101 Cal. 396, 35 Pac. 1008; Davis v. McGrew, 82 Cal. 135, 23 Pac. 41.

[106] Peralta v. Ginochio, 47 Cal. 459; Franklin v. Merida, 35 Cal. 558, 575.

[107] Holloway v. Galliac, 47 Cal. 474.

[108] Fuller v. Sweet, 30 Mich. 237. In this case the *ratio decidendi* is stated as follows: "Where a person in possession agrees by parol to pay money to a person out of possession, and who has no title, it is impossible to find any sensible ground for sustaining such a promise which would not sustain any other promise without consideration. Where there is possession given there is an actual consideration, which may render it also reasonable enough, under ordinary circumstances, to require the landlord to be put back in *statu quo*. But a person who never had or gave up possession to the tenant, is left in *statu quo* by the tenant's remaining in possession, and in reason should have no further claim. If he has it must be by some peculiar and anomalous rule, for which we have found no support. Such a relation, if valid at all, must rest on a valid contract, and the only consideration for the contract would be proof of title, not covering merely the period of the tenancy, but outlasting it. When that is proved a right of possession is proved with it, and a further holding by the tenant would be wrongful, and subject him to eviction. But whether it could be made the basis of an implied contract to pay rent any longer is a different question. . . ."

[109] Arkansas: Earle v. Hale, 31 Ark. 470. Illinois: Sexton v. Carley, 147 Ill. 269, 35 N. E. 471. Missouri: Stagg v. Eureka &c. Co., 56 Mo. 317; Merchants' Bank &c. v. Clavin, 60 Mo. 559. North Carolina: Doe v. Lachenour, 12 Ired. L. (N. Car.) 180; Stewart v. Keener, 131 N. Car. 486, 42 S. E. 935; Den v. Alexander, 4 Dev. & B. (N. Car.) 40; Conwell v. Mann, 100 N. Car. 234, 6 S. E. 782. New Hampshire: Thorndike v. Norris, 24 N. H. 454. Oregon: Jones v. Dove, 7 Ore. 467. South Carolina: Milhouse v. Patrick, 6 Rich. L. (S. Car.) 350. Tennessee: Washington v. Conrad, 2 Humph. (Tenn.) 562. Texas: Oury v.

against denying the title of his landlord is equally binding on one to whom the tenant has conveyed the premises in fee.[110] A mere licensee from a tenant is bound by the estoppel not to deny the landlord's title because he, too, comes in under the lease.[111] The purchaser of a leasehold interest in land at judicial sale will not be permitted to dispute the title of the landlord under whom he holds the estate.[112]

Knowledge of the tenancy by those succeeding the tenant in possession is not material, provided they accept possession from him. Under a possession thus acquired, the occupants are bound by all the obligations of loyalty to the title resting on the original tenancy.[113] When a tenant takes advantage of his position to turn over the land occupied by him to the holder of a conflicting title, such holder will not be regarded otherwise than as an intruder, who cannot set up title under a third person or in himself to defeat an action of ejectment.[114]

§ 700. That the estoppel enures, both as to its benefit and burden to privies in law,[115] in blood,[116] and in estate[117] is a rule as applicable

Saunders, 77 Tex. 278, 13 S. W. 1030. Vermont: Reed v. Shepley, 6 Vt. 602; Greeno v. Munson, 9 Vt. 37; Derrick v. Luddy, 64 Vt. 462, 24 Atl. 1050. Virginia: Emerick v. Tavener, 9 Grat. (Va.) 220; Neff v. Ryman, 100 Va. 521, 42 S. E. 314; Allen v. Paul, 24 Grat. (Va.) 332. West Virginia: Allen v. Bartlett, 20 W. Va. 46; Genin v. Ingersoll, 2 W. Va. 558. United States: Blight v. Rochester, 7 Wheat. 535, 547.

[110] Emerick v. Tavener, 9 Grat. (Va.) 220.

[111] Doe v. Lachenour, 12 Ired. L. (N. Car.) 180. A party residing with tenant and helping to pay the rent, thereby admits landlord's title, and can acquire no right against the landlord by adverse possession. Hodgkin v. McVeigh, 86 Va. 751, 10 S. E. 1065.

[112] Hentiz v. Pipher, 58 Kan. 788, 51 Pac. 229.

[113] Reed v. Shepley, 6 Vt. 602; Greeno v. Munson, 9 Vt. 37.

[114] Kepley v. Scully, 185 Ill. 52, 57 N. E. 187; Hardin v. Forsythe, 99 Ill. 312; Anderson v. Gray, 134 Ill. 550, 25 N. E. 843; Swift v. Gage, 26 Vt. 224. An adverse claimant of land cannot collusively with the tenant obtain possession to the prejudice of the title of the landlord when he goes into possession by collusive concert with the tenant. He at once becomes identified with him—shares and stands in his place, and he cannot resist the landlord's title where the tenant cannot do so. As he goes into possession with and under the tenant he is bound by the allegiance the lessee owes the lessor, and he cannot throw it off at his will and pleasure. Springs v. Schenck, 99 N. Car. 551, 6 S. E. 405.

[115] Parer v. Manning, 7 Term R. 533; Doe v. Austin, 9 Bing. 41.

[116] Blantire v. Whitaker, 11 Humph. (Tenn.) 313; Den v. Murray, 6 Ired. L. (N. Car.) 62.

[117] Louer v. Hummel, 21 Pa. St. 450; Hilbourn v. Fogg, 99 Mass. 11; Palmer v. Ekins, 2 Ld. Raym. 1550; Russell v. Allard, 18 N. H. 222.

to this species of estoppel as to the strict estoppel at common law. The rule seems settled that a tenant can no more dispute the title of his lessor when asserted by an assignee of the latter than when it is held by the lessor himself. But the tenant may show that the title was never validly transferred.[118] Not only are those succeeding to the interest of the tenant placed under the same restriction that he is under, but all those who succeed to the interest of the original landlord are entitled to the same benefits which such landlord could claim. So it may be stated as a general rule that a tenant is estopped to deny the title of his landlord's assignee to the same extent that he is precluded from controverting the title of the landlord himself.[119] An assignee of a leasehold would have the same immunity against a sublessee in regard to his title as would the original lessee who granted the sub-lease.[120] The tenant may, however, attack the validity of a transfer made by the landlord, and his right to do so continues even though he has paid rent to such third party under a misapprehension as to the title.[121]

The rule that a tenant cannot dispute his landlord's title may be invoked by an administrator of a deceased landlord upon a proper case for an administrator to maintain a suit in respect to the land.[122] A tenant's allegiance to his landlord's title continues although the landlord dies and the property descends to heirs who are unknown to the tenant.[123]

§ 701. The burden is on the tenant, in an action for the rent or to recover possession of the premises to establish that the case falls within some exception of the general rule stated that he would avail himself of the right to dispute the landlord's title.[124] A landlord need not show good title against all the world nor need he give any

[118] Streeter v. Ilsley, 147 Mass. 141, 16 N. E. 776; Gillett v. Mathews, 45 Mo. 307; Dunshee v. Grundy, 15 Gray (Mass.) 314; Bergman v. Roberts, 61 Pa. St. 497; Louer v. Hummel, 21 Pa. St. 450.

[119] Streeter v. Ilsley, 147 Mass. 141, 16 N. E. 776; Dunshee v. Grundy, 15 Gray (Mass.) 314; Funk v. Kincaid, 5 Md. 404; Palmer v. Melson, 76 Ga. 803; Thorndike v. Norris, 24 N. H. 454; Blight v. Rochester, 7 Wheat. (U. S.) 535, 547; Den v. Alexander, 4 Dev. & B. (N. Car.) 40.

[120] Dunshee v. Grundy, 15 Gray (Mass.) 314.

[121] De Wolf v. Martin, 12 R. I. 533.

[122] State v. Votaw, 13 Mont. 403, 34 Pac. 315.

[123] Fowler v. Simpson, 79 Tex. 611, 15 S. W. 682.

[124] Derrick v. Luddy, 64 Vt. 462, 24 Atl. 1050.

evidence of title at all, the only proof required being that the defendant entered into possession as his tenant.[125]

In an action for rent it is sufficient to show a contract with the plaintiff and a holding under him, the plaintiff's title and right of possession are immaterial and therefore he is under no obligation to prove his title.[126] For a tenant who admits the execution of a lease to defend an action for rent, it is necessary for him to allege either that he had not entered under the lease, or that he had been evicted by a paramount title or that possession had been surrendered. It is no defense to plead that the plaintiff fraudulently alleged that he was the owner and thereby induced the defendant to accept a lease; and that thereafter the defendant had attorned and paid rent to the true owner.[127]

Where plaintiff in an action of forcible detainer pleads a written lease by the terms of which defendant was to surrender possession at the expiration of the term, he is not required to plead title and in such case no issue involving title to the property can arise.[128] And if a lessee holds over after the expiration of his term and the landlord brings ejectment against him, the landlord need produce no evidence of title except the lease by which the term was created.[129] In any action by a landlord against his tenant to recover possession, it is immaterial whether he had any title at the time the contract of lease was made.[130]

The nature of the interest covered by a demise does not affect the rule as to estoppel to deny title, provided only that the subject-matter was an interest in real estate. Thus the general rule has been applied in the case of a lease of a party wall,[131] and where the *locus* was a building which stood on rented land.[132] However, it has been

[125] Cressler v. Williams, 80 Ind. 366.

[126] Bartlett v. Robinson, 52 Neb. 715, 72 N. W. 1053; Voss v. King, 33 W. Va. 236, 10 S. E. 402, s. c. 38 W. Va. 607, 18 S. E. 762.

[127] Nissen v. Turner, 50 Neb. 272, 69 N. W. 778; Mosher v. Cole, 50 Neb. 636, 70 N. W. 275; Fordyce v. Young, 39 Ark. 135; Reynolds v. Lewis, 59 Cal. 20.

[128] Browne v. Haseltine, 9 S. D. 524, 70 N. W. 648.

[129] Mattox v. Helm, 5 Litt. (Ky.). 185.

[130] South v. Marcum, 15 Ky. L. R. 339.

[131] Mackin v. Haven, 187 Ill. 480, 58 N. E. 448, affirming 88 Ill. App. 434.

[132] Pool v. Lamb, 128 N. Car. 1, 37 S. E. 953. Where the boundary between two farms was disputed an agreement fixing a temporary boundary was held not to create a tenancy between the owner on one side who occupied land to which he had good title. It was a mere license to occupy, and no estoppel resulted. Bishop v. Babcock, 22 Vt. 295.

held that one who usurps the right to keep a public ferry, in violation of local statutes, cannot claim the allegiance from his lessee which is due from a tenant to his landlord. Another clear ground upon which to rest such a decision is that one who usurps a franchise, and makes contracts based on it, cannot be allowed to enforce such contracts in the courts of the country on grounds of public policy.[183]

§ 702. Where the tenant has been induced to accept the lease by misrepresentation, fraud or trick practiced upon him by the lessor, he is not estopped from setting up a superior title to that of the lessor. It matters not whether the deception practiced originated in voluntary falsehood or in simple mistake, for the immunity it confers springs not so much from the fraud of the usurper, as from the wrong which the deception would otherwise work on the rights of the lessee.[184] For a party in possession of land to accept a lease from a stranger in ignorance of his rights, or in entire ignorance of its purport and effect, does not preclude him from impeaching the validity of the stranger's title.[185] "The exception is as well established as the rule itself that where the tenant is induced to accept the lease by the employment of trick, the suggestion of falsehood or the use of undue promises or threats, such acceptance will not close his mouth against the assertion of a title superior to that residing in the lessor. This is so even though at the time of acceptance the lessee be not in the occupancy of the demised premises. But the exception is more stringently applicable where he, who is improperly prevailed on to attorn as tenant, is in peaceable occupancy of the land."[186]

[183] Milton v. Haden, 32 Ala. 30.

[184] Mays v. Dwight, 82 Pa. St. 462; Baskin v. Seechrist, 6 Pa. St. 154.

[185] Cain v. Gimon, 36 Ala. 168; Wiggin v. Wiggin, 58 N. H. 235.

[186] Baskin v. Seechrist, 6 Pa. St. 154. Same principle affirmed in Robins v. Kitchen, 8 Watts (Pa.) 390; Hockenbury v. Snyder, 2 W. & S. (Pa.) 240; Gleim v. Rise, 6 Watts (Pa.) 44; Thayer v. Society &c., 20 Pa. St. 60; Mays v. Dwight, 82 Pa. St. 462. **Alabama:** Blankenship v. Blackwell, 124 Ala. 355, 27 So. 551; Farris v. Houston, 74 Ala. 162. **California:** Pacific &c. Ins. Co. v. Stroup, 63 Cal. 150, 153; Knowles v. Murphy, 107 Cal. 107, 40 Pac. 111. **Illinois:** Young v. Heffernan, 67 Ill. App. 354. **Maine:** People's Loan &c. Asso. v. Whitmore, 75 Me. 117. **Michigan:** Michigan &c. R. v. Bullard, 120 Mich. 416, 79 N. W. 635. **Missouri:** Higgins v. Turner, 61 Mo. 249; Suddarth v. Robertson, 118 Mo. 286, 24 S. W. 151. **New Hampshire:** Wiggin v. Wiggin, 58 N. H. 235. **South Carolina:** Givens v. Mullinax, 4 Rich. L. (S. Car.) 590. **Tennessee:** Hammons v. McClure, 85 Tenn. 65, 2 S. W. 37. **Texas:** Hammers v. Haurick, 69 Tex. 412, 7 S. W. 345. **Vermont:** Swift v. Dean, 11 Vt. 323. **Virginia:** Alderson v. Miller, 15 Grat. (Va.) 279; Locke v. Frasher, 79 Va. 409. **West Virginia:** Bodkin

The distinction has been made, however, that a person in possession, accepting a lease from an outstanding title, may show that his acknowledgment of such title was induced by imposition or fraud, without surrendering possession; but that a party entering into possession under a lease, cannot dispute the validity of his landlord's title, even where the lease was induced by fraud, without first surrendering the possession obtained under the lease.[137] Yet even where the tenant went into possession under the lease, if there be fraud on the part of the landlord in the execution of the lease, and he is unable by reason of insolvency to indemnify the tenant for rents wrongfully exacted, the tenant may, while in possession, purchase a superior title if he does so in good faith, from a well-grounded fear of eviction, and may rely on the title thus acquired in resisting a suit by the landlord for possession.[138] And where a lessee goes into the occupation of land under a lease, it is nowhere disputed that he may, in case of fraud, misrepresentation, or mistake, surrender possession and relieve himself of the estoppel.[139]

Where a tenant himself participates in the fraud, he has no right to dispute his landlord's title on the ground that it was fraudulent.[140] The nature of the defect in the landlord's title is immaterial on the question of estoppel. In order to discharge a tenant from the estoppel which ordinarily arises, it is necessary not only that a false representation of ownership be made by the landlord, but that it was made for the purpose of inducing the tenant to accept the lease, and did in fact induce him to accept it.[141]

But fraudulent representations of a landlord inducing tenant to pay rent have been held not to remove the estoppel where tenant does not surrender possession of the premises as soon as he discovers the fraud.[142]

v. Arnold, 45 W. Va. 90, 30 S. E. 154. Owner of land conveyed it and took a lease back from the grantee. He subsequently attempted to attack the validity of the conveyance as obtained under duress. Held he could not do so without first showing the invalidity of the lease. Williams v. Wait, 2 S. D. 210, 49 N. W. 209.

[137] Jackson v. Spear, 7 Wend. (N. Y.) 401; Crockett v. Althouse, 35 Mo. App. 404.

[138] Gallagher v. Bennett, 38 Tex. 291.

[139] Crockett v. Althouse, 35 Mo. App. 404.

[140] Tufts v. Du Bignon, 61 Ga. 322, 328; Gleaton v. Gleaton, 37 Ga. 650.

[141] Camarillo v. Fenlon, 49 Cal. 202.

[142] Kiernan v. Terry, 26 Ore. 494, 38 Pac. 671.

§ 703. Showing transfer or expiration of landlord's title.—Although a tenant cannot dispute or gainsay the title of his landlord so long as it remains as it was at the time the tenancy commenced, and no fraud has been practiced; yet it may be shown that the title under which the tenant has entered has expired or has been extinguished by operation of law.[143] In some cases it has been insisted that the determination of the lessor's title would not avail the lessee, unless the latter had attorned to the new owner.[144] But this requirement which seems to rest on a misconception of the real ground of the defense, has not been insisted upon;[145] and it nowhere seems to be held that an eviction of the tenant is necessary to enable him to show the expiration of the landlord's title.[146]

The tenant may also show that, since the commencement of the tenancy, he has acquired a title consistent with that admitted by the demise.[147] This rule applies whether the action be for the recovery

[143] **Arkansas:** Bettison v. Budd, 17 Ark. 546. **Alabama:** Randolph v. Carlton, 8 Ala. 606; Hammond v. Blue, 132 Ala. 337, 31 So. 357. **Florida:** Robertson v. Biddell, 32 Fla. 304, 13 So. 358; Winn v. Strickland, 34 Fla. 610, 16 So. 606. **Illinois:** Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746; Born v. Stafford, 93 Ill. App. 10. **Indiana:** Kenney v. Doe, 8 Blackf. (Ind.) 350; Millikan v. Davenport, 5 Ind. App. 257, 31 N. E. 1122. **Iowa:** Stout v. Merrill, 35 Iowa 47. **Kentucky:** Sabastian v. Ford, 6 Dana (Ky.) 436; Casey v. Gregory, 13 B. Mon. (Ky.) 505. **Maine:** Ryder v. Mansell, 66 Me. 167. **Maryland:** Presstman v. Silljacks, 52 Md. 647; Keys v. Forrest, 90 Md. 132, 45 Atl. 22. **Massachusetts:** Lamson v. Clarkson, 113 Mass. 348. **Michigan:** McGuffie v. Carter, 42 Mich. 497, 4 N. W. 211; Sherman v. Spalding, 126 Mich. 561, 85 N. W. 1129. **Mississippi:** Rhyne v. Guevara, 67 Miss. 139, 6 So. 736. **Missouri:** Cook v. Basom, 164 Mo. 594, 65 S. W. 227; Robinson v. Troup Min. Co., 55 Mo. App. 662. **New Hampshire:** Russell v. Allard, 18 N. H. 222; Page v. Kinsman, 43 N. H. 328. **New Jersey:** Den v. Ashmore, 22 N. J. L. 261. **New York:** Jackson v. Rowland, 6 Wend. 666; Jackson v. Davis, 5 Cow. 123. **North Carolina:** Lancashire v. Mason, 75 N. Car. 455. **Ohio:** Devacht v. Newsam, 3 Ohio 57. **Oregon:** West Shore Mills Co. v. Edwards, 24 Ore. 475, 33 Pac. 987. **Pennsylvania:** Heckart v. McKee, 5 Watts (Pa.) 385; Newell v. Gibbs, 1 W. & S. (Pa.) 496. **English:** Mountnoy v. Collier, 1 E. & B. 630, 72 E. C. L. 630, 16 E. L. & Eq. 232; England v. Slade, 4 Term R. 682; Doe v. Edwards, 5 B. & Ad. 1065.

[144] Holt v. Martin, 51 Pa. St. 499; Evertsen v. Sawyer, 2 Wend. (N. Y.) 507.

[145] Simers v. Saltus, 3 Denio (N. Y.) 214; Whalin v. White, 25 N. Y. 462.

[146] Binney v. Chapman, 5 Pick. (Mass.) 124; Jackson v. Davis, 5 Cow. (N. Y.) 123; Den v. Ashmore, 22 N. J. L. 261; Clarke v. Byne, 13 Ves. 383; England v. Slade, 4 Term R. 682.

[147] Millikan v. Davenport, 5 Ind.

of the premises, or for rent accrued after the extinguishment of the landlord's title. Thus, a tenant may show that his landlord had a limited estate only which expired by its own limitation before the cause of action accrued, as where he held an estate for the life of another, who has died during the term;[148] or that the landlord had sold or conveyed the land, or had been evicted by title paramount, or that his title had been sold under execution and conveyed.[149] Thus it is open to the tenant to show that the landlord's interest has been sold at a tax or execution sale,[150] or that a mortgage executed by the landlord prior to the lease has been foreclosed.[151]

Where a tenant bought a title to the demised land during the term at a sheriff's sale, this title extinguished the landlord's title and could be set up as a bar to an action for rent or an action to recover possession of the premises.[152] By setting up the title which has been transferred to him from the lessor, a tenant affirms rather than denies his landlord's title, and it makes no difference as far as the principle is concerned whether the conveyance is directly from the landlord or from a trustee having a prior lien.[153]

A default in the condition of an outstanding mortgage is one mode in which a lessor's title may come to an end, and a lessee who has procured an assignment of the mortgage would not be estopped from asserting his rights as assignee and the default in the condition of the mortgage, to protect his possession when sued in ejectment by the lessor.[154] When the title of the lessor is subsequently taken from him and determined, and the lease thereby at an end, the lessee is not precluded from availing himself of the truth; in covenant against him for non-payment of rent, he may plead the determination of the

App. 257, 31 N. E. 1112; Casey v. Gregory, 13 B. Mon. (Ky.) 505; Ryder v. Mansell, 66 Me. 167.

[148] Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746; St. John v. Quitzow, 72 Ill. 334; Lamson v. Clarkson, 113 Mass. 348; Heckart v. McKee, 5 Watts (Pa.) 385.

[149] Franklin v. Palmer, 50 Ill. 202, Board &c. v. Herrington, 50 Ill. 232; Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746; Tilghman v. Little, 13 Ill. 239; Wolf v. Johnson, 30 Miss. 513; Jackson v. Rowland, 6 Wend. (N. Y.) 666, 670; Lancashire v. Mason, 75 N. Car. 455.

[150] Keys v. Forrest, 90 Md. 132, 45 Atl. 22; Wolf v. Johnson, 30 Miss. 513.

[151] Stout v. Merrill, 35 Iowa 47; Wolf v. Johnson, 30 Miss. 513;

[152] Hetzel v. Barber, 69 N. Y. 1; Jackson v. Rowland, 6 Wend. (N. Y.) 666, 670; Nellis v. Lathrop, 22 Wend. (N. Y.) 121; Despard v. Walbridge, 15 N. Y. 374.

[153] Carson v. Crigler, 9 Ill. App. 83; Hardin v. Forsythe, 99 Ill. 312.

[154] Pickett v. Ferguson, 45 Ark. 177; Niles v. Ransford, 1 Mich. 338; Pierce v. Brown, 24 Vt. 165.

lessor's title in bar; and in ejectment he may avail himself of the expiration of the lessor's title under a general issue.[155]

§ 704. A tenant may purchase his landlord's title at an execution sale and does not stand in such a fiduciary relation as to become in any sense a trustee of such title for his landlord, it being open to him to use the title thus acquired to defeat an action for rent or an ejectment suit. That the legal proceeding resulting in judgment and execution against the landlord existed before the lease was granted does not affect the lessee's rights.[156] If there has been a sheriff's sale of the whole reversion in demised premises and the tenant redeems or purchases under the judgment, no action can be sustained against him for rent, for a purchase or acquisition of title under a judgment against the lessor is equivalent to his voluntary grant by deed. It is, to be sure, acquiring title indirectly and by operation of law from the lessor, but it comes through his act and consent or his neglect and is therefore the same in legal effect as if he had granted or devised the reversion.[157] There is no doubt that a tenant may buy of the landlord at private sale. There is no consideration of law or public policy to prevent his bidding when his landlord's title is exposed at an involuntary sale. He owes no duty to his landlord inconsistent with his right to purchase. The bidding is open to all the world, and the injury is no greater than if any other person had bought.[158]

Not only has the tenant the full right to purchase his landlord's title on an execution sale, but if such a purchase is made by the tenant, the landlord has no more right to redeem in such a case than if the purchase had been by a stranger.[159] But it has been held that the relation of trust and confidence established between a landlord and tenant are such as to render it inequitable for the tenants to combine for the purpose of obtaining the title of their landlord at judicial sale or otherwise, without notice to him. This combination had no right to proceed to sell the property, knowing it to be the property of the

[155] Orleans Co. &c. School v. Parker, 25 Vt. 696.

[156] Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285; Higgins v. Turner, 61 Mo. 249; Smith v. Scanlan, 106 Ky. 572, 51 S. W. 152; Ryder v. Mansell, 66 Me. 167; Pickett v. Ferguson, 86 Tenn. 642, 8 S. W. 386, overruling dictum in Scott v. Levy, 6 Lea (Tenn.) 662, 667; Bettison v. Budd, 17 Ark. 546, 65 Am. Dec. 442; Camley v. Stanfield, 10 Tex. 546; Elliott v. Smith, 23 Pa. St. 131; Pickett v. Ferguson, 45 Ark. 177.

[157] Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285.

[158] Pickett v. Ferguson, 45 Ark. 177.

[159] Casey v. Gregory, 13 B. Mon. (Ky.) 505; Pickett v. Ferguson, 45 Ark. 177.

landlord, without notice to him. It would be a breach of faith to allow the property to be sold by the sheriff to any one, without notifying the landlord; much more so for the tenants to procure a sale upon their own judgment and execution.[160]

Furthermore, the time when the levy of execution takes place is material, for if made before the term commenced it cannot be claimed that the tenant is showing his landlord's title valid at the time of demise has since expired and come to an end. Consequently, it has been held that a lessee cannot set up the title of his landlord's execution creditor if the execution was levied prior to the making of the lease.[161]

§ 705. After a judgment of eviction has been obtained against a tenant, he may proceed to buy in and set up the adverse title of a stranger and it is not necessary that he be actually evicted to entitle him to do this.[162] But where it appears that successful resistance might have been made to a recovery by the elder title, it is the duty of the tenant to show that he in good faith made defense, or at least that he notified his landlord, or those in reversion or remainder, of the suit against him for possession.[163] Furthermore, a valid outstanding title, alone, will not discharge the lessee from his estoppel to deny title of landlord. He must be evicted or prevented from entering or from enjoying the thing demised by virtue of such title.[164] Acceptance of a lease from another and acknowledgment of possession under him will not discharge the estoppel against a lessee to deny his original landlord's title. He may be equally estopped as to both.[165] In general, unauthorized attornment to a third person does not affect the landlord's rights or make the holding adverse, as such attornment is void, and the tenant still continues to be the tenant of the original landlord, holding possession for him.[166] Although the land-

[160] Matthews' Appeal, 104 Pa. St. 444.

[161] Wood v. Turner, 8 Humph. (Tenn.) 685; s. c. 7 Humph. 517.

[162] Gore v. Stevens, 1 Dana (Ky.) 201; Mills v. Peed, 14 B. Mon. (Ky.) 180.

[163] Mills v. Peed, 14 B. Mon. (Ky.) 180.

[164] McDowell v. Sutlive, 78 Ga. 142, 2 S. E. 937; McKesson v. Jones, 66 N. Car. 258; Maverick v. Lewis, 3 McCord (S. Car.) 211; Hawes v. Shaw, 100 Mass. 187; Simmons v. Robertson, 27 Ark. 50. "A lessee cannot deny his lessor's title until discharged from the estoppel by yielding up possession to the lessee; nor will the acceptance of a lease from any other enable him to do so unless when he has been evicted and afterward let in possession by a new and distinct title of a new landlord, and this *bona fide*." Pate v. Turner, 94 N. Car. 47.

[165] Freeman v. Heath, 13 Ired. L. (N. Car.) 498.

[166] Doe v. Reynolds, 27 Ala. 364;

lord's title may be bad, his tenant cannot dispute it so long as the true owner permits the tenant's occupation.[167] And if a tenant has enjoyed the land, he cannot repel the landlord's claim for rent by saying he had nothing in the land or that the lease was void.[168]

§ 706. An evicted tenant may take a new lease from the party evicting him, it being also held that if threatened with suit upon a paramount title, the threat under such circumstances is equivalent to eviction. He may thereupon submit in good faith, and attorn to a party holding a valid title, to avoid litigation. In such case it is incumbent on him and those who have profited by his admission to show the existence and superiority of the title in question.[169] For it is always open to proof that there has been an eviction by title paramount since the making of a demise,[170] and the doctrine of estoppel between landlord and tenant does not bind the tenant after he has been evicted and let into possession again by another landlord under a new and distinct title.[171] Where an ejectment suit has been brought against the tenant in possession and successfully prosecuted, and the tenant yields to the officer's authority and executes a new lease to the plaintiff in the suit, this is not such a voluntary act as to make it a wrong against the original landlord.[172]

§ 707. Although it is well established that a tenant cannot voluntarily attorn to an adverse claimant,[173] "it is equally well settled,"

Milsap v. Stone, 2 Colo. 137; McNamee v. Reif, 52 Miss. 426; Rutherford v. Ullman, 42 Mo. 216; McCartney v. Auer, 50 Mo. 395; Kepley v. Scully, 185 Ill. 52, 57 N. E. 187; Perkins v. Potts, 52 Neb. 110, 71 N. W. 1017.

[167] Providence Co. Sav. Bank v. Phalen, 12 R. I. 495. In an action for rent under a lease which had been accepted from the plaintiff alone, defendant set up then that plaintiff did not have title to the entire premises, and rent had been recovered by his co-owner. Held, this defense could not be set up because lessee was estopped to deny his lessor's title. The proper way to prevent double recovery would have been to have filed a bill of interpleader. McCoy v. Bateman, 8 Nev. 126.

[168] Cook v. Cook, 28 Ala. 660; Love v. Law, 57 Miss. 596; Allen v. Hall, 64 Neb. 256, 89 N. W. 803; Watson v. Alexander, 1 Wash. (Va.) 340.

[169] Merryman v. Bourne, 9 Wall. (U. S.) 592, 600; Lunsford v. Turner, 5 J. J. Marsh (Ky.) 104; Mayor &c. v. Whitt, 15 M. & W. 571, 577; Emery and Barnett, In re, 4 C. B. (N. S.) 423, 93 E. C. L. 423.

[170] Cook v. Basom, 164 Mo. 594, 65 S. W. 227; Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746; Wheelock v. Warschauer, 21 Cal. 309.

[171] Gilliam v. Moore, Busb. L. (N. Car.) 95.

[172] Foss v. Van Driele, 47 Mich. 201, 10 N. W. 199.

[173] Nissen v. Turner, 50 Neb. 272, 69 N. W. 778; Mosher v. Cole, 50 Neb. 636, 70 N. W. 275; § 476.

declares Justice Wilde, of Massachusetts, "that if the lessee is disturbed in his occupation by a party having a title paramount to that of his lessor, so that he cannot legally continue his occupation under the lessor without rendering himself liable as a trespasser to the other party, he may yield the possession and take a new lease under him, or he may abandon the possession; and in either case he will thereafter not be liable to pay rent to the original lessor." The reason for this is that such an entry and disturbance are equivalent to an ouster, as where execution creditors of the landlord entered claiming title, and threatening to put the lessee out unless he would yield possession and attorn to them.[174] But while a tenant may attorn to one who has recovered against his lessor in ejectment, if the writ and return be set aside, his relation to his former landlord is reëstablished.[175] And it has been held that notice to the landlord of the pendency of the ejectment suit is necessary, mere proof of the judgment of ejectment against the tenant not being enough. The landlord is entitled to an opportunity to defend the ejectment suit, before his tenant can justify an attornment to a third party.[176]

A few statutes are to be found defining the right of tenants to attorn to adverse claimants. Thus, under the California statute an attornment to a stranger is void unless made with the consent of the landlord or in pursuance of a judgment at law or decree in equity.[177] A statute of similar import is to be found in Mississippi,[178] and in Kentucky there is an enabling act authorizing an attornment in consequence of a judgment, order, or decree of court.[179]

§ 708. Estoppel does not bar a lessee from exercising a power of eminent domain. All the property in the country is held subject to the power of eminent domain, the exercise of which is subject only to the limitation that just compensation must be made in all cases for the property taken. There is no distinction in principle in a case where the state is already in possession of the property, as lessee under a contract with the lessor to deliver possession at a certain time, and an ordinary case of condemnation, where no such relations growing

[174] George v. Putney, 4 Cush. (Mass.) 351, 354; Palmtag v. Doutrick, 59 Cal. 154; Carpenter v. Parker, 3 C. B. (N. S.) 206, 235, 91 E. C. L. 206.

[175] Coughanour v. Bloodgood, 27 Pa. St. 285.

[176] Douglas v. Fulda, 45 Cal. 592; Calderwood v. Pyser, 31 Cal. 333.

[177] Thompson v. Ploche, 44 Cal. 508.

[178] Tucker v. Whitehead, 58 Miss. 762.

[179] McMurtry v. Adams, 3 Bush (Ky.) 70.

out of contract exist. The state in entering into the contract, acts merely as an individual may do, whereas in condemning the property, it acts in its sovereign capacity. In other words, a right founded upon a contract with the state is not more sacred than any other property.[180] Every contract is made in subordination to certain conditions, of which the right of eminent domain is one.[181]

§ 709. The attornment of a tenant to a third person does not have the effect of making the possession of the tenant the constructive possession of the stranger to whom he attorns but the rightful owner is still in constructive possession through his tenant.[182] For a tenant in possession to accept a lease from a stranger does not make his holding adverse to the original lessor.[183]

While the attornment of a tenant to a stranger does not alone operate as a disseisin of a landlord, yet if possession be assumed by other acts besides the attornment, and the landlord has full knowledge of such change, the holding may become adverse to him.[184] Moreover, attornment to a stranger is not wrongful as between the tenant and the stranger, particularly if the latter has a right to evict the landlord, and this justifies the stranger in bringing distress for rent.[185]

In Kansas it has been held that a tenant, when confronted with a tax title, is justified in recognizing the grantee in such deed as the owner of the property; and this decision is based on the ground that it is competent to show that the landlord's title has terminated.[186] In New York the right to attorn to the holder of a tax title was denied the tenant, the case going on a New York statute which only allowed attornment to privies, and a majority of the court being of opinion that the holder of the tax title was not in privity with the landlord. The court argue that if the tax is not paid, then the state, by virtue of its taxing power, and through the medium provided by statute, either acquires the land or grants it to a citizen. The pur-

[180] Tait v. Central &c. Asylum, 84 Va. 271, 4 S. E. 697.

[181] West River Bridge Co. v. Dix, 6 How. (U. S.) 507; Boom Co. v. Patterson, 98 U. S. 403.

[182] Campbell v. Davis, 85 Ala. 56, 4 So. 140; Collier v. Carlisle, 133 Ala. 478, 31 So. 970; Pence v. Williams, 14 Ind. App. 86, 42 N. E. 494; Ratcliff v. Bellfonte Iron Works Co., 87 Ky. 559, 10 S. W. 365, 10 Ky. L. R. 643; State v. Howell, 107 N. Car. 835, 12 S. E. 569; Bryan v. Winburn, 43 Ark. 28.

[183] Farrar v. Heinrich, 86 Mo. 521; Dausch v. Crane, 109 Mo. 323, 19 S. W. 61.

[184] Winn v. Strickland, 34 Fla. 610, 16 So. 606.

[185] Smith v. Coker, 110 Ga. 650, 36 S. E. 105.

[186] Sheaff v. Husted, 60 Kan. 770, 57 Pac. 976, reversing 8 Kan. App. 271, 55 Pac. 507.

chaser is not subjected to any of the inconveniences of the old title, nor can he take advantage of it.[187]

Under the Missouri statute a tenant is authorized to attorn to a purchaser under the foreclosure of the landlord's deed of trust of older date than the lease, and, on proper exhibition of purchaser's deed, he must so attorn.[188]

The meaning of the Iowa provision in regard to attornment has been declared to be that a tenant of a mortgagor may attorn to the mortgagee, after the right of possession of the mortgagor is cut off under the statute—that is, after time for redemption from the sale under the mortgage has expired.[189]

As has already appeared, a lessee may yield to the title of a levying creditor of a lessor, and will not thereafter be liable to pay rent to the original lessor.[190] But in an action by the execution creditor, for use and occupation, against a tenant in possession under the execution debtor, the tenant might take advantage of a defect in the levy. The tenant has a right to protect himself against a double payment, by objecting to the creditor's title; so that whether the levy be void, or merely voidable, is not material.[191]

[187] O'Donnell v. McIntyre, 118 N. Y. 156, 23 N. E. 455.

[188] Holden &c. Asso. v. Wann, 43 Mo. App. 640.

[189] Mills v. Hamilton, 49 Iowa 105; Mills v. Heaton, 52 Iowa 215, 2 N. W. 1112.

[190] George v. Putney, 4 Cush. (Mass.) 351.

[191] Pickett v. Breckenridge, 22 Pick. (Mass.) 297.

CHAPTER XI.

FIXTURES.

§ 710. **The general rule of law is that whatever is fixed to the soil becomes a part of the realty,** and every case in which there exists the right of severing and removing a thing which has been affixed to the soil of another is considered as an exception to the general rule above stated. This right of removal is a special privilege conferred by the law in certain cases from reasons of public policy upon certain classes of persons, in derogation of what would otherwise be the rights of the owner of the soil. In an early case it was laid down as a general rule "that where the instrument or utensil is an accessory to anything of a personal nature, as to the carrying on of a trade, it is considered a chattel; but where it is a necessary accessory to the enjoyment of the inheritance, it is to be considered as a part of the inheritance."[1] In accordance with this principle, salt pans, which were very slightly fixed with mortar to the floor and might be removed without injuring the building, were held to be fixtures. "The present case," said Lord Mansfield, "is very strong. The salt spring is a valuable inheritance; but no profit arises from it unless there is a salt work, which consists of a building for the purpose of containing the pans which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the use and enjoyment of the principal. The owner erected them for the benefit of the inheritance."[2] So a steelyard hung in a machine-house was a fixture because the principal purpose of the house was for weighing.[3] The mere fixing and fastening is not alone to be considered, but the use and nature of the article and the intention of the parties. So, if furnishings are in their nature articles of furniture, the fact that they were fastened to the walls, for safety or convenience, does not deprive them of their character as personal chattels and make them a part of the realty.[4]

[1] Olympic Theatre, 2 Browne (Pa.) 275, 285.

[2] Lawton v. Salmon, 1 H. Bl. 259, *n.*

[3] Rex v. Inhabitants of St. Nicholas, Cald. 262.

[4] Winslow v. Merchants' Ins. Co., 4 Metc. (Mass.) 306.

Thus, a glass case, a case of drawers, a mirror and gas fixtures, though fastened to the walls, were not annexed to the realty so as to become part of it. The nature of the articles, the circumstances under which they were placed in the building, the mode of their connection, and the relation which they bear to the use of the freehold, are not such as to give them the character of fixtures or additions to the real estate.[5] It is impossible to regard personal property capable of removal from the land, which does not belong to the land-owner, as part of the realty. So it was held that machines fastened in a building by bolts and screws, and removable without injury to the building, did not become a part of the realty.[6]

However, the principle of law is that whatever is planted in the soil belongs to the soil—*quic quid plantatur solo, solo cedit;* while the tenant may have the right to remove fixtures of a certain nature, they are not goods and chattels at all, but parcel of the freehold, and as such not recoverable in trover.[7] Therefore, it has been held that an action of trover will not lie against a landlord for the conversion of fixtures, during the term of the lease, while they remain unsevered from the realty.[8] And the price of the fixtures of a house cannot be recovered by the tenant under a declaration for goods sold and delivered.[9] The doctrine of the law of landlord and tenant is not that the articles attached to the freehold remain chattels for the purposes of removal, but that, under certain circumstances, parts of the freehold may be removed by the tenant.

§ 711. **The original doctrine was that fixtures were generally regarded as immovable,** and therefore, as belonging to the landlord, though erected by the tenant and at his own expense; but this doctrine has been modified, in modern times, to meet the wants and necessities of trade and commerce, and the arts and sciences, until now, perhaps, a majority of fixtures erected by tenants may be removed, if done whilst the tenant's dominion over the leased premises still exists.[10]

In regard to the additions which do become fixtures in that they are temporarily attached to the freehold, the exception in favor of a tenant allows him to remove trade, domestic and ornamental fixtures, but not

[5] Guthrie v. Jones, 108 Mass. 191.

[6] Bartlett v. Haviland, 92 Mich. 552, 52 N. W. 1008; Scudder v. Anderson, 54 Mich. 126, 19 N. W. 775.

[7] Mackintosh v. Trotter, 3 M. & W. 184; Minshall v. Lloyd, 2 M. & W. 450.

[8] Guthrie v. Jones, 108 Mass. 191.

[9] Lee v. Risdon, 7 Taunt. 188.

[10] Thomas v. Cront, 5 Bush (Ky.) 87; Coombs v. Jordan, 3 Bland (Md.) 284, 22 Am. Dec. 236; Tate v. Blackburne, 48 Miss. 1; Jones on Mort., § 441.

other fixtures.[11] A tenant who has put trade fixtures into a building has a right to remove them if it can be done without permanent injury to the freehold, provided the right is exercised within proper time. The right must be exercised during the term of the lease.[12] Nevertheless, trade fixtures become part of the realty, whatever intention to the contrary on the part of the tenant erecting them may be inferred from his limited interest in the land. The indulgence shown by the law to the tenant in allowing him to remove them during his term arises, not from any regard to his intention, but by way of exception to a rule which would otherwise work hardship or retard improvement.[13]

§ 712. **Fixtures which would be destroyed in removal.**—In determining whether an addition by the tenant to a leased building is removable or not by him during the term, the mode of its annexation is to be considered, and whether it can be removed without substantial injury to the building or to itself. It has been held that the right of removal should not be extended so far as to include a thing which cannot be severed from the realty without being destroyed or reduced to a mere mass of crude materials. A baker's oven so united with the building that the two were inseparable without the destruction of the oven and a substantial injury to the building, is not a removable trade fixture.[14] On the other hand, the Illinois Supreme Court held that removable trade fixtures might include boilers, ovens, and other trade appliances if they may be removed without injury to the freehold. The fact that the masonry of the ovens and boilers must be taken down, brick by brick, and that the iron work must be taken apart, does not destroy the tenant's right to remove them,[15] the general rule in Illinois being exceptionally liberal in favor of the tenant. As between him and the landlord, removable trade fixtures may include all erections made for the purpose of trade, such as soap-vats, engines, a working colliery, pans used in manufacturing salt, brewhouses, furnaces, greenhouses and hothouses erected by nurserymen and gardeners.[16] Ordinarily such things cannot be removed without injury to the material composing them, and there is no reason why an

[11] Wright v. Du Bignon, 114 Ga. 765, 40 S. E. 747; Charleston &c. R. Co. v. Hughes, 105 Ga. 1, 23, 30 S. E. 972; McCracken v. Hall, 7 Ind. 30.

[12] Allen v. Kennedy, 40 Ind. 142; Poole's Case, 1 Salk. 368.

[13] Treadway v. Sharon, 7 Nev. 37.

[14] Collamore v. Gillis, 149 Mass. 578, 29 N. E. 46.

[15] Baker v. McClurg, 198 Ill. 28, 64 N. E. 701, affirming 96 Ill. App. 165.

[16] Moore v. Smith, 24 Ill. 513.

exception should be made in the case of ovens, an engine, and a boiler. It has even been held that a two-story house with brick chimney and foundations was so removable.[17] "Indeed, it is difficult to conceive," said the Supreme Court of the United States, "that any fixture however solid, permanent, and closely attached to the realty, placed there for the mere purposes of trade, may not be removed at the end of the term."[18]

On the other hand the New Jersey court held the fact that the articles in dispute might be removed and used elsewhere is not decisive of their character.[19] Trade fixtures to be capable of removal by a tenant must be additions made by the tenant to the property of the landlord and not substitutions for essential parts of it which the tenant has irrecoverably removed. When a tenant accepts a lease of a mill and covenants to keep it in repair and during the term takes the greater part of the equipment out of the mill and puts new machinery in its place, he will be restrained from removing such new machinery and thus dismantling the mill.[20]

§ 713. Agreements as to removal.—The rules of common law, relating to the rights of lessor and lessee, in buildings and other structures erected by the lessee upon the property leased, and in such things as are annexed to any buildings or structures thereon, are liable to be changed and modified in any way by agreements between the parties on the subject. So far as such agreements extend, the question is no longer what is the common law, but what have the parties agreed.[21] In accordance with this principle it has been settled by many decisions that where a building is erected by one man upon the land of another, by his permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel and the property of the person who erected it. In such case it is immaterial what is the purpose, size, material, or mode of construction of such building.[22]

[17] Van Ness v. Pacard, 2 Pet. (U. S.) 137; Moore v. Wood, 12 Abb. Pr. (N. Y.) 393.

[18] Wiggins Ferry Co. v. Ohio &c. R. Co., 142 U. S. 396, 12 S. Ct. 188.

[19] Feder v. Van Winkle, 53 N. J. Eq. 370, 33 Atl. 399.

[20] Ashby v. Ashby, 59 N. J. Eq. 536, 46 Atl. 528.

[21] Merritt v. Judd, 14 Cal. 59; Dubois v. Kelley, 10 Barb. (N. Y.) 496; Wall v. Hinds, 4 Gray (Mass.) 256, 273; Dame v. Dame, 38 N. H. 429; Foley v. Addenbrooke, 13 M. & W. 174; Naylor v. Collinge, 1 Taunt. 19; Thresher v. East London &c. Co., 2 B. & C. 608.

[22] Vanness v. Pacard, 2 Pet. (U. S.) 137; Keefe v. Furlong, 96 Wis. 219, 70 N. W. 1110.

It is merely personal, and is governed by the same rules as any other article of personal property; as for instance, a pile of lumber, left by consent of the owner of the land upon his premises.[23]

Specific provisions in a lease as to the removal of structures to be erected by the tenant are controlling and in respect to such removal the question of the tenant's rights at common law does not arise.[24] The principle is well settled that parties may treat as personal property machinery which would otherwise be part of the realty and thus convert it into personal property as between themselves.[25] Under a contract between landlord and tenant for the tenant to erect buildings at his own expense with the privilege of removing them at any time during the lease, they do not become a part of the land and may be moved off the leased premises, as they continue to be personal chattels and the property of the person who builds them.[26] A purchaser of the reversion, though without notice of such an agreement, acquires no title or interest in the buildings covered by it. They continue to be personal property and do not pass by a conveyance of the land.[27]

Where a mere tenant at will is entitled by agreement to remove fixtures, a conveyance of the estate would of course terminate the will and revoke the license to allow the building to remain upon the premises, but the lessee at will must receive actual or constructive notice of the conveyance before he forfeits his right of removal.[28]

§ 714. If a grantee of the reversion is injured by an agreement which entitles the tenant to remove buildings or fixtures, from the granted premises, his remedy is upon the covenants in the deed. A grantor who executes a conveyance of land undertakes to convey everything described in his deed; and by a covenant of seisin he assumes to be the owner of all he undertakes to convey. Trees, buildings, fixtures and fences on a farm, are corporeal in their nature and the sub-

[23] Smith v. Benson, 1 Hill (N. Y.) 176.

[24] Linahan v. Barr, 41 Conn. 471; Allen v. Gates, 73 Vt. 222, 50 Atl. 1092; Town of Lemington v. Stevens, 48 Vt. 38.

[25] Keefe v. Furlong, 96 Wis. 219, 70 N. W. 1110; Smith v. Waggoner, 50 Wis. 155, 6 N. W. 568; Fitzgerald v. Anderson, 81 Wis. 341, 51 N. W. 554.

[26] Goodman v. Hannibal &c. R. Co., 45 Mo. 33; Lowenberg v. Bernd, 47 Mo. 297; Priestley v. Johnson, 67 Mo. 632; Union &c. Ins. Co. v. Tillery, 152 Mo. 421, 54 S. W. 220; Inhabitants &c. v. Jones, 8 Cush. (Mass.) 184; Howard v. Fessenden, 14 Allen (Mass.) 124.

[27] Russell v. Richards, 10 Me. 429; Dubois v. Kelley, 10 Barb. (N. Y.) 496; Smith v. Benson, 1 Hill (N. Y.) 176.

[28] Dubois v. Kelley, 10 Barb. (N. Y.) 496; Rising v. Stannard, 17 Mass. 282, 286.

jects of seisin, like the land itself of which they are regarded in the law as a part. Fences are not only indispensable to the enjoyment of real estate, but they are in their nature real estate, to the same extent that houses and other structures on the land are so. A rail applied to its appropriate use in building a fence or a house becomes real estate and is governed by the law regulating land. So a fence being within the description of a deed of land is part of that which the deed purports to convey and of which the grantor covenants that he is the owner.[29]

§ 715. The agreement allowing removal must be made before the building is erected, for it has also been decided that if a building has once been annexed to the realty, any subsequent contract of the owner or any acts of his, such as giving a chattel mortgage, without a severance, will not, as against a purchaser of the land, disconnect it from the realty and give it the character of personal property. The admitted intention of the parties, to change this to personal property, was one which the law could not carry into effect. So, where the owner of the land agreed, after the house was commenced and before it was completed, that the builder should hold it as personal property, the agreement was inoperative, and the house became annexed to the realty, as to a subsequent grantee of the land.[30]

After the execution of a mortgage deed of trust on land, the mortgagor would have no right to enter into an agreement that buildings erected by a tenant should remain personal property and thereby bind a purchaser at a sale under the mortgage; the rule being that if a mortgagor erects improvements or attaches fixtures to the mortgaged premises, they become the property of the mortgagee for the payment of his debt.[31] The fixtures attached at the time of sale un-

[29] Mott v. Palmer, 1 N. Y. 564. In Mitchell v. McNeal, 4 Colo. App. 36, 34 Pac. 840, the proposition decided is that covenants in a valid parol lease run with the land. One of the arguments of the court is that "If, by the terms of the agreement between the lessor and the lessee, the lessee should erect a structure on the property which by their contract was to remain a chattel with the right of removal, it would hardly be seriously argued that the grantor could escape the force of the agreement, or the grantee become the owner of that which was the property of the tenant because of a subsequent transfer."

Under the Georgia code fences permanently affixed to land constitutes a part of the realty. Ga. Civ. Code, § 2219; Bagley v. Columbus &c. R. Co., 98 Ga. 626, 25 S. E. 638.

[30] Richardson v. Copeland, 6 Gray (Mass.) 536; Gibbs v. Estey, 15 Gray (Mass.) 587; Madigan v. McCarthy, 108 Mass. 376.

[31] Curry v. Schmidt, 54 Mo. 515, 517; Butler v. Page, 7 Metc. (Mass.) 40; Jones on Mort., § 428.

der a deed of trust pass by the sale.[32] If a purchaser at such sale has no notice of the contract for removal at the time he acquires title to the land upon which the buildings stand, the tenant occupies no more advantageous position toward such purchaser with respect to the buildings than the landlord mortgagor does. As the latter cannot remove the buildings without the permission of the purchaser, it follows logically that the tenant cannot do so.[33]

An agreement by which a tenant releases his right to remove trade fixtures is equally binding on one claiming through him. Thus, where a lease stipulated that the lessee should not remove improvements, his attaching creditor could acquire no rights in such improvements as against the lessor, although without such stipulation in the lease, they would have been removable by the lessee as trade fixtures and the attaching creditor had no notice of the agreement.[34] The general rule sustained by modern authority is that an attaching creditor can acquire no greater right to improvements or fixtures placed upon the leasehold by the tenant than the tenant himself had.[35]

§ 716. In the absence of a special agreement a tenant under a lease for a specific term must ordinarily remove his fixtures during the term, or at farthest during the time he remains in possession of the leased premises under a right to still consider himself a tenant.[36] Furthermore where the term is surrendered, or is put an end to by the lessor under a forfeiture clause, the right of the tenant to remove his fixtures is gone as effectually as if the term had expired by lapse of time.[37] This right of the tenant, whereby he may sever fixtures from the freehold and restore them to their former condition as chattels, is referred to in the books as a "privilege." The limitation upon

[32] Sands v. Pfeiffer, 10 Cal. 258; Cohen v. Kyler, 27 Mo. 122.

[33] Union &c. Ins. Co. v. Tillery, 152 Mo. 421, 54 S. W. 220.

[34] Little Valeria &c. Co. v. Lambert, 15 Colo. App. 445, 62 Pac. 966.

[35] Waples on Attachment & Garnishment, § 258; Manwaring v. Jenison, 61 Mich. 117, 139, 27 N. W. 899; Morey v. Hoyt, 62 Conn. 542, 547, 26 Atl. 127; Friedlander v. Ryder, 30 Neb. 783, 47 N. W. 83; Rex v. Topping, McCl. & Y. 544.

[36] Morey v. Hoyt, 62 Conn. 542, 26 Atl. 127; Loughran v. Ross, 45 N. Y. 792; Carlin v. Ritter, 68 Md. 478, 13 Atl. 370, 16 Atl. 301; Griffin v. Ransdell, 71 Ind. 440; Dingley v. Buffum, 57 Me. 381; Torrey v. Burnett, 38 N. J. L. 457; Youngblood v. Eubank, 68 Ga. 630; Haflick v. Stober, 11 Ohio St. 482; Burk v. Hollis, 98 Mass. 55; Leader v. Homewood, 5 C. B. (N. S.) 546, 94 E. C. L. 546.

[37] Morey v. Hoyt, 62 Conn. 542, 26 Atl. 127; Davis v. Moss, 38 Pa. St. 346; Whipley v. Dewey, 8 Cal. 36; Kutter v. Smith, 2 Wall. (U. S.) 491; Friedlander v. Ryder, 30 Neb. 783, 47 N. W. 83; Pugh v. Arton, L. R. 8 Eq. 626; Weeton v. Woodstock, 7 M. & W. 14.

its exercise, *viz.*, that he must do so while in possession as tenant is obvious. If he does not exercise the privilege during that period, or indeed, if he acts inconsistent with a claim to the fixtures as distinct to the land, he is regarded as having waived his right, and the fixtures in such case, being a part of the freehold, belong to the landlord.[38] This general rule has been laid down in many cases, that things which a lessee has annexed to the freehold, if movable at all, must be removed before the expiration of the tenancy.[39] If a tenant does not remove his fixtures during the term or at its expiration, he will be presumed to have abandoned them. But this presumption may be rebutted by proof of a parol agreement between the parties.[40] Some sort of agreement is necessary, however, to entitle a tenant to remove fixtures after the end of the term.[41]

A mere permission to leave fixtures behind does not amount to a license to reënter and remove them after a surrender of possession, there being no express recognition of a right of property in the tenant after surrender. Where the question and answer upon which the alleged agreement is founded are both ambiguous, and the conversation will bear the construction of being founded on the convenience of the tenants to leave the fixtures behind to save the trouble and expense of removing them, it would be dangerous to imply a right to enter upon realty and sever things attached to it, upon such vague and ambiguous language.[42]

As it is not known when the rights of tenants at will or for an uncertain period will terminate, they will have a reasonable time after such termination in which to remove fixtures.[43] After the tenant's rights have been terminated and they have been urged to remove a

[38] Bauernschmidt &c. Co. v. McColgan, 89 Md. 135, 42 Atl. 907; Northern &c. R. Co. v. Canton Co., 30 Md. 347, 355; Van Ness v. Pacard, 2 Pet. (U. S.) 137, 143.

[39] Merritt v. Judd, 14 Cal. 59; Dostal v. McCaddon, 35 Iowa 318; Free v. Stuart, 39 Neb. 220, 57 N. W. 991; Friedlander v. Ryder, 30 Neb. 783, 787, 47 N. W. 83; White v. Arndt, 1 Whart. (Pa.) 91; Sweet v. Myers, 3 S. D. 324, 53 N. W. 187; Ombony v. Jones, 19 N. Y. 234, 238; Poole's Case, 1 Salk. 368; Quincy, Ex parte, 1 Atk. 477; Lee v. Risdon, 7 Taunt. 188; Lyde v. Russell, 1 B. & Ad. 394; Colegrave v. Dias Santos, 2 B. & C. 76; Josslyn v. McCabe, 46 Wis. 591, 1 N. W. 174; Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362.

[40] McCracken v. Hall, 7 Ind. 30.

[41] McCracken v. Hall, 7 Ind. 30; Cromie v. Hoover, 40 Ind. 49.

[42] Josslyn v. McCabe, 46 Wis. 591, 1 N. W. 174. In Fitzgerald v. Anderson, 81 Wis. 341, 51 N. W. 554, an alleged agreement regarding removal was not established.

[43] Howard v. Fessenden, 14 Allen (Mass.) 124; Burk v. Hollis, 98 Mass. 55; Talbot v. Whipple, 14 Allen (Mass.) 177.

building, with ample allowance of time to do so, the landlord would not be a trespasser in entering upon the land and taking possession of the building. He was not obliged to remove it for them, or to permit an indefinite occupancy of the land.[44]

A forfeiture for non-payment of rent not being a voluntary termination of the lease, the rule that a tenant must remove trade fixtures during the term does not apply, but in such case the tenant has a reasonable time after the termination of the tenancy for the exercise of his right, and his right to remove his fixtures is not lost by a forfeiture of the lease.[45]

§ 717. **Where a right of removal conferred by agreement is conditioned on the performance of all the undertakings in the lease,** actual performance of such undertakings forms a condition precedent to the removal of improvements and an offer to perform is not sufficient.[46]

A lessee leaving during the term and paying rent as long as he occupied, does not become entitled to remove improvements under a clause allowing removal provided the rents were paid which may be due upon the expiration of the lease.[47] Payment of rent as a condition precedent to the removal of a building from leased premises would bind a purchaser from the lessee.[48]

Buildings may be sold and transferred as personalty if, by the condition of the lease, they may be removed by the lessee at the expiration of the term. It is immaterial that the right of removal is conditioned upon the final fulfillment of the stipulations in the lease, as such a condition may attach against the buildings while in the hands of the transferee.[49]

§ 718. **Effect of renewal on right to remove fixtures.**—According to the weight of authority, a new contract between the landlord and tenant which neither merely renews or extends the former lease, but creates a new term without reserving any right to the fixtures annexed, forfeits the tenant's privilege of removal.[50] The right to re-

[44] Sullivan v. Carberry, 67 Me. 531.

[45] Updegraff v. Lesem, 15 Colo. App. 297, 62 Pac. 342.

[46] Clemens v. Murphy, 40 Mo. 121.

[47] Mathinet v. Giddings, 10 Ohio 364.

[48] Forbes v. Williams, 1 Jones L. (N. Car.) 393.

[49] Dryden v. Kellogg, 2 Mo. App. 87.

[50] Carlin v. Ritter, 68 Md. 478, 13 Atl. 370; Hedderick v. Smith, 103 Ind. 203, 2 N. E. 315; Sanitary Dist. v. Cook, 169 Ill. 184, 48 N. E. 461; Bauernschmidt &c. Co. v. McColgan, 89 Md. 135, 42 Atl. 907; Talbot v.

move fixtures is not lost to the tenant so long as his possession as tenant continues, but this qualification does not include and save the right of a tenant continuing in possession under a new lease. The tenant is in under a new tenancy, and not under the old; and the rights which existed under the former tenancy and which were not claimed or exercised are abandoned as effectually as if the tenant had actually removed from the premises and after an interval of time had taken another lease and returned to the premises.[51] The reason of the rule has been stated as follows: "It results from the terms of the lease that whatever constituted a part of the freehold at the time the lease was accepted must be surrendered at its termination, and the lessee will not be permitted to say that part of the premises leased was in fact a trade fixture erected by him under a previous lease, and that he has the right, against the face of his contract, to sever and remove it. To permit the tenant to do this would, in effect, be to permit him to deny the title of his landlord to part of the demised premises; and if he may deny his title to a part, why not to the whole?"[52] If it is the intention of the parties in this or any similar case that the right to remove fixtures should continue, nothing is easier than to insert in the lease a clause to that effect; and it seems reasonable to infer from the absence of such a clause that it is their intention that this right should no longer continue.[53] This rule, however, does not apply when the tenant merely holds over without a new demise under permission from the landlord, or in such a way as to raise an implication of an extension of the original lease.[54]

In Colorado the first tenancy has been regarded as continuous when

Cruger, 151 N. Y. 117, 45 N. E. 364; Watriss v. First Nat. Bank, 124 Mass. 571, 26 Am. R. 694; Cook v. Sanitary Dist. &c., 67 Ill. App. 286; Leman v. Best, 30 Ill. App. 323; Marks v. Ryan, 63 Cal. 107; Jungerman v. Bovee, 19 Cal. 354; Wright v. Macdonnell, 88 Tex. 140, 30 S. W. 907; Williams v. Lane, 62 Mo. App. 66. The Maryland Act of 1898, ch. 92, provides that the right of a tenant to remove fixtures erected by him under one demise shall not be lost or in any manner impaired by reason of his acceptance of a new lease of the same premises without any intermediate surrender of possession.

[51] Loughran v. Ross, 45 N. Y. 792.

[52] Hedderich v. Smith, 103 Ind. 203, 2 N. E. 315, 53 Am. R. 509, per Spencer v. Commercial Co., 30 Wash. 520, 71 Pac. 53.

[53] Carlin v. Ritter, 68 Md. 478, 13 Atl. 370, 6 Am. St. 467.

[54] Estabrook v. Hughes, 8 Neb. 496, 1 N. W. 132; Wright v. Macdonnell, 88 Tex. 140, 30 S. W. 907; Young v. Consolidated Imp. Co., 23 Utah 586, 65 Pac. 720; Lewis v. Ocean Nav. &c. Co., 125 N. Y. 341, 26 N. E. 301; Macdonough v. Starbird, 105 Cal. 15, 38 Pac. 510; Glass v. Colman, 14 Wash. 635, 45 Pac. 310.

the new lease was executed simply as the most convenient mode of continuing the original tenancy. A finding that the tenant's occupancy of the premises after the execution of the second lease was, in effect, merely a continuation of the old tenancy would not be disturbed under such circumstances.[55]

An agreement in a lease authorizing the lessee to remove fixtures would have the effect of extending his right to do so for a reasonable time after the termination of the tenancy. It has been held that this would not affect the result on principle and that by taking a new lease without any reservation of the right of removal of the fixtures, the lessee would lose the title and right of removal.[56] An oral agreement made after a lease is neither more comprehensive nor more effective than an agreement expressed in the lease. The result from a renewal of the lease would be the same, as it would amount to a waiver of the prior parol contract.[57]

§ 719. Time for removal under agreement.—While the common-law right to remove trade fixtures must be exercised during the term, a similar privilege conferred by agreement is not so narrowly restricted as to the time when the removal must be effected. If a house is erected under a lease giving the right of removal at the expiration of the term, the tenant is not required to remove the house during his term, but can occupy it during the full term, and has a reasonable time thereafter to remove it. If nothing appeared to prevent, the removal should be effected without any considerable delay; at least, no great time should elapse before the work of removal is commenced. If the removal should not be effected within a reasonable time after the term expired, the right would cease and the property become a part of the realty.[58] It follows as the logical result from this right of removal that the tenant is entitled to ingress and egress for a reasonable time for the purpose of removing his property. An express clause giving a right to remove *"at the end of the term"* would not be inserted to limit the tenant's rights of removal but to protect them. Nothing is said about losing such rights if the property should not be seasonably removed, but on the contrary, it expressly says that the tenant shall have a right to remove *at* the end of the term, when, under

[55] Ross v. Campbell, 9 Colo. App. 38, 47 Pac. 465.

[56] Merritt v. Judd, 14 Cal. 59, citing Fitzherbert v. Shaw, 1 H. Bl. 258; Lyde v. Russell, 1 B. & Ad. 394.

[57] Stephens v. Ely, 162 N. Y. 79, 56 N. E. 499.

[58] Smith v. Park, 31 Minn. 70, 16 N. W. 490; Cheatham v. Plinke, 1 Tenn. Ch. 576; Wright v. Macdonnell, 88 Tex. 140, 30 S. W. 907.

the law as generally understood, unless otherwise agreed, it would be his duty to remove before yielding up possession. Clearly, if any force is to be given to this provision, it is that, after the expiration of the term, the tenant should be permitted ingress and egress for a reasonable time to remove his property.[59] However, an agreement of this kind does not entitle the lessee to occupy the premises after the expiration of the lease, that not being necessary to enable him to remove the improvements.[60] In case the removal be prevented by act of the lessor, or by a provision of the lease itself, or by an independent contract with the lessor, the right of removal would only be suspended, and would revive whenever the obstruction was removed. So, if the payment of all rent were made a condition precedent to the removal of buildings, whenever the lessee did pay, even upon suit at the end of the lease, his right to remove would become absolute.[61] And the right of removal would not be lost if the improvements were left at the request of the lessor, pending negotiations for their purchase or rental by him.[62] But for the pendency of the negotiations, the tenants might have removed the building in controversy within the limit as to the time of their right to do so, and the delay is occasioned by the acts and representations of the landlord made for the express purpose of inducing them to act as they did. To allow the landlord to claim the fixtures for such delay would be obviously unjust, and the landlord's conduct would override an express agreement that fixtures be removed during the term.[63]

If by the terms of a lease, the lessee has the right to use and occupy the improvements during the entire term and to remove them at the end of the term, to require him to remove them before the expiration of his term would violate his contract right to use and occupy them on the premises until the expiration of the term; to refuse him the right to remove them after the expiration of the lease, provided he did so within a reasonable time, would cause him to lose his property by availing himself of his contract right. Hence, the law implies his right to remove the improvements within a reasonable time after the expiration of the lease.[64]

[59] Davidson v. Crump Mfg. Co., 99 Mich. 501, 58 N. W. 475; Caperton v. Stege, 91 Ky. 351, 15 S. W. 870, 15 S. W. 84, 12 Ky. L. R. 947.

[60] Caperton v. Stege, 91 Ky. 351, 15 S. W. 870, 16 S. W. 84, 12 Ky. L. R. 947.

[61] Cheatham v. Plinke, 1 Tenn. Ch. 576.

[62] Merriam v. Ridpath, 16 Wash. 104, 47 Pac. 416; Young v. Consolidated Imp. Co., 23 Utah 586, 65 Pac. 720.

[63] Merriam v. Ridpath, 16 Wash. 104, 47 Pac. 416.

[64] Caperton v. Stege, 91 Ky. 351, 15 S. W. 870, 16 S. W. 84, 12 Ky. L. R. 947.

§ 720. Moreover there is good authority for the position that the rights conferred by an agreement for removal are not lost by the acceptance of a new lease which does not provide for removal. Of the several cases[65] reaching this conclusion, the opinion in a leading one was delivered by Judge Cooley, the original lease in that case containing a provision allowing the lessees thirty days after its termination in which to remove their buildings and improvements. The whole question depends on whether the fixtures, at the time the second lease is executed, are to be considered as part of the realty, or as personal property. In the absence of agreement fixtures are abandoned to the landlord the moment the tenant surrenders the possession; but under an agreement for removal the tenant has a reasonable time after the end of the term to remove them. This right of removal by force of an agreement might continue after the acceptance of a new lease by the tenant just as it might survive his abandonment of possession. So that the fixtures and improvements might be regarded as still belonging to the tenant and as not coming within the new lease at all. They would be in exactly the same situation as if they were erected anew on the premises by the tenant after the execution of the new lease. Whereas, in the absence of agreement, there could be no removal after a surrender of possession and none after the acceptance of a new lease. That the tenant must remove fixtures before surrendering possession is a well-established rule, and to require the same diligence of him before doing what is equivalent to a surrender of possession, so far as the termination of the original tenancy is concerned, seems equally fair and reasonable. This line of reasoning makes the tenant's rights depend on whether or not the lease gave him a right to remove improvements. If by express agreement between the parties improvements are determined to be chattel property with a right of removal in the tenant the new lease, when executed, would cover only the realty. It would no more include those chattels than any other personal property belonging to the tenant, and upon the demised property at the time. By taking the new lease the tenant's rights to any personal property belonging to him were neither lost nor in anywise affected.[66] So long as the tenant has the right of removal the fixtures are his, and to assume that by leasing the land upon which they are placed, he leases them of his landlord, is to assume that he intends

[65] Young v. Consolidated Imp. Co., 23 Utah 586, 65 Pac. 720; Wright v. Macdonnell, 88 Tex. 140, 30 S. W. 907; McCarthy v. Trumacher, 108 Iowa 284, 78 N. W. 1104; Kerr v. Kingsbury, 39 Mich. 150; Second Nat. Bank v. Merrill Co., 69 Wis. 501, 34 N. W. 514.

[66] McCarthy v. Trumacher, 108 Iowa 284, 78 N. W. 1104.

to lease his own property. Whether it is or is not the intention of the parties in any particular case to make them the property of the landlord, is the very point to be determined.[67] The general doctrine to be gathered from the cases under discussion is that a prior agreement authorizing a tenant to remove fixtures and improvements is sufficient to rebut any presumption that he abandons them to the landlord by taking a new lease. In many of these cases other circumstances strongly repel any such presumption. The actual intention of the parties as shown by their conduct and agreement should govern in every case.

§ 721. Removal during extension of term.—The law does not in strictness require of a tenant that he shall remove fixtures during the term, but only before he surrenders possession, and during the time that he has a right to regard himself as occupying in the character of a tenant.[68] Though the earlier English authorities limit the right of removal to the actual term of the demise, more recent ones extend this right during the period during which the tenancy may be considered as continuing.[69] Both English and American cases support the conclusion that, after the term and possession are surrendered by the tenant, unremoved fixtures are to be regarded as abandoned to the use of the landlord. When a tenant quits possession without removing a fixture, he is understood as making a dedication of it to his landlord.[70]

[67] Wright v. Macdonnell, 88 Tex. 140, 30 S. W. 907. In the Michigan case, Kerr v. Kingsbury, 39 Mich. 150, the reasoning is broad enough to cover all renewals, but the facts of the case did not render a decision on that point necessary. Judge Cooley says, at page 154: "But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of the lease is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal, 'If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterwards bringing them back again they shall be yours; otherwise you will be deemed to abandon them to your landlord.'"

[68] Penton v. Robart, 2 East 88; Weeton v. Woodcock, 7 M. & W. 14; Second Nat. Bank v. O. E. Merrill Co., 69 Wis. 501, 34 N. W. 514.

[69] Tyler on Fixtures, 426–7; Mackintosh v. Trotter, 3 M. & W. 184; Minshall v. Lloyd, 2 M. & W. 450.

[70] Youngblood v. Eubank, 68 Ga. 630; Reynolds v. Shuler, 5 Cow. (N. Y.) 323; Loughran v. Ross, 45 N. Y.

The surrender of a lease during the term and the execution of a new one for the same period for the purpose of releasing one lessee does not constitute such a new leasing as to amount to an abandonment of the fixtures by the tenant. The new lease being for the balance only of the term, at the same rental, payable in monthly instalments of the same amount, at the same place, to the same parties, is but a reiteration of the former lease. Since it does not amount to a new leasing of the demised premises the transaction has no effect upon the ownership of the trade fixtures.[71]

§ 722. A lessor may by estoppel be precluded from claiming fixtures and improvements after the renewal of a lease. By accepting a chattel mortgage on buildings erected by the tenant to secure rent, the lessor admits that they are the property of the lessee, and for the lessor to renew the mortgage after a renewal of the lease estops him from claiming that the right to remove improvements was lost by the execution of a new lease.[72] By urging a new lessee to buy fixtures from an outgoing tenant a landlord is estopped to claim them as part of the realty, such conduct affirming the tenant's right to sell, and consequently his right to remove fixtures.[73]

Where a lessee, instead of renewing his lease, elected to purchase the premises as he was entitled to do under a clause in the lease, his receipt of a bond for title upon the payment of certain sums in effect made him a mortgagor of the premises with a right to perform the conditions and acquire the legal title. By this arrangement the lessee lost his right to remove fixtures which was conferred by the lease, and upon non-fulfillment of the required conditions had only the rights which a mortgagor in default has against his mortgagee, and thus forfeited the fixtures.[74]

§ 723. A mortgagee from a tenant stands in no better position than the tenant. His right to the property, as against the landlord, is only such as the tenant under whom he claimed had. It is for him to see to it that the building is removed within the time which, by the law and the terms of the contract, is given to the tenant for such a pur-

792; Donnelly v. Thieben, 9 Ill. App. 495; Childs v. Hurd, 23 W. Va. 66, 9 S. E. 362; Carlin v. Ritter, 68 Md. 478, 13 Atl. 370, 16 Atl. 301; Bauernschmidt &c. Co. v. McColgan, 89 Md. 135, 42 Atl. 907.

[71] Baker v. McClurg, 198 Ill. 28, 64 N. E. 701, affirming 96 Ill. App. 165.

[72] Platto v. Gettelman, 85 Wis. 105, 55 N. W. 167.

[73] Morrison v. Sohn, 90 Mo. App. 76.

[74] Merritt v. Judd, 14 Cal. 59.

pose.[75] The same principle is involved and the same conclusion should be reached in case a creditor levied an execution upon a tenant's fixtures.[76]

§ 724. **The term improvements, as used to describe the additions made to leased premises,** is a more comprehensive word than fixtures and necessarily includes them and such additions as the law might not regard as fixtures. Improvements would embrace every addition, alteration, erection or annexation made by the lessee during the demised term to render the premises more available and profitable or useful and convenient to them.[77] A furnace, shelves, counters, and awnings were all improvements within the meaning of a covenant that improvements should pass to the landlord and he could enjoin their removal by an assignee of the lease.[78] The same interpretation was put upon a similar provision in a case where a new boiler was set up by a tenant.[79]

But where a clause against the removal of improvements proceeds to specify the improvements which cannot be removed, the list is limited to the articles enumerated and is not extended by the expression "and so forth" at the end of the list. The word "improvements" is restricted by a *videlicet* clause which follows it, the office and general purpose of such clause being to define and particularize that which before is general. An *"etc."* at the end of such clause does not enlarge its scope further than to indicate that articles directly connected with those specified are included.[80]

§ 725. **Fixtures erected by the tenant for the purpose of carrying on his trade** are considered as accessory to the enjoyment of his term and the law gives him a right to remove them during the continuance of the term just as if they were personal property.[81] The tenant's

[75] Smith v. Park, 31 Minn. 70, 16 N. W. 490; Free v. Stuart, 39 Neb. 220, 57 N. W. 991; Jones on Chat. Mort., § 123.

[76] Friedlander v. Ryder, 30 Neb. 787, 47 N. W. 83.

[77] French v. Mayor &c., 29 Barb. (N. Y.) 363, s. c. 16 How. Pr. (N. Y.) 220.

[78] Parker v. Wulstein, 48 N. J. Eq. 94, 21 Atl. 623.

[79] Agnew v. Whitney, 30 Leg. Int. (Pa.) 312.

[80] Loeser v. Liebmann, 60 Hun (N. Y.) 579, 14 N. Y. S. 569.

[81] Powell v. Bergner, 47 Ill. App. 33; Weathersby v. Sleeper, 42 Miss. 732; Perkins v. Swank, 43 Miss. 349; Raymond v. White, 7 Cow. (N. Y.) 319; Pemberton v. King, 2 Dev. L. (N. Car.) 376; Overman v. Sasser, 107 N. Car. 432, 12 S. E. 64; Lemar v. Miles, 4 Watts (Pa.) 330; Davis v. Moss, 38 Pa. St. 346; Kile v. Giebner, 114 Pa. St. 381, 7 Atl. 154; Van Ness v. Pacard, 2 Pet. (U. S.) 137, 7 L. ed. 374; Crane v. Brigham, 11 N. J. Eq. 29; City of Buffalo, In re, 1 N. Y. St. 742.

right to remove trade fixtures is qualified by the restriction that he must not do serious damage to the freehold. This does not reckon in damage by reason of the loss of the fixtures themselves but merely has regard to the state in which the premises are left after the fixtures are taken out. A tenant who, with the consent of his landlord, annexes chattels to the land in such manner that they can be removed without damage to the realty, does not thereby part with his property in them, but may remove them at or before the termination of his lease.[82] Under this rule, chimney pieces, wainscot, grates, furnaces, cider mills, buildings resting on blocks, and many other things of like nature have been held to be removable by the outgoing tenant.[83] Slight damage to the freehold, by reason of the removal, will not bar the tenant's rights to remove fixtures. Thus bowling alleys in a room leased "for hall purposes" were held to be trade fixtures, which the lessee could remove, though such removal would injure the building to some extent. The tenant was described as occupying the premises "for hall purposes" and the alley was apparently constructed for a temporary use, incident and subordinate to his occupation.[84]

Engines and boilers being for the purpose of trade and manufacture would be removable fixtures except when so annexed to the freehold that material injury would be caused by their removal. A small shed erected to protect the engine and machinery would constitute a part of it and could be removed by a tenant as a trade fixture if the engine could be.[85]

A scenic railway and pavilion at a pleasure resort were held to be trade fixtures and removable by the tenant. The scenic railway under consideration was a composite affair consisting of a pavilion with a series of undulating, elevated tracks starting from and returning to it, with the requisite machinery and apparatus and cars. It was only available for pleasure resorts and had no general utility. The lessee arranged to have it put upon the demised land as one of the agencies for conducting the business of the summer resort he intended to es-

[82] Harkey v. Cain, 69 Tex. 146, 6 S. W. 637.

[83] Hanrahan v. O'Reilly, 102 Mass. 201; Doty v. Gorham, 5 Pick. (Mass.) 487; Gaffield v. Hapgood, 17 Pick. (Mass.) 192; Elwes v. Maw, 3 East 38.

[84] Hanrahan v. O'Reilly, 102 Mass. 201.

[85] Smith v. Whitney, 147 Mass. 479, 18 N. E. 229; Conrad v. Saginaw &c. Co., 54 Mich. 249, 20 N. W. 39; Livingston v. Sulzer, 19 Hun (N. Y.) 375; Updegraff v. Lesem, 15 Colo. App. 297, 62 Pac. 342; Mason v. Fenn, 13 Ill. 525.

tablish. It was to all intents and purposes a trade fixture which the lessee could remove at the end of his lease.[86]

Fixtures for a store room made in sections, so that they can be removed, not intended by a tenant who put them in to become a part of the room, are trade fixtures.[87]

§ 726. **As a rule a dwelling-house or similar structure erected on leasehold land is deemed a part of the realty** and a person claiming it to be personalty must show some fact changing its character.[88] A large frame building resting on stone walls and used for the purpose of curing tobacco was held not to be a trade fixture which could be removed by the tenant at the end of his term.[89] A tenant at will who has erected buildings on real estate without any agreement for removing them has no right to or interest in such improvements.[90] If a building is erected on land against the will of the landowner, or without his consent, it becomes realty, and cannot be removed therefrom without the commission of waste.[91] After the expiration of a life tenancy by death and the termination of a lease thereunder, the lessee cannot remove buildings put on such lot during the continuance of the tenancy. The buildings become a part of the realty, and go to the person entitled to the remainder.[92] A three-story brick eating-house erected on leased land under an agreement for purchase at appraised value or renewal of lease is not a fixture because it cannot be removed without the lessor's consent. Buildings and improvements which cannot be removed except at the will of the lessor are not fixtures. Had it been intended to treat the buildings as chattels, apt language to that effect could have been incorporated in the lease. The improvements were intended to become part of the realty.[93] In whatever manner a fixture may be annexed, the lessee will have no right to remove it, if the lease requires its annexation, and affords no indication that the connection was intended to be temporary. A building erected

[86] Thompson &c. R. Co. v. Young, 90 Md. 278, 44 Atl. 1024.

[87] Roth v. Collins, 109 Iowa 501, 80 N. W. 543.

[88] Griffin v. Ransdell, 71 Ind. 440; Board &c. v. Grant, 118 Cal. 39, 50 Pac. 5; Boyd v. Douglass, 72 Vt. 449, 48 Atl. 638.

[89] Carver v. Gough, 153 Pa. St. 225, 25 Atl. 1124.

[90] Wheeler &c. Mfg. Co. v. Hasbrouck, 68 Iowa 554, 27 N. W. 738.

[91] Bonney v. Foss, 62 Me. 248; Cannon v. Copeland, 43 Ala. 252; Dart v. Hercules, 57 Ill. 446; Honzik v. Delaglise, 65 Wis. 494, 27 N. W. 171.

[92] Jones v. Shufflin, 45 W. Va. 729, 31 S. E. 975.

[93] Fletcher v. Kelly, 88 Iowa 475, 55 N. W. 474.

by a tenant pursuant to a covenant in his lease is not removable, unless the lease gives him a right to remove it.[94]

When a building erected by a tenant is not an isolated structure but constitutes an addition to a house already standing upon the land, the right to remove it may be denied not merely on the ground that it is attached to the freehold but also because the improvement is so annexed to the main building that its removal would greatly injure the demised premises. A tenant can only remove such improvements, the removal of which will not materially injure the demised premises or put them in a worse condition than they were when he took possession.[95]

§ 727. The strict rule that a building becomes a part of the realty is relaxed where it appears that it is put up merely for the exercise of a trade or for the mixed purpose of trade, agriculture, and manufacturing. This exception to the general rule does not depend upon the character of the structure or thing erected, or whether it is built of one material or another, or whether it is set in the earth or upon it, but whether it is for the purposes of trade or manufacture, and not intended to become identified with any part of the land; this is the test.[96] Thus it has been held that a shaft house, and an engine, boiler and other machinery placed upon mining premises for the purpose of carrying on the business were trade fixtures and removable by the tenant.[97]

A greenhouse seems to be a trade fixture so that a tenant erecting one on leased premises would be entitled to remove it at the end of the term, in reliance on the doctrine that buildings which are erected for the purpose of carrying on a trade are excepted from the general rule. The greenhouse in dispute was built on wooden foundation, set

[94] Deane v. Hutchinson, 40 N. J. Eq. 83, 2 Atl. 292; Peirce v. Grice, 92 Va. 763, 24 S. E. 392; Gett v. McManus, 47 Cal. 56; Mayor &c. v. Brooklyn &c. Ins. Co., 41 Barb. (N. Y.) 231; Boyd v. Douglass, 72 Vt. 449, 48 Atl. 638.

[95] Friedlander v. Ryder, 30 Neb. 783, 47 N. W. 83.

[96] Western North Carolina R. v. Deal, 90 N. Car. 110; Pemberton v. King, 2 Dev. L. (N. Car.) 376; Moore v. Valentine, 77 N. Car. 188; Beers v. St. John, 16 Conn. 322; Updegraff v. Lesem, 15 Colo. App. 297, 62 Pac. 342; Royce v. Latshaw, 15 Colo. App. 420, 62 Pac. 627; Ombony v. Jones, 19 N. Y. 234; Van Ness v. Pacard, 2 Pet. (U. S.) 137; Talbot v. Whipple, 14 Allen (Mass.) 177; Antoni v. Belknap, 102 Mass. 193.

[97] Updegraff v. Lesem, 15 Colo. App. 297, 62 Pac. 342.

a few inches into the soil, and could be removed without injury to the real estate.[98]

A stable and carriage house were declared to be on the border line of buildings which can be removed as trade fixtures at the end of the term. The reasons assigned for allowing removal were that the lot was vacant when the lease was executed and the buildings could be removed *in toto* and the premises be left in good condition, the erections being attached to the soil only by their own weight.[99]

Informing a lessee that he will not be allowed to remove a contemplated erection, built to replace one destroyed by fire, will preclude him from claiming it as a trade fixture and the understanding would be equally binding upon one who purchases the building for removal. In an action by such purchaser against the landlord declarations of the original lessee are admissible to show his understanding that the building became a part of the realty.[100]

§ 728. **Fixtures used for agricultural purposes** are generally not included among those which may be removed by the tenant, but where they are used for mixed purposes of trade and agriculture, they are held to belong to the tenant. Thus a cotton gin, engine condenser and feeder placed on a farm, with the intention of being removed, do not become fixtures so as to belong to the landlord.[101]

Fruit-trees and ornamental shrubbery grown upon premises leased for nursery purposes would probably be held to be personal property as between landlord and tenant, though there is neither authority nor reason for saying that, as between vendor and vendee, such trees and shrubbery would not pass with a sale of the land.[102]

[98] Royce v. Latshaw, 15 Colo. App. 297, 62 Pac. 627.

[99] Firth v. Rowe, 53 N. J. Eq. 520, 32 Atl. 1064.

[100] Linahan v. Barr, 41 Conn. 471.

[101] McMath v. Levy, 74 Miss. 450, 21 So. 9, 523; Tate v. Blackburne, 48 Miss. 1; Overman v. Sasser, 107 N. Car. 432, 12 S. E. 64.

[102] Smith v. Price, 39 Ill. 28.

INDEX.

[*References are to Sections.*]

ABANDONMENT,
of itself no discharge of assignee, 456.
not a surrender, 539.
no duty on lessor to relet after, 539.
entitles lessor to resume possession, 539.
repairs by landlord on abandoned premises, 548, 549.
reletting of abandoned premises, 549.
notice of continued liability to tenant, 550.
followed by reëntry, 547.
of crops gives landlord right to harvest, 547.
right of, for lessor's failure to repair, 673.

ABATEMENT OF RENT,
not allowed after fire, 675.
origin and basis of rule, 675.
effect of seal, 675.
injury by tempest and flood, 675.
failure of water supply, 675.
acts of landlord after destruction, 675.
destruction prior to commencement of term, 675.
application of insurance money after fire, 676.
destruction of entire subject matter of lease, 677.
when interest in land passes to lessee, 677.
voluntary advance payment of rent, 677.
Kentucky rule, 677.
exceptional Nebraska doctrine, 678.
destruction by public enemies, 678.
agreements for abatement in case of destruction, 679.
lease not terminated under, 679.
election to disregard injuries, 679.
what constitutes a "casualty," 679.
lessor's covenant to repair does not abate rent, 679.
taking on eminent domain, 680.
tearing down dangerous building, 680.
statutory modifications of common law rule, 681.

ACCEPTANCE,
of lease by lessee binds him before entry, 77, 79.
presumption of, from beneficial nature, 79.
question of, decided by jury, 79.

[*References are to Sections.*]

ACCEPTANCE—*Continued.*
of assignment by assignee necessary, 427, 457.
of rent from assignee discharges lessee when, 452.
of key by landlord as proof of surrender, 548.

ACCOUNT, ACTION OF,
allowed against tenant for crop rent, 656.
between tenants in common replaced by assumpsit, 657.

ACKNOWLEDGMENT OF LEASES,
unnecessary between parties, 71.
necessary to entitle instrument to record, 71.
rule in Ohio and Maryland, 72.
rights of third parties, 73.

ACT OF GOD,
as excuse for holding over, 208.

ADMINISTRATORS,
See EXECUTORS AND ADMINISTRATORS.

ADVERSE HOLDING,
raises no inference of tenancy, 2.
changed to tenancy, 2.
what constitutes holding adverse, 85.
overt act necessary to change tenancy into, 696.
jury decides what constitutes, by tenant, 696.
attornment to stranger does not create, 709.

ADVERTISEMENT,
on wall not a leasing, 40.
right to place, on outside wall, 108.
not a breach of covenant against sub-letting, 468.

AGENTS,
bind undisclosed principal, 81.
mode of execution of lease by, 81.
recitals regarded as mere description, 81.
infant cannot lease through agent, 95.
authority in writing required by statute of frauds, 157.
ratification of lease by, 157.
undisclosed principals, 158.
lease by unauthorized, does not create tenancy at will, 181.
notice to quit addressed to, 263.
authority of, to give notice to quit, 265.
grantor receiving rent as, for grantee, 426.
executing assignment for undisclosed principal, 437.
action for rent on lease executed by, 660.

AGREED STATEMENT OF FACTS,
inferences not to be drawn from, 14.

[*References are to Sections.*]

AGREEMENTS COLLATERAL TO LEASE,
valid when, 130.
contracts partly in writing and partly by parol, 130.
omitted term in written lease supplied by parol, 130.
presumption that oral negotiations merge in writing, 130.
oral agreements not within statute of frauds, 131.
partly within statute of frauds, 131.
agreement must be collateral, 132.
what agreements are collateral, 133.
time for performance the test, 133.
rule in England, 134.
subsequent agreements reducing rent, 135.
acceptance of reduced amount as ratification, 135.
grantee of lessor not bound, 135.
what constitutes sufficient consideration, 136.
time for performance enlarged by parol, 136.
execution of new lease operates as surrender, 137.
parol agreement for holding over, 137.

AGREEMENTS TO LEASE,
essentials of valid contract, 137a.
binding though formal instruments are to follow, 137a.
fair rent a sufficient specification, 137a.
statement of gross sum as rent, 137a.
contract for ordinary covenants too vague, 137a.
specific performance, 138.
lost by laches when, 138.
premature suit for, 139.
what constitutes a breach of agreement, 139.
unconditional refusal waives strict compliance, 139.
measure of damages for breach, 140.
loss of profits, 140.
expenses incurred, 140.
unnecessary loss must be prevented, 140.
lease or agreement to lease, 141.
question of construction as to intention of parties, 141.
defects in form, 141.
difference in effect of two kinds of contracts, 141.
test of intention, 142.
execution of further instrument, 142, 143.
agreements depending on a condition, 143, 145.
"agree to let" apt words of present demise, 144.
effect of transfer of possession, 146.
valid as evidence showing actual demise, 146.
showing waiver of formal lease, 146.

ALABAMA,
statute as to cropping contracts, 56.
leases limited to twenty years, 111.
statute as to part performance, 161.

[*References are to Sections.*]

ALASKA,
statute as to notice to quit, 277.

ALIENATION,
by either party ends tenancy at will, 186.
mode and purpose of transfer immaterial, 187.
notice of transfer necessary, 188.

AGRICULTURAL FIXTURES,
See FIXTURES.

AIR,
See LIGHT AND AIR.

ALTERATION,
of lease renders it void when, 62.
when lease is executed in duplicate, 129.
in amount of rent and mode of payment, 663.

ALTERATIONS IN LEASED PREMISES,
covenant against, 380.
injunction against, 381.
constitute waste, 632.
unless authorized, 632.
rule in the United States, 633.

APPORTIONMENT OF RENT,
leases of real and personal property, 10.
none of liability after assignment as to time, 422, 455.
of liability as to assignee of part, 460.
determined by jury, 460.
transfer of undivided interest, 460.
permitted as to estate but not as to time, 667.
no redress for lessor ending tenancy before rent day, 667.
tenancy ended by entry of mortgagee, 667.
tenancy at will ended by transfer, 667.
apportionment is for benefit of owner of rent, 667.
on sale of part of reversion, 668.
on death of lessor, 668.
wrongdoer cannot claim benefit of, 668.
transferee may sue in covenant, 668.
jury the proper tribunal to make, 668.
transfer of part of leasehold as occasion for, 669.
surrender of part by lessee, 669.
eviction by title paramount, 669.
basis for, value not quantity assigned, 669.
possessory right not actual possession, 699.
lease covering land and chattels, 669.
past due rent never apportioned, 670.
not discharged by quitclaim deed, 670.
obligation to pay rent not apportioned, 670.
South Dakota statute as to mortgage foreclosure, 670.
statutory provisions as to apportionment, 671.

[*References are to Sections.*]

APPRAISAL,
of improvements on leased premises, 379.
distinguished from arbitration, 379.
after assignment conducted by assignee, 450.

APPURTENANCES,
what passes as, in a lease, 104, 105.

ARBITRATION,
award of, cannot create tenancy, 4.
fixing rent in renewal lease by, 346.

ARIZONA,
statute as to notice to quit, 278.
forfeiture for non-payment of rent, 506.

ARKANSAS,
statute as to notice to quit, 279.
forfeiture for non-payment of rent, 507.
purchase of tax title by tenant, 690.

ASSAULT AND BATTERY,
action of, by tenant against landlord, 228.

ASSESSMENTS,
See TAXES AND ASSESSMENTS.

ASSIGNEE,
of reversion entitled to collect rent, 422.
how distinguished from sub-tenant, 445.
double remedy against lessee and assignee, 447.
recovery discharges both *pro tanto*, 448.
proper party to act in appraisement, 450.
liable for money paid in his behalf by lessee, 451.
bound by covenants running with land, 455.
extent and basis of liability, 455.
no apportionment of rent in favor of, 455.
assignment over discharges, when, 455, 456.
liability of, to pay taxes, 455.
sufficiency of assignment over, 456.
conveyance of equitable title, 456.
mere abandonment insufficient, 456.
acceptance by assignee essential, 457.
devisee not liable as, until acceptance, 457.
actual entry unnecessary, 458.
assignment by way of mortgage, 458.
doctrine in Missouri and New York, 458.
possession necessary against third persons, 458
assignees of the reversion, 459.
of part of leasehold liable for *pro rata* share of rent, 460.
of undivided interest subject to same rule, 460.
assumption by, of liability on covenants, 462.
what constitutes such assumption, 463.
estoppel in favor of assignee, 473.

[*References are to Sections.*]

ASSIGNMENT OF LEASE,
by infant lessee, 97.
of illegal lease does not make it valid, 124.
by parol invalid, 151.
part performance by transfer of possession, 151.
right of lessor to assign his interest, 421.
attornment not necessary, 421.
rule in England as to attornment, 421.
rent follows the reversion, 422.
no apportionment of liability as to time, 422.
payment of rent to lessor after assignment of reversion, 422.
effect of transfer by sale on execution, 422.
Illinois statute as to attornment, 423.
mode of transferring reversion, 424.
transfer of lease alone, 424.
transfer of leases in fee, 424.
exception of rent in grant of reversion, 425.
attornment defined, 426.
attornment by payment of rent, 426.
covenant in assignment to deliver possession, 427.
transfer of possession by symbol unnecessary, 427.
acceptance by transferee of tenant, 427.
merger on assignment to lessee, 428.
mortgage of leasehold to lessor, 428.
legal interest necessary to merger, 428.
undivided interests produce merger when, 428.
sale on partition, 428.
effect of sub-tenancy on merger, 429.
liability of sub-tenants on covenants, 429.
English statutory provision covering such cases, 429.
election not to have merger take place, 429.
assignment of lessor's interest under lease without a transfer of any rights in the reversion, 430.
action of debt for rent in such case, 430.
assignment of rent already due, 430.
assignment of crop rent, 430.
equitable lien conferred by assignment, 430.
transfer of lessee's interest, 431.
leases at will and from year to year, 431.
injunction against assignment, 431.
collateral agreements against sub-letting, 431.
lease upon shares not assignable, 431.
condition in assignment against future assignments invalid, 431.
assignment of renewal right, 431.
statutory provisions against assignment, 432.
in Kansas, 432.
in Missouri, 432.
in Kentucky, 432.
Georgia statutes, 433.

[*References are to Sections.*]

ASSIGNMENT OF LEASE—*Continued.*
Texas statute, 434.
no tenancy between assignee and assignor, 435.
caveat emptor is the rule in sale of leasehold, 435.
remedies of assignee for eviction, 435.
what constitutes fraud in assignment, 435.
implication of covenants in assignment, 435.
introduction of express covenants, 435.
what passes on an assignment, 436.
form of assignment immaterial, 437.
form of assignment by agent, 437.
deed in fee effective as assignment, 437.
indorsement on back of lease, 438.
"sold" equivalent to "assigned," 438.
signing and sealing blank paper no assignment, 438.
delivery essential, 438.
compliance with contract to assign, 438.
condition against assignment, effect of, 438.
seal necessary when, 439.
statute of frauds covers assignments, 151, 440.
part performance of parol assignment, 440.
parol assignment of parol lease, 441.
implication of assignment from occupation, 442.
rebutting this presumption, 442.
receiver in charge not an assignee, 443.
sale on execution operates as assignment, 444.
decree of sale on lien judgment, 444.
distinction between assignee and sub-tenant, 445.
under-lease for full term is assignment, 446.
technical words unnecessary, 446.
instrument taking effect both as lease and assignment, 446.
right of reëntry a mere chose in action, 446.
express covenants bind after assignment, 447.
implied covenant discharged by assignment, 447.
double remedy open to lessor after assignment, 447.
absolving lessee from express covenants, 448.
express continuance of lessee's liability, 448.
effect of assent to second assignment, 448.
lessee discharged by authorized change in mode of use, 448.
lessee becomes surety for assignee, 449.
liability of lessee not affected by duration of term, 450.
lessee can recover amounts paid from assignee, 451.
not restricted to immediate assignee, 451.
liability of assignee under forbidden assignment, 451.
liability on covenants to repair and maintain, 451.
discharge of lessee by acceptance of rent from assignee, 452.
what constitutes an express covenant to pay rent, 452.
surety for lessee not discharged by assignment, 453.
lessor's liability on covenants after assignment, 454.

[*References are to Sections.*]

ASSIGNMENT OF LEASE—*Continued.*
assignee is bound by express covenants, 455.
arises without express assumption, 455.
privity of estate and privity of contract, 455.
no apportionment of liability for rent or taxes, 455.
extent of sub-tenant's liability, 455.
assignee discharged by assignment over, 456.
absolute transfer necessary for this purpose, 456.
acceptance of second assignment necessary, 456.
equitable assignment insufficient, 456.
unrecorded deed of assignment, 456.
mere abandonment not sufficient, 456.
liability for prior breaches continues, 456.
assignee must accept assignment, 457.
devisee must accept leasehold, 457.
assignees by operation of law, 457.
actual entry by assignee unnecessary, 458.
liability rests on privity of estate, not on occupation, 458.
assignments by way of security, 458.
lienor is not assignee, 458.
rights of mortgagee of reversion, 459.
liability of assignee of reversion released by second transfer, 459.
pro rata liability of assignee of part, 460.
apportionment by jury, 460.
transfer of undivided interest, 460.
liability on covenant to deliver up in that case, 460.
general assignment includes leasehold when, 461.
assumption of covenants by assignee, 462.
basis of liability to lessor, 462.
consideration for assumption, 462.
what constitutes an assumption of covenants, 463.
taking deed "subject to" some condition, 463.
sufficient for assignee to "assume" lease, 463.
Condition against assignment and subletting, 464–495.
not a usual provision in lease, 464.
construction of such provisions, 464.
intention of parties controls, 464.
provision for reëntry valid against sub-tenants, 464.
such provision affects value of lease, 464.
forbidden assignment not void but voidable, 465.
option rests with lessor, 465.
waiver of ground for forfeiture, 465.
transfer by operation of law not a breach, 466.
under-letting not a breach of covenant not to assign, 467.
assignment is breach of covenant not to under-let, 467.
what constitutes a breach of such covenant, 468.
changes in business relations as breach, 469.
rule in Dumpor's case as to waiver of condition against assignment, 470.

[*References are to Sections.*]

ASSIGNMENT OF LEASE—*Continued.*
considered as law in United States, 471.
effect of special license to assign or sub-let, 472.
waiver of right to forfeit for assignment, 473.
effect of acceptance of rent, 473.
though contrary to condition, voidable only, 495.
not invalid between parties, 495.

ASSUMPSIT,
See USE AND OCCUPATION, AND RENT.

ASSUMPTION OF COVENANTS,
by assignee, 462.
what constitutes, 463.
not necessary to create liability, 455.

ASSUMPTION OF RISK,
from defects by tenant, 576.

ATTORNEY,
stipulation of fee for, valid, 64.
Indiana statute against conditional fee, 64.

ATTORNMENT,
not necessary in United States, 421.
rule in England, 421.
Illinois statute as to attornment, 423.
definition of, 426.
payment of rent constitutes, when, 426.
to stranger an act of disclaimer, 476.
to adverse claimant not permissible, 706, 707.
to stranger after threat of eviction, 707.
unauthorized confers no constructive possession, 709.
to holder of tax title, 709.
statutory provisions as to attornment to strangers, 709.

AWNING,
tenant injured by fall of, 579.
San Francisco ordinance in regard to, 601.
tenant's right to avail himself of such ordinance, 601.
liability for, in front of tenement, 613.

B

BARGAIN AND SALE,
lease taking effect as, executes possession in lessee, 17.

BAWDY HOUSE,
letting adjoining tenement as, 360.

BOARDER,
not generally a tenant, 23, 24.

[*References are to Sections.*]

BEQUEST,
operating as assignment, 437.

BOILER,
tenant injured by explosion of, 579.
explosion of, a casualty, 679.
a fixture removable by tenant when, 725.

BOWLING ALLEY,
removable as fixture, 725.

BUILDING,
leased *eo nomine*, includes what, 102.
separate rooms in tenements, 102.
no continuing breach of, covenant, 501.
liability for collapse of, 609.
not removable as fixture, 726.
when considered trade fixture, 727.

C

CALIFORNIA,
right to lease property in possession of another, 85.
statute as to yearly tenancy, 231.
statute for notice to quit, 280.
statute as to repairs by lessor, 406.
forfeiture for non-payment of rent, 508.
statute as to interpleader, 670.
statute as to lessor's duty to repair, 672.
statute as to attornment to stranger, 705.

CANCELLATION AND DESTRUCTION OF LEASE,
not a valid mode of effecting a surrender, 541.

CARPETING,
of passageway, defect in, 621.

CASE,
See TRESPASS ON THE CASE.

"CASUALTY,"
defined, 679.
effect of excepting, from covenant to rebuild, 405.

CAVEAT EMPTOR,
rule of, applies on assignment, 435.
applies on letting of premises, 576.

CESSPOOL,
considered as nuisance, 579.

CESTUI QUE TRUST,
See TRUSTEE.

[*References are to Sections.*]

CHATTELS,
let for a term, rights of parties, 10.
joint lease of land and chattels, 10.
apportionment of rent in such case, 10, 669.

CHOSE IN ACTION,
not assignable, 658.

COAL HOLE,
liability for injury caused by defective, 600.

COMMENCEMENT OF LEASE,
See LEASE; DURATION OF TERM.

COMMUNITY LANDS,
right to lease, 87.
Washington statute as to, 88.

COLORADO,
statute as to notice to quit, 281.
forfeiture for non-payment of rent, 509.

COLLATERAL AGREEMENTS,
See AGREEMENTS COLLATERAL TO LEASE.
against assignment, 431.

CONDITION,
precedent distinguished from independent agreement, 324.
covenant distinguished from condition, 326.
conditional limitation, 327, 482.
validity of condition, 482.
definition, 482.
necessity for entry, 483.
what equivalent to entry, 485.
construction of condition, 486.
not enforced in equity, 486, 490.
relief against breach of, 491, 492.

NDITIONAL LIMITATION,
applicable during holding over, 202.
what constitutes, 327.
distinguished from condition, 482.

ECTICUT,
tatute as to yearly tenancy, 232.
atute as to notice to quit, 282.
rfeiture for non-payment of rent, 510.
atement of rent under statute, 681.

ERATION,
r lease, 65.
inois statute authorizing plea of want of consideration, 65.
r agreement reducing rent, 136, 137.

[*References are to Sections.*]

CONSTRUCTION OF LEASES,
to be declared by court, 66.
instrument to be construed as a whole, 67.
custom of country not admissible to vary, 68.
inconsistent and contradictory clauses, 69.
weight of written and printed provisions, 69.
erasure of printed clause, 69.
meaning of term "relet," 69a.
instruments construed together, 69a.
instrument to be construed as a whole, 322.
words of indenture to be attributed to whom, 322.
reservation of crop rent construed, 322.
motive of covenantor immaterial, 322.

CONTINGENT LIMITATION,
of lease valid, 114.
sale of premises, 114.
damages payable under agreement, 114.
"used for railroad purposes" defined, 114.
happening of contingency, 115.
limitation distinguished from condition, 115.
"life of building" defined, 115.

CORPORATIONS,
lease by, not under seal, 74.
mode of executing leases by, 82.

CO-TENANCY,
See TENANTS IN COMMON.
in crops on demised premises, 54.

COVENANT, ACTION OF,
on deed poll, 80, 318.
no previous demand necessary, 503.
compared with action of debt, 650.
lies only on privity of contract, 658.
such privity transferred by assignment, 658.

COVENANTS IN LEASES,
nature of a covenant, 318.
deed poll and indenture, 318.
created without technical words, 319.
interpreted to carry out intention of parties, 319.
as to payment of royalty, 319.
provision for right of way, 319.
form of execution by joint covenantors, 320.
express and implied distinguished, 321.
instrument to be construed as a whole, 322.
words in indenture to be taken as words of party to whom they belong, 322.
reservation of crop rent construed, 322.

[*References are to Sections.*]

COVENANTS IN LEASES—*Continued.*
motive of covenantor immaterial, 322.
dependent, concurrent and independent covenants, 323, 673.
conditions precedent and independent agreements, 324.
no injunction against breach of independent covenants, 325.
distinction between covenant and condition, 326.
wnat constitutes a conditional limitaton, 327.
runnng of covenants, 328.
rule in Spenser's case, 329.
as to personal matter does not bind assigns, 330.
for quiet enjoyment held to run, 330.
affecting mode of occupation and enjoyment run, 331.
to buy improvements run, 332.
to purchase chattels do not run, 332.
no liability for prior breaches of continuing covenant, 332.
guaranty for rent collateral, 333.
to pay money in lieu of dower do not run, 333.
running of covenants after breach, 334.
what constitutes a continuing covenant, 334.
to insure do not run, 335.
For renewal of lease, 336–348.
privilege of renewal and extension usual and valid, 336.
lease for one year with provision for continuance from year to year, 336.
distinction between stipulation to renew and one to extend term, 337.
whether general provision to renew calls for new lease, 338.
notice required before end of original term, 339.
no notice necessary in case of extension, 340.
compliance with provisions as to notice, 340, 342.
effect of holding over, 340.
payment of rent as evidence of extension, 340.
right of lessor to call for election, 341.
effect of statement of intention by tenant, 341.
sufficiency of the covenant, 343.
perpetual renewal not ordinarily implied, 343.
not applicable to sub-division of property, 344.
parties bound and parties entitled, 345.
fxing rent in renewal lease by arbitration, 346.
conditional covenant to renew, 347.
happening of contingency, 348.
For quiet enjoyment, 349–371.
when implied, 349.
express covenant excludes implied ones, 350.
special and general express covenants, 350.
statutory provisions against implied covenants, 351.
scope of covenant for enjoyment, 352.
runs with land, 352.
no covenant implied against assignor, 352.

[*References are to Sections.*]

COVENANTS IN LEASES—*Continued.*
implied covenant against lessor's own acts, 353.
no breach without eviction, 354.
what constitutes an eviction, 354, 355.
actual and constructive eviction compared, 355, 356.
waiver of constructive eviction, 356.
physical expulsion, 357.
entry by landlord under claim of privilege, 358.
interference with light and air, 359.
nuisance on adjoining premises, 360.
no covenants against acts of wrong-doers, 361.
taking under eminent domain, 362.
outstanding title alone no eviction, 363.
serving notice to quit, 363.
eviction by judgment of law, 363.
eviction suspends rent, 364.
effect of partial eviction on rent, 365.
duty of lessor to give possession of premises, 366.
rule in England, 367.
right of lessee to obtain possession by suit, 367.
effect of outstanding right of possession in another, 367a.
right of action for eviction, 368.
rule of damages in such actions, 369–371.
In regard to buildings and improvements, 372–381.
when to be performed, 372.
right to perform during renewal, 372.
liability of landlord for value of improvements, 373.
right of tenant to remove improvements, 373.
agreements for purchase of buildings by landlord, 374.
rights under alternative option to purchase or renew, 375.
improvements considered as part of realty, 376.
covenants to buy improvements run with land, 377.
payment into court in case of disputed claim, 377.
assignment of right to remove, 377.
mechanics' lien for improvements, 378.
proceedings for appraisal of improvements, 379.
distinction between appraisal and arbitration, 379.
covenants against alterations, 380.
injunction against alterations, 380.
tenant's right to light and air, 381.
covenant not to build on adjoining close, 381.
Covenants restricting use of premises, 382–386.
validity of restriction, 382.
rights in absence of restriction, 382.
construction of such covenant, 382.
what constitutes such a covenant, 383.
effect of recitals in lease, 383.
breach of such covenant occurs when, 383.
prohibited use enjoined, 384.

[*References are to Sections.*]

COVENANTS IN LEASES—*Continued.*
covenant must be express in that case, 384.
injunction to stay waste, 384.
for personal occupation not a usual covenant, 385.
domestic relations of tenant a collateral matter, 385.
agreement not "to make or suffer" an unlawful use, 386.
Covenants as to sale of leased premises, 387–388.
valid and enforceable, 387,
nature of the obligation, 387.
time of performance of sale, 387.
right to end term by sale, 388.
right of lessee to quit on sale, 388.
bona fide sale required, 388.
Covenants for insurance, 389, 390.
extent of lessee's liability under, 389.
mode of effecting insurance, 389.
such covenant runs with the land, 389.
measure of damage for failure to insure, 390.
Covenants for repairs, 391–410.
regarded as a usual covenant, 391.
sufficiency of oral undertaking, 391.
extent of lessee's liability under, 391.
sub-tenant's covenant, 391.
bound to repair inevitable accident, 392.
basis of this liability, 392, 393.
express qualifications of liability, 392.
liability affected by form of covenant, 392, 393.
agreement to deliver in good order and condition, 393.
Mississippi code provision, 393.
liability affected by nature of property, 393.
"unavoidable casualty" defined, 394.
negligence of tenant a question for jury, 394.
"damages by the elements" defined, 395.
"external parts" of premises defined, 396.
covenant refers to condition of premises at time of letting, 397, 402.
lessee to rebuild after condemnation by authorities, 397.
extent of repair required by covenant, 397.
"habitable" defined, 397.
"necessary repairs" defined, 397.
lessee is without claim on insurance, 398.
effect of ordinance forbidding wooden buildings, 399.
duty to maintain machinery, 400.
painting, papering and decorating, 401.
right of action for failure to return in good condition accrues when, 403.
what constitutes a continuing covenant to repair, 403.
obligation on landlord rests on express contract, 404.
what amounts to an agreement to repair, 404.
effect of voluntary repairs by landlord, 404.

[*References are to Sections.*]

COVENANTS IN LEASES—*Continued.*
insurance money need not be used in rebuilding, 405.
excepting casualty from repair covenant does not exempt from liability for rent, 405.
right of landlord to enter after destruction, 405.
California statute as to repairs, 406.
statutory provisions in the Dakotas, 407.
covenant for outside repairs, 408.
extent of lessor's obligation under covenant to repair, 408, 588–598 (see Defects in Demised Premises).
notice to landlord of lack of repair, 409.
when lack of repair is visible, 409.
remedies of tenant for breach of covenant to repair, 410.
measure of damages for breach, 410.
Covenant to pay taxes, 411–420.
runs with land, 411.
rights of lessee against assignee for taxes, 411.
right of assignee of reversion, 411.
form of covenant, 411.
payment of taxes not a part of rent, 411.
liability for taxes in absence of agreement, 412.
new buildings erected by tenant, 412.
exempt property, 412.
statutory duty of tenant to pay taxes, 413.
recovery back of money so paid, 413.
effect of special agreements, 413.
responsibility on life tenant, 413.
water rate not a tax or assessment, 414.
landlord not bound to pay water rates, 414.
implication of agreement to pay them, 414.
tenant's covenant to pay water rate, 414.
construction of covenant to pay taxes, 415.
special assessments included when, 415.
license fee for lessor not payable by lessee, 415.
apportionment of taxes, 416.
levy distinguished from assessment, 417.
liability for taxes not payable till after end of term, 417.
taxable year defined, 417.
invalid taxes not included in covenant, 418.
destruction of premises does not release covenantor, 419.
what constitutes a breach of such covenant, 420.
prior payment by lessor unnecessary, 420.
necessity for demand, 420.
damages for breach, 420.
covenant in assignment to deliver possession, 427.
express, not discharged by assignment, 447.
implied, discharged by assignment, 447.
double remedy on, after assignment, 447.
absolving lessee from express covenants, 448

[*References are to Sections.*]

COVENANTS IN LEASES—*Continued.*
no apportionment of, to repair and deliver up possession, 460.
no forfeiture for breach of, 487, 488.
what constitutes a continuing covenant, 500.
election to treat covenants as independent, 673.
rent not abated by lessor's, to repair, 679.

CROP RENTS AND CROPPING CONTRACTS,
definition of the phrase, 46.
status of cropper, 46.
general rules of construction, 46.
intention the test as to whether a tenancy exists, 47.
inference from words "lease" and "demise," 47.
imputing intention not to create tenancy, 48.
contracts of hire to work land, 49.
character of occupation as a test, 50.
no partnership created by such contracts, 50.
effect of exclusive possession and control, 51.
rent may be paid in kind under lease, 52.
tenancy carries idea of legal ownership, 53.
agreements in regard to ownership of crop, 53.
co-tenancy in both land and crops, 54.
crop rent considered as a reservation, 55.
New Hampshire doctrine, 55.
statutory regulation of cropping contracts, 56.
reservation of crop rent construed, 322.
replevin by assignee of crop rents, 430.
lease for, not assignable, 431.
right of landlord to gather abandoned, 547.
right of landlord to sue for injury to, 645.
recovery of, by action at law, 656.
belong to year when they are harvested, 656.
North Carolina statute as to division, 656.

CURTESY,
not a subject of lease, 89.
not allowed in leasehold, 173.

CURTILAGE,
what passes under designation, 107.

CUSTOM OF COUNTRY,
not admissible to vary construction, 68.
gives right to emblements after fixed term when, 569.

D

DAM,
flowing land creates an easement, 45.
responsibility for negligent use of water gates, 606.
what included among tolls earned by, 663.

[*References are to Sections.*]

"DAMAGES BY THE ELEMENTS,"
defined, 395.

DAMAGES, MEASURE OF,
for breach of agreement to lease, 140.
loss of profits, 140.
expenses incurred by lessee, 140.
unnecessary loss to be prevented, 140.
in action for eviction, 369–371.
for failure to insure, 390.
for failure to repair, 410, 672.
for failure to pay taxes, 420.

DATE,
not essential to lease, 60.
lease takes effect from delivery, 60.
term commences from day of date, 60.
Sunday leases, 61.

DEATH,
of either party revokes license, 37.
does not terminate lease for years, 111.
does not invalidate renewal agreement, 345.
of lessee, continued liability of executor, 447.
of cropper during year of occupancy, 547.
apportionment of rent after, 668.
estoppel to deny title after, 700.

DEBT, ACTION OF,
by assignee of rent without the reversion, 430.
maintainable when, 650.
for reasonable value, 650.
nature and origin of indebitatus assumpsit, 651.
lies not till end of term, 661.

DECEIT,
See FRAUD.

DEED POLL,
lease by instrument of such nature, 57.
abolished in Missouri, 57.
action of covenant will not lie on, 80, 318.
definitions, 318.

DEFECTS IN DEMISED PREMISES,
no implied warranty against, 574.
rule of *caveat emptor* applies, 574.
liability for damage caused by, 576.
tenant assumes risk when, 576.
personal injuries to tenant or guest, 579.
rule of *caveat emptor* applies as to inherent defects, 579.
and as to obvious and apparent defects, 579.

[*References are to Sections.*]

DEFECTS IN DEMISED PREMISES—*Continued.*
fraudulent concealment a ground for liability, 580.
what constitutes fraud, 580.
concealed defects not discoverable on examination, 581.
Minnesota statute, 581.
landlord's duty to learn of defects, 582.
unsanitary condition of premises, 583.
injuries to guests of the tenant, 585.
injuries to property of the tenant, 586.
Georgia statute, 587.
Liability imposed by lessor's agreement to repair, 588–598.
no duty to repair in absence of agreement, 588.
clear language necessary to create obligation, 589.
extent of statutory duty to repair fire escapes, 589.
payment by landlord for repairs made by tenant, 590.
voluntary promise to pay for repairs, 590.
no duty to repair inevitable accidents, 590.
exempting lessee does not bind lessor to make repairs, 591.
landlord's responsibility for damage rests on his breach of contract, 592.
measure of damages, 592.
damages for personal injuries are too remote, 592.
no recovery in tort allowed, 592.
notice to landlord of need of repairs, 593.
tenant's contributory negligence protects landlord, 594.
rights conferred on third persons by landlord's covenant to repair, 595.
liability for unsafe repairs, 596.
when made by agent or independent contractor, 597.
non-performance of voluntary promise to repair, 598.
When the defect constitutes a nuisance, 599–611.
primary liability rests on occupier, 599.
"occupier" defined, 599.
landlord liable when, 599.
statement of general rule, 599.
effect of technical outstanding title, 599.
injuries on abutting sidewalks, 600.
defective scuttle or coal hole, 600.
general supervision a basis of liability, 600.
injuries from falling articles, 601.
cap stone, window-blind, awning, 601.
falling snow and ice, 602.
landlord and tenant both responsible when, 603.
necessity for request to abate nuisance, 604.
lessor is not liable when, 605.
improper use does not make lessor liable, 606.
lessor is liable when, 607.
injuries on public wharves, 608.
collapse of building, 609.

[*References are to Sections.*]

DEFECTS IN DEMISED PREMISES—*Continued.*
statutory nuisances, 610.
no criminal liability on lessor, 610.
what constitutes a reletting of premises, 611.
Premises occupied by more than one tenant, 612–624.
no implied covenant of fitness, 612.
extent of landlord's duty to repair, roof, 612.
to maintain side walls, 613.
to make an awning secure, 613.
landlord's duty as to common passageways, 614, 615.
injuries caused by water flowing from closet, 616.
persons to whom landlord's duty extends, 617, 618.
landlord only responsible for reasonable care, 619.
place where accident occurs, 620.
defective carpeting of passageways, 621.
liability for negligent repairs, 622.
for negligence of janitor, 623.
duty of tenant to use due care, 624.
liability for injury to servant, 624.

DELAWARE,
requirement for seal, 74.
statute as to yearly tenancies, 234.
notice to quit, 283.
doctrine as to emblements, 569.

DELIVERY,
of lease a question of intent, 83.
rule as to escrows, 83.
of instruments executed in duplicate, 83.
possession of instrument as evidence of, 83.
of assignment of lease essential, 438.

DEMAND FOR RENT,
necessary before forfeiture, 503.
sufficiency of demand, 503.
when continued default is a cause of forfeiture, 503.
in action of use and occupation, 503.
no demand for performance of other covenants, 503.
stipulations dispensing with demand, 504.

DENIAL OF TITLE,
by lessee is forbidden, 682.
origin and extent of rule, 682.
by purchaser let into possession, 682.
reason for rule, 682.
power and capacity of lessor, 683.
surety for lessee bound by estoppel, 683.
suit by owners in severalty to recover possession, 684.
tenant at will bound by estoppel, 685.

[*References are to Sections.*]

DENIAL OF TITLE—*Continued.*
occupation under void lease, 686.
disability to contract, 687.
tenant holding over after term, 688.
effect of restoring possession, 688.
what constitutes a sufficient restoration, 688.
purchase of adverse title by tenant, 689.
encumbrance by life tenant, 689.
tax title, 690.
Arkansas doctrine, 690.
Kansas and Missouri doctrine, 690.
right to deny existence of tenancy, 691.
province of court and jury, 691.
limited to land included in lease, 692.
acceptance of lease by purchaser in possession, 693.
mortgagee as tenant of mortgagor, 693.
waiver of estoppel, 694.
no estoppel against stranger, 694.
lessee not in possession, 694.
disclaimer and disavowal of tenancy, 695.
running of statute of limitations, 695.
overt act necessary to make holding adverse, 696.
what constitutes adverse holding, 696.
non-payment of rent, 696.
tenant at will, 696.
effect of previous possession on tenant's right to deny title, 697.
mistake or misrepresentation, 697.
contrary doctrine in California and Michigan, 698.
successors of the tenant's interest, 699.
knowledge of tenancy not material, 699.
estoppel runs in favor of assignee of reversion, 700.
validity of assignment open to attack, 700.
administrator of lessor, 700.
burden of establishing exception on tenant, 701.
lessor need give no evidence of title, 701.
effect of nature of premises demised, 701.
effect of inducing acceptance of lease by fraud, 702.
necessity for acceptance of possession, 702.
tenant participating in fraud, 702.
waiver of tenant's rights by laches, 702.
showing transfer or expiration of landlord's title, 703.
tax or execution sale, 703.
foreclosure of mortgage, 703.
tenant may purchase at execution sale, 704.
rights of tenant after eviction, 705.
actual eviction unnecessary, 705.
attornment to stranger, 705.
statutory provisions, 705.
evicted tenant may take new lease, 706.

[*References are to Sections.*]

DENIAL OF TITLE—*Continued.*
threatened eviction sufficient, 707.
lessee may exercise power of eminent domain, 708.
no constructive possession conferred by attornment, 709.

DESCRIPTION OF PREMISES,
necessary in lease, 98.
parol evidence to apply description, 98.
technical misdescriptions, 98.
misstatement of quantity, 98.
entry cures uncertain description, 99.
extrinsic evidence to locate between parties, 99.
inadequate description not cured by parol, 100.
description by reference, 100.
subject matter included within a description, 101.
hotel described as "house," 101.
"furniture" includes what, 101.
lease of building *eo nomine*, 102.
separate rooms in tenements, 102.
designation by street number, 103.
easements passing as appurtenant, 104.
right to maintain exhaust pipe, 104.
rights to use abutting streets, 105.
easement for light and air, 106.
what included by term "curtilage," 107.
outside walls used for signs, 108.
riparian boundaries, 109.
right to accretions, 109.
reservation to lessor of part of premises, 110.
land includes improvements, 110.

DESTRUCTION,
of entire subject matter ends lease, 474.
by fire does not abate rent, 675.
by tempest and flood, 675.
prior to commencement of term, 675.
of entire subject matter abates rent, 677.
contrary rule in Kentucky, 677.
Nebraska law contrary to general rule, 678.

DEVISEE,
not liable as assignee till acceptance, 457.

DISCLAIMER OF RELATION,
by tenant works a forfeiture, 474a.
hostile claim of title a repudiation, 474a.
acts must be open, continuous, and notorious, 474a.
sufficiency of acts to constitute disclaimer, 475.
attornment or delivery of possession to stranger, 476.
conveyance by tenant, 477.
forfeiture by matter of record, 478.

[*References are to Sections.*]

DISCLAIMER OF RELATION—*Continued.*
forfeiture by deed recorded, 479.
payment of rent to stranger, 480.
mere words never work forfeiture, 481.

DISTRESS FOR RENT,
waives forfeiture, 497.
right to forfeit not contingent on lack of sufficient, 502.
definition of remedy, 650.
cannot include interest on rent, 666.

DISTRICT OF COLUMBIA,
statute as to yearly tenancies, 233.
statute as to notice to quit, 284.

DOWER RIGHT,
not capable of lease, 87, 333.
none in leasehold estate, 173.
payment in lieu of, a personal undertaking, 333.
emblements after sale, 570, 571.
clearing wild land, 636.

DUE CARE,
See NEGLIGENCE.

DURATION OF TERM,
may be for years, for life, or in perpetuity, 111.
statutory limits in Alabama, 111.
agricultural lands in New York, 111.
death of parties does not affect, 111.
term of lease for years must be certain, 112.
if uncertain creates mere tenancy at will, 112.
determined by matter *ex post facto*, 112.
leases from an indefinite future time, 113.
contingent limitation of term, 114.
on sale of premises, 114.
happening of contingency, 115.
necessity for entry by lessor, 115.
"life of building" defined, 115.
leases for life, 716.
omission of word "heirs," 716.
term lasting for several lives, 716.
errors in calculating length of term, 717.
different parcels terminating at different times, 718.
word "from" either inclusive or exclusive, 719.
"from the date" equivalent to "from the day of the date," 719.

DWELLING HOUSES,
implied warranty of fitness, 576.
doctrine as to furnished houses, 577–578.

[*References are to Sections.*]

E

EASEMENTS,
granted only by deed, 36.
grant of right of way constitutes, 39.
flowing of land an easement, 45.
grant of, distinguished from lease, 58.
pass as appurtenances when, 104, 105.
for light and air protected by injunction, 106.
tenancy by sufferance after taking of, by eminent domain, 221.

EMBLEMENTS,
vendee in possession entitled to, 32.
right of servant to, 21.
belong to lessor after forfeiture, 493.
definition of term, 567.
"*fructus industriales*" defined, 567.
driftwood belongs to lessee, 567.
turpentine from trees is personal property, 567.
reasons for doctrine of emblements, 567.
growing crops considered as personal property, 567.
tenant owns, during term, 568.
provisions for spending hay and manure on premises, 568.
doctrine of, rests on uncertainty of tenure, 569.
rule in Delaware, 569.
rule in New Jersey, 569.
rights conferred by contract, 569.

EMINENT DOMAIN,
taking by, creates no tenancy, 7.
tenancy by sufferance possible after taking easement by, 221.
right of tenant by sufferance after taking, 226.
taking under, entitles lessee to damages, 643.
agreement to abate rent, does not include taking under, 680.
no estoppel upon lessee against use of power, 708.

ENCUMBRANCE,
purchase of, by life tenant, 689.

ENTRY,
by landlord after destruction, 405.
by assignee not necessary to bind him, 458.
essential to take advantage of condition, 482.
necessity for, generally, 483.
in pursuance of covenants not unlawful, 483.
waiver of necessity for, 483.
service of declaration in ejectment as substitute for, 484.
no notice of forfeiture necessary beyond entry, 485.
right of, not assignable, 494.
provision that does not work forfeiture of rents, 501.
effect of, by tenant after abandonment, 547.

[*References are to Sections.*]

EQUITY,
right of reformation of lease in, 70.
lost by *laches*, 70.
third parties affected with knowledge, 70.
injunction against interference with light and air, 106.
specific performance of agreement to lease, 138.
loss of right by *laches*, 138.
premature suit for, 139.
no injunction against breach of independent covenants, 325.
injunction against alterations, 380.
prohibited use enjoined, 384.
injunction to stay waste, 384.
injunction against assignment, 431.
enjoining collection of purchase money for leasehold, 435.
decree for sale of leasehold, liability of assignee, 444.
will not compel delivery of lease after sale on execution, 444.
relief against sub-tenant of insolvent lessee, 445.
bill in, not appropriate remedy to regain possession, 563.
injunction against threatened waste, 638.

ESCROW,
rule as to delivery of lease in, 83.

ESTOPPEL,
to deny assignment after transfer of possession, 440.
of lessor against entering on assignee or sub-tenant, 473.
by acceptance of rent, 473.
of lessee to deny lessor's title, see DENIAL OF TITLE.
to claim fixtures, 722.

EVICTION,
essential to breach of covenant for quiet enjoyment, 354.
what constitutes an eviction, 354, 355.
actual and constructive compared, 355, 356.
waiver of constructive, 356.
physical expulsion, 357.
entry by landlord under claim of privilege, 358.
interference with light and air, 359.
nuisance on adjoining premises, 360.
acts of wrong doers do not constitute, 361.
taking under eminent domain, 362.
outstanding title alone does not constitute, 363.
service of notice to quit, 363.
judgment of law, considered as, 363.
effect of, is to suspend rent, 364.
partial eviction suspends rent when, 365.
right of action for eviction, 368.
rule of damages in such actions, 369–371.
by title paramount as ground for apportioning rent, 669.
entitles tenant to deny landlord's title, 705.
effect of judgment of eviction, 705.
after, tenant may take new lease, 706.

[*References are to Sections.*]

EXECUTION SALE OF LEASEHOLD,
allowed as of a chattel, 172.
operates as assignment, 444.
return of officer sufficient memorandum, 444.
title passes subject to equities, 444.
tenant may purchase at, against landlord, 704.

EXECUTORS AND ADMINISTRATORS,
authority to grant lease, 93.
can sell leasehold as chattel, 171.
action on guaranty of rent, 333.
liable after death of lessee, 447.

EXPLOSION,
of boiler injuring tenant, 579.
considered a casualty when, 679.

EXTENSION OF TERM,
See RENEWAL OF LEASE.

FEE,
grant of, distinguished from lease, 58.
ownership of, not necessary to grant of lease, 84.

FENCES,
damage for failure to repair, 410.
become a part of realty, 714.

FIRE,
destruction by, does not release from covenant to repair, 392.
distinction between repairing and rebuilding, 392.
Nebraska doctrine, 392.
responsibility rests on contract, 393.
construction of such covenants, 393.
liability of tenant for negligent, 627.
destruction by, does not abate rent, 675.
lessor's obligation to rebuild, 676.

FIRE ESCAPE,
duty of landlord to repair, 589.

FITNESS OF DEMISED PREMISES,
no implied warranty as to, 574.
no implied condition as to, 574.
rule of *caveat emptor* applies, 574.
oral evidence of warranty inadmissible, 575.
application of rule to demise of dwelling house, 576.
to letting of rooms in tenement, 576.
to demise of furnished apartments, 577–578.

FIXTURES,
general rule for articles fixed to freehold, 710.
furnishings in the nature of furniture, 710.
trover does not lie for conversion of, 710.

[*References are to Sections.*]

FIXTURES—*Continued.*
allowing removal a modification of ancient rule, 711.
mode of annexation affects right of removal, 712.
substitutions for wornout parts, 712.
agreements as to removal, 713.
remedy of grantee of reversion, 714.
fence becomes part of realty, 714.
time of making agreement, 715.
agreements bind assignees when, 715.
right to remove justifies sale, 715.
rights of attaching creditors, 715.
time for removal, 716.
agreement necessary after end of term, 716.
what constitutes an agreement, 716.
tenants at will have reasonable time after end of holding, 716.
conditional right of removal, 717.
binds assignee of fixtures, 717.
renewal forfeits right to removal, 718.
mere continuance of same tenancy does not forfeit, 718.
what constitutes a continuance, 718.
Colorado doctrine, 718.
new lease following agreement for removal, 718, 720.
time for removal under agreement, 719.
removal during extension of term, 721.
new lease executed to release retiring partner, 721.
estoppel on lessor to prevent removal, 719, 722.
rights of lessee purchasing estate, 722.
mortgagee of lessee's interest, 723.
"improvements" defined, 724.
videlicet clause, 724.
erections for carrying on trade, 725.
what constitutes, 725.
scenic railway, 725.
boilers and engines, 725.
bowling alley, 725.
buildings cannot be removed ordinarily, 726.
relaxation of foregoing rule, 727.
declarations of lessee as evidence, 727.
agricultural fixtures, 728.

FLOOD,
injury by, does not abate rent, 675.

FLORIDA,
forfeiture for non-payment of rent, 511.

FLOWING LANDS,
right of, is an easement, 45.

[*References are to Sections.*]

FORCIBLE ENTRY AND DETAINER,
only lies in case of tenancy, 19.
indictment against servant holding as tenant, 21.
right to recover possession by force, 556.
early statute, 556.
tenant's good faith in holding over, 556.
forcible entry defined, 557.
civil liability of landlord, 558.
plea of *liberum tenementum*, 558, 561.
exclusiveness of remedy, 558.
entry to post notice of lien, 558.
liability for assault, 559.
entry on tenant legally in possession, 560.
special restrictions on right to enter by force, 561.
summary process distinguished, 562.
necessity for existence of tenancy, 563.
statutory penalty for holding over, 564.
bill in equity as remedy to obtain possession, 565.

FORFEITURE OF LEASE,
for assignment contrary to statute, 432.
by repudiation of tenant's obligation, 474a.
effect of hostile claim of title, 474a.
acts of disclaimer open, continued and notorious, 474a.
sufficiency of disclaimer to cause forfeiture, 475.
attornment or delivery of possession to stranger, 476.
conveyance by tenant a disclaimer when, 477.
by matter of record, 478.
by deed recorded, 479.
payment of rent to stranger as disclaimer, 480.
mere words never work forfeiture, 481.
By breach of condition in lease, 482–495.
condition of this nature valid and enforcible, 482.
condition defined, 482.
condition distinguished from limitation, 482.
forfeture for obscure facts not permitted, 482.
necessity for reëntry, 483.
statutory substitutes for reëntry, 484.
entry or equivalent acts sufficient to determine estate for breach of condition, 485.
notice of intention to forfeit necessary in Nebraska, 485.
condition for, to be strictly construed, 486.
equity will not aid to enforce a forfeiture, 486.
estoppel to enforce a forfeiture, 486.
breach of covenant confers no right of reëntry, 487.
construed as covenants in case of doubt, 487.
breach of implied covenant no ground for, 488.
lease of mineral lands, 488.
by acts of sub-tenants, 489.

[*References are to Sections.*]

FORFEITURE OF LEASE—*Continued.*
statutory, for illegal use by sub-tenant, 489.
equity will not enforce a forfeiture, 490.
removal of cloud caused by alleged forfeiture, 490.
relief against forfeiture by equity, 491.
of covenants to pay money, 491.
of covenants to repair or insure, 492.
right to emblements, 493.
right of entry not assignable, 494.
not an estate in land, 494.
exception in Illinois, New Jersey and Kansas, 494.
landlord may hold lessee liable on lease instead of forfeiting, 495.
lease not "void," but voidable after breach of condition, 495.
conditions for forfeiture for benefit of lessor alone, 495.
assignment contrary to condition voidable only, 495.
landlord cannot enforce in part and waive in part, 495.
Waiver of ground for, 496–501.
what constitutes a waiver, 496.
distinction as to conditional limitations, 496.
acceptance of rent constitutes, 497.
suit for entire amount of rent, 497.
distraining for rent, 497.
effect of mere demand for rent, 497.
lessor must have knowledge of ground for forfeiture, 497.
past due rent receivable without waiving rights, 498.
allowing default to continue not a waiver, 499.
permission to hold over a waiver, 499.
does not apply to continuing covenant, 500.
liability for rent subsequent to forfeiture, 501.
Non-payment of rent as ground for forfeiture, 502–537.
no right to enter for, at common law, 502.
same rule applies to royalties, 502.
a harsh remedy, not favored by law, 502.
sufficiency of distress on premises, 502.
necessity for demanding rent, 503.
time and place for demand, 503.
amount to be demanded, 503.
mode of making demand, 503.
including interest on demand, 503.
demand by assignee valid when, 503.
use and occupation not preceded by demand, 503.
stipulation dispensing with demand, 504.
sufficiency of such stipulation, 504.
damages by tenant not a legal set off, 505.
state statutes regarding forfeiture for non-payment of rent, 506–537.
waste as a ground for forfeiture, 639.

[*References are to Sections.*]

FRAUD,
in inducing lease shown by parol, 125.
forged instrument and fraudulent inducement distinguished, 125.
rescission and defense of action for rent, 126.
what constitutes *laches*, 126.
Missouri doctrine as to trial of issue of fraud, 127.
defrauded lessee's election of remedies, 128.
prompt rescission required in Illinois, 128.
what constitutes fraud, 129.
misrepresenting legal effect, 129.
fraudulent alteration, 129.
concealing defects a ground for liability, 580.
as basis for recoupment, 674.
landlord not an insurer, 674.
lessee induced by, may deny landlord's title, 702.

FRAUDS, STATUTE OF,
applies to what collateral parol agreements, 131.
the English act, 147.
form of statutes in the United States, 148.
parol leases not absolutely void, 148.
exception of short term parol leases, 148.
requirements as to value of rent reserved, 149.
New Mexico follows English law, 150.
parol assignments forbidden, 151, 440.
part performance by transfer of possession, 151.
leases for one year from future date, 152.
extent of validity of parol lease for short term, 153.
doctrine in South Carolina and Maryland, 153.
duration of term of parol lease, 154.
renewal agreement, 154.
whether void only as to excess, 155.
sufficiency of memorandum, 156.
written receipts invalid to create a legal term, 156.
ratification of parol lease, 156.
authority of agent, 157.
ratification of lease by agent, 157.
undisclosed principals, 158.
effect of part performance on parol lease, 159.
distinction between equity and law, 159.
what constitutes part performance, 160.
must refer to agreement, 160.
delivery of possession, 160.
making valuable improvements, 160.
part payment, 160.
Alabama statute, 161.
parol agreement to lease distinguished from parol lease, 162.
parol notice of extension, 342.
parol promise to purchase improvements, 375.

[*References are to Sections.*]

FRAUDS, STATUTE OF—*Continued.*
extends to assignments of leases, 440.
of parol leases, 441.
undertaking by surety valid when, 662.

FRUCTUS INDUSTRIALES,
defined, 567.

FURNISHED HOUSE,
implied warranty of fitness when, 577–578.

FURNITURE,
in description includes what, 101.
distinguished from fixtures, 710.

"FURTHER" LIABILITY,
defined, 334.

G

GAMBLING,
on demised premises, 123.
duty of lessor to prevent, 386.

GENERAL ASSIGNMENT,
may transfer leasehold, 461.
acceptance of leasehold by assignee, 461.
as breach of condition against sub-letting, 466.

GEORGIA,
statute as to cropping contracts, 56.
statute as to yearly tenancies, 235.
statute as to notice to quit, 285.
estate for years passes as realty, 433.
right "to possess and enjoy" how transferred, 433.
forfeiture for non-payment of rent, 512.
statute as to liability for defective premises, 587.

GUARANTY,
of rent does not run with land, 333.
suit on, by administrator of lessor, 333.
none implied on assignment, 352.

GUARDIAN,
may lease ward's land, 89.
rent should be reserved to whom, 89.
mineral leases not permitted, 89.
for nurture without power to lease, 89.
Illinois statute, 89.
Iowa statute, 89.
mode of leasing, 90.
lease limited to infancy of ward, 90.
cannot bind ward by general covenants, 350.

[*References are to Sections.*]

H

HABENDUM,
clause not necessary in assignment, 437.

"HEIRS,"
necessary to create more than life estate, 716.

HOLDING OVER,
creates tenancy from year to year, 201.
landlords right to charge tenant, 201.
new tenancy not under original lease, 201.
terms of contract remain the same, 202, 555.
conditional limitation applicable, 202.
tenant cannot create different tenancy, 202.
landlord's option to charge for another year, 203.
acceptance of rent implies assent, 204.
overt acts not necessary to indicate assent, 205.
effect of dissent on part of tenant, 206.
rule in England, 207.
followed in Massachusetts and Missouri, 207.
surrender rendered impossible by act of God, 208.
length of, necessary to charge tenant, 209.
where landlord is responsible, 209.
Kentucky statute, 209.
rebutting presumption of yearly tenancy, 210.
covenant as to, in lease, 211.
express renewal, 212.
negotiations for renewal, 212.
changes in amount of rent, 213.
penalty of double rent, 214.
by sub-tenant, 554.
agreements as to, 555.
sufficiency of vacating premises, 555.
agreements as to improvements, 555.
statutory penalty for, 564.
bill in equity as remedy to obtain possession, 565.
denial of title during, not permitted, 688.

HOLIDAY,
rent falling due on, 661.

HUSBAND,
right of, to lease wife's land, 88.
right of to wife's leaseholds, 88.
Washington statute as to community lands, 88.
statute forbidding, to lease wife's land, 181.

I

ICE,
grant of right to cut, a lease, 40.
See also, SNOW AND ICE.

[*References are to Sections.*]

IDAHO,
statute as to notice to quit, 286.

ILLEGALITY,
lease to aid unlawful conspiracy, 120.
landlord's responsibility for, 120.
effect of illegal user by sub-tenant, 120.
kinds of illegality, 121.
fixing knowledge on lessor, 121.
establishing defense of, 121.
lease of premises for purpose of prostitution, 122.
premises used for gambling, 123.
no estoppel to set up defense of, 124.

ILLINOIS,
statute authorizing plea of want of consideration, 65.
right of guardian to lease ward's land, 89.
leasing for purpose of prostitution, 122.
statute as to notice to quit, 287.
statute dispensing with attornment, 423.
forfeiture for non-payment of rent, 513.
surrender of leases *in futuro*, 546.
statute as to action for rent by undisclosed principal, 660.
defense of want of consideration, 665.
statute as to interest on rent, 666.

IMPLIED COVENANTS,
See COVENANTS.
on assignment of lease, 435.

IMPLIED WARRANTY,
of fitness, general rule, 574.
no condition as to fitness, 574.
rule of caveat emptor applies, 574.
oral evidence of warranty inadmissible, 575.
application of rule to demise of dwelling house, 576.
no liability for damage caused by defects, 576.
tenant assumes risks after inspection, 576.
application of rule to letting of rooms in tenement, 576.
defects known to landlord, and unknown to tenant, 576.
Michigan rule, 576.
application of rule to demise of furnished house, 577.
offensive odors, 577.
English doctrine, 578.
furnished rooms in a house, 578.
Massachusetts doctrine, 578.

IMPROVEMENTS ON LEASED PREMISES,
landlord liable for, only by agreement, 373.
stipulation as to removal, 373.
agreements for purchase of, by landlord, 374.

[*References are to Sections.*]

IMPROVEMENTS ON LEASED PREMISES—*Continued.*
alternative option to buy, or renew lease, 375.
considered as part of realty, 376.
covenants as to, run with land, 332, 377.
mechanic's lien for, 378.
proceedings for appraisal of, 379.
provision against alterations, 380.
cannot be removed without agreement, 590.
more comprehensive term than fixtures, 724.

INDENTURE,
construction of covenants in, 57.
delivery of counterparts, 57.
distinguished from deed poll, 318.
general principles of construction, 322.

INDEPENDENT CONTRACTOR,
becomes tenant when, 22.

INDIANA,
statute against conditional attorney's fee, 64.
right of married woman to lease lands, 87.
statute as to yearly tenancies, 236.
statute as to notice to quit, 288.
forfeiture for non-payment of rent, 514.
forfeiture for waste, 639.

INFANCY,
of lessee, 92.
liability after enjoyment, 92.
of lessor, 95.
cannot act through agent, 95.
how lease executed during, is avoided, 95.
leased room regarded as necessary, 96.
assignment by infant, 97.

INFECTION,
duty of landlord to warn against, 584.

INSURANCE,
covenants as to, 389–390.
classed as usual covenant in leases, 389.
sufficiency of agreement, 389.
compliance with covenant, 389.
runs with the land, 389.
measure of damages for failure to insure, 390.
lessee rebuilding has no claim on, 398.
collected by landlord need not be used in rebuilding, 399, 405, 676.

INTERESSE TERMINI,
definition, 15.
rights conferred by on holder of, 15.

[*References are to Sections.*]

INTERESSE TERMINI—*Continued.*
created as a future interest, 15.
landlord's right to maintain trespass not affected by outstanding, 16.
possession executed in lessee when lease takes effect as a bargain and sale, 17.
destruction of premises during, 675.

INTEREST,
demand for rent including, valid, 503.
on rent recoverable when, 666.
not included in distress, 666.
Virginia doctrine, 666.
statutes in Illinois and Kentucky, 666.
rents and profits due mortgagor, 666.

IOWA,
guardian's right to lease ward's land, 89.
statute as to yearly tenancies, 237.
statute as to notice to quit, 298.
forfeiture for non-payment of rent, 515.
statute as to attornment to stranger, 709.

J

JANITOR,
landlord liable for negligence of, 623.

JOINT LESSEES,
breach of covenant not to sub-let by, 468.

K

KANSAS,
rights as to notice to quit not mutual, 259.
statutory provision as to notice to quit, 290.
statutory provision against assignment, 432.
forfeiture for non-payment of rent, 516.
doctrine as to application of insurance money after fire, 676.
purchase of tax title by tenant, 690.
attornment to holder of tax title, 709.

KENTUCKY,
statute as to effect of holding over, 209.
statute as to yearly tenancies, 238.
statute as to notice to quit, 291.
statutory provisions against assignment, 432.
statute as to interest on rent, 666.
statute as to apportionment of rent, 671.
no abatement of rent after entire destruction, 677.
attornment to stranger after judgment of eviction, 705.

[*References are to Sections.*]

KEY,
retained by tenant after eviction, 356.
delivery of, as symbol of possession, 427.
acceptance of by landlord as proof of surrender, 540, 548.
failure to return as evidence of holding over, 555.

KINDS OF TENANCY,
See TENANCY FROM YEAR TO YEAR, TENANCY AT WILL, TENANCY BY SUFFERANCE, AND TENANCY FROM MONTH TO MONTH.

L

LEASE,
written instrument as proof of tenancy, 11, 12.
distinguished from license, 37–45 (see LICENSE).
considered as a deed by ancient authors, 57.
in common parlance a leasehold estate, 57.
indentures and deeds poll, 57.
construction of indenture, 57.
deed poll abolished in Missouri, 57.
distinguished from other instruments, 58.
grant of fee, 58.
grant of easement, 58.
technical requirements of form, 59.
instrument in form of receipt, 59.
indorsement on back of title bond, 59.
grant of franchise not a lease, 59.
vote of town selectmen, 59.
agreement to pay bonus to landowner, 59.
date is not essential, 60.
deed takes effect from delivery, 60.
term commences from day of date, 60.
executed on Sunday, 61.
ratification of void lease, 61.
alteration of instrument, 62.
reservation of part of thing demised, 63.
thing specifically granted cannot be excepted, 63.
public roads and lots designated by number, 63.
failure of reason for making exception, 63.
stipulation for attorney's fee valid, 64.
Indiana statute against conditional fees, 64.
consideration for grant of lease, 65.
Illinois statute authorizing plea of want of consideration, 65.
construction to be declared by court, 66.
instrument to be construed as a whole, 67.
custom of country not admissible, 68.
inconsistent and contradictory clauses, 69.
weight of written and printed provisions, 69.
erasure of a printed clause, 69.
meaning of term "relet," 69a.

[*References are to Sections.*]

LEASE—*Continued.*
instruments construed together, 69a.
reformation of lease, 70.
right of reformation lost by *laches*, 70.
when dispute is no longer between original parties, 70.
Execution and delivery, 71–83.
necessity for acknowledgment, 71, 72.
proof of signature of subscribing witness, 71.
doctrine in Ohio and Maryland, 72.
rights of third parties unaffected by unrecorded lease, 73.
seal unnecessary between parties, 74.
lease by corporation not under seal, 74.
Delaware statute requiring seal, 74.
signature of lessor necessary, 75.
leases drawn in duplicate, 75.
errors in signature, 76.
lessee need not sign, 77.
bound by acceptance of lease, 77.
indenture taking effect as deed poll for lack of lessee's signature, 78.
acceptance sufficient without occupation, 79.
presumption of acceptance, 79.
acceptance determined by jury, 79.
form of action on unsigned lease, 80.
executed by undisclosed principal, 81.
executed by corporations, 82.
delivery a question of intention, 83.
Parties to leases, 84–97.
in general, 84.
ownership in fee unnecessary, 84.
joint lease by owners in severalty, 84.
estoppels distinguished, 84.
person dispossessed cannot grant lease, 85.
what constitutes adverse holding, 85.
California code provision, 85.
one tenant in common cannot lease community land, 86.
leases by and to married women, 87.
separate property, 87.
Mississippi code provision, 87.
Maine act, 87.
Indiana statute, 87.
no lease of dower interest, 87.
right of husband to lease wife's real estate, 88.
leasehold estates of married women, 88.
Washington act as to community lands, 88.
guardian's right to lease, 89.
mode of procedure for guardian, 90.
lease limited to infancy of ward, 90.
trustees have general power to make, 91.

[*References are to Sections.*]

LEASE—*Continued.*
duty of trustee in this respect, 91.
trustee for charitable use, 91.
infant lessee, 92.
executors and administrators, 93.
mortgagor and mortgagee, 94.
infant lessor, 95.
Description of premises, 98–110.
necessity for, 98.
parol proof allowable to apply description, 98.
technical misdescriptions, 98.
location of boundaries by parties, 99.
insufficiency of description cured by possession, 99.
parol evidence to complete inadequate, 100.
what included in a, a matter of evidence, 101.
"furniture" includes what, 101.
lease of bulding *eo nomine*, 102.
rooms in tenement, 102.
designation of house by street number, 103.
easement passes as appurtenance when, 104.
rights in public streets pass as appurtenances, 105.
easement for light and air, 106.
what passes as "curtilage," 107.
use of outside walls for signs, 108.
protected in such use by equity, 108.
riparian boundaries, 109.
reservations by lessor, 110.
validity of reservation, 110.
Duration of term, 111–119.
for life, for years, or in perpetuity, 111.
limited by statute in Alabama, 111.
agricultural lands in New York, 111.
death of parties does not affect, 111.
term should be certain, 112.
determined by matter *ex post facto*, 112.
beginning at indefinite future time, 113.
contingent limitation of term, 114.
happening of contingency, 115.
term for life of tenant, 116.
errors in calculation, 117.
word "from" either exclusive or inclusive, 119.
Illegal leases, 120–124.
rent not recoverable on lease to aid conspiracy, 120.
landlord not responsible for illegal use by tenant, 120.
illegal user by sub-tenant, 120.
kinds of illegality, 121.
fixing knowledge on lessor, 121.
establishing defense of illegality, 121.
use of premises for purpose of prostitution, 122.

[*References are to Sections.*]

LEASE—*Continued.*
rescission and defense of action for rent, 126.
premises used for gambling,123.
no estoppel to set up defense of illegality, 124.
Leases obtained by fraud, 125–129.
fraud may be shown by parol, 125.
distinction between forged instrument and fraud in inducement, 125.
rescission and defense of action for rent, 126.
what constitutes *laches*, 126.
Missouri doctrine, 127.
defrauded lessee's election of remedies, 128.
prompt rescission required in Illinois, 128.
what constitutes fraud, 129.
misrepresenting legal effect, 129.
fraudulent alteration, 129.
Collateral parol agreement, 130–137.
presumption as to written instrument, 130.
compliance with statute of frauds, 131.
what agreements are collateral, 132, 133.
agreement to be performed before term begins, 133.
English rule, 134.
subsequent agreement reducing rent, 135.
sufficiency of consideration, 136.
execution of new lease, 137.
See also AGREEMENTS TO LEASE; FRAUDS, STATUTE OF; RECORDING LEASES.

LESSEE,
need not sign lease, 77.
bound by acceptance of lease, 77.
indenture taking effect as deed poll for lack of signature by, 78.
mere acceptance sufficient without entry, 79.
married women, 88.
infant, 92.
right to assign leasehold, 431.
statutory provisions restricting right to assign, 432.
bound by express covenants after assignment, 447.
obligation based on privity of contract, 447.
released from implied covenants by assignment, 447, 452.
liability in covenant, 447.
executor bound after death of, 447.
discharge from express covenants when, 448.
agreements for, 448.
implied from what facts, 448.
lessor's consent to different use, 448.
right of action after assignment, 448.
obligation is that of surety for assignee, 449.
not discharged by lessor's laches in suing assignee, 449.
obligation unaffected by length of term after assignment, 450.

[*References are to Sections.*]

LESSEE—*Continued.*
can recover money paid in behalf of assignee, 451.
liability of assignee on express covenant, 451.
what constitutes express covenant to pay rent, 452
surety for, not discharged, 453.
waiver of covenant against assignment, 453.
effect of general assignment by, 461.

LESSOR,
must sign lease, 75.
instruments drawn in duplicate, 75.
errors in signature by, 76.
need not own fee, 84.
must not be disseised, 85.
co-tenant, 86.
married woman, 87.
husband, 88.
guardian, 89.
trustee, 91.
executor or administrator, 93.
mortgagor and mortgagee, 94.
infant, 95.
right of, to assign lease or reversion, 421.
does not release lessee by accepting assignee, 447.
double remedy against lessee and assignee, 447.
effect of recovery from one, 448.
agreement to discharge lessee, 448.
implied from what circumstances, 448.
putting premises to new use, 448.
laches in suing assignee as discharge of lessee, 449.
liability of, on covenants after assignment, 454.
covenant to sell to lessee, 454.
no duty to relet abandoned premises, 539.
estoppel to deny power and capacity of, 683.

LIBERUM TENEMENTUM,
plea of, by landlord as defense for entering on tenant, 228, 558, 561.

LICENSE,
definition, 36.
need not be in writing, 36.
easements granted only by deed, 36.
license is revocable, indivisible, non-assignable, 37.
revoked by death of either party, 37.
when incident to a valid grant, 37.
executed license to cut standing timber, 38.
takes effect as lease when, 38.
conveyance of estate in land constitutes a lease, 39.
grant of right of way is an easement, 39.
legal possession essential for a tenancy, 40.

[*References are to Sections.*]

LICENSE—*Continued.*
wall advertisement a license, 40.
exclusive possession by tenant unnecessary, 40.
grant of right to cut ice, 40.
grant of mining rights, 41.
payment of consideration as test between lease and license, 42.
interrupted and restricted use a mere license, 43.
theater ticket, 44.
flowing of lands an easement, 45.

LIFE ESTATE,
created by grant without word "heirs," 116.
grant for term of several lives, 116.
interest ceases on death of life tenant, 116.

LIFE TENANT,
bound to pay taxes, 413.
failure by, to pay taxes constitutes waste, 637.
right to open and work mines, 638.
leases granted by, apportionment of rent under, 670.
purchase of encumbrance on estate by, 689.

LIGHT AND AIR,
interference with easement for, prevented by injunction, 106.
tenant's right to, 381.
interference with as breach of covenant of quiet enjoyment, 359.
artificial, for passageways, 619.

LIMITATION, STATUTE OF,
running of, after disavowal of tenancy, 695.

LODGER,
becomes a tenant when, 23, 24.

LOUISIANA,
recording leases, 163.
statute as to notice to quit, 292.

M

MAINE,
leasing by married women, 87.
statute as to yearly tenancies, 239.
statute as to notice to quit, 293.

MANURE,
does not belong to outgoing tenant, 573.
when made in course of husbandry, 573.
manufactured out of eel grass, 573.
Maine doctrine as to sale of, on execution, 573.
North Carolina rule, 573.
covenants as to manure, 573.

[*References are to Sections.*]

MARRIED WOMEN,
right to grant and accept leases, 87.
leasing of separate property belonging to, 87.
Mississippi code provision, 87.
Maine act, 87.
Indiana statute, 87.
dower interest incapable of being leased, 87.
leasehold estates of, pass to husband, 88.
holding over after divorce does not become tenant at sufferance, 225.
covenant not to sublet not broken by marriage, 468.
not bound by estoppel, 687.

MARYLAND,
acknowledgment of lease necessary, 72.
recording leases, 164.
statute as to notice to quit, 294.

MASSACHUSETTS,
statute as to rent recoverable from tenant at will, 189.
tenant at sufferance liable for use and occupation, 227.
statute as to tenancy at sufferance, 230.
doctrine as to yearly tenancies, 240.
statute as to notice to quit, 295.
forfeiture for non-payment of rent, 517.
doctrine as to implied warranty of fitness of furnished house, 578.
statute as to apportionment of rent, 671.

MECHANIC'S LIEN,
for improvements, 378.
holder of, not an assignee, 444.
purchaser at, sale not an assignee, 458.
entry to post notice of, 558.

MERGER OF LEASE,
takes place on assignment to lessee, 428.
effect of mortgaging leasehold to lessor, 428.
legal interest necessary to constitute, 428.
undivided interests will merge when, 428.
sale on partition causes, when, 428.
effect of subtenancy on, 429.
liability of subtenant on covenants, 429.
English statutory provision, 429.
election to avoid, 429.

MEMORANDUM,
in writing sufficient to satisfy statute of frauds, 156.
officer's return sufficient, of assignment, 444.

MICHIGAN,
statute as to tenancy of sufferance, 230.
statute as to yearly tenancies, 241.

[*References are to Sections.*]

MICHIGAN—*Continued.*
statute as to notice to quit, 296.
forfeiture for non-payment of rent, 518.
rule as to implied warranty of fitness of premises, 576.
use and occupation maintainable on lease under seal, 652.

MINERAL LANDS,
forfeiture of lease of, 488.

MINNESOTA,
statute as to notice to quit, 297.
forfeiture for non-payment of rent, 519.
statutory liability for defects in premises, 581.
abatement of rent under statute, 681.

MINES,
grant of right to work, operates as lease, 41.
right of tenant to open and work mines, 637.

MISREPRESENTATION,
as to fitness of premises a ground for liability, 580.
as basis for recoupment, 674.

MISSISSIPPI,
provision as to leases by married women, 87.
statute as to notice to quit, 298.
statutory duty of lessor to repair, 393.
forfeiture for non-payment of rent, 520.
attornment to stranger after judgment of eviction, 705.

MISSOURI,
leases by deed poll abolished, 57.
defense of fraud triable by jury, 127.
statute as to yearly tenancies, 242.
statute on notice to quit, 299.
statute against assignment, 432.
forfeiture for non-payment of rent, 521.
doctrine as to assignment of leasehold by way of mortgage, 458.
purchase of tax title by tenant, 691.
attornment to purchaser at foreclosure, 709.

MONTANA,
statute as to notice to quit, 300.

MONTH TO MONTH TENANCY,
See TENANCY FROM MONTH TO MONTH.

MORTGAGE,
or contract for letting, 26.
foreclosure of, on leasehold an assignment, 444.
of leasehold equivalent to assignment, 458.
foreclosure of, may be shown to defeat landlord's title, 703.

[*References are to Sections.*]

MORTGAGEE,
in possession not a tenant of mortgagor, 27.
right to lease premises, 94.
entitled to emblements against lessee of mortgagor, 572.
as tenant bound by estoppel, 693.
of leasehold, right to remove fixtures, 723.

MORTGAGOR,
in possession is not a tenant, 25.
right to lease premises, 94.
becomes tenant at sufferance when, 223.
lease by, gives no right to emblements, 572.

N

NEBRASKA,
notice of intention of forfeit necessary, 485.
forfeiture for non-payment of rent, 522.
doctrine as to liability for rent after destruction, 678.

NECESSARIES,
room for infant lessee classed among when, 96.

NEGLIGENCE,
of tenant a question for jury, 394.
contributory, by tenant, 594.
intervening criminal act, 596.
unsafe repairs, 596.
by agent or independent contractor, 597.
landlord's duty as to passageways, 614, 615.
persons to whom duty extends, 617, 618.
only responsible for reasonable care, 619.
negligent repairs, 622.
of janitor employed by landlord, 623.
duty of tenant to use due care, 624.

NEVADA,
statute as to yearly tenancies, 243.
statute as to notice to quit, 301.

NEW HAMPSHIRE,
doctrine as to crop rents, 55.
statute as to tenancies from year to year, 244.
statute as to notice to quit, 302.
forfeiture for non-payment of rent, 523.

NEW JERSEY,
recording leases, 163.
statute as to notice to quit, 303.
forfeiture for non-payment of rent, 524.
rule as to emblements, 569.
abatement of rent under statute, 681.

[*References are to Sections.*]

NEW MEXICO,
follows English law as to statute of frauds, 150.

NEW YORK,
right to bring summary process dependent on existence of tenancy, 19.
rule as to emblements, 32.
agricultural lands leased for twelve years, 111.
tenancy at sufferance, 229.
statute as to yearly tenancies, 245.
statute as to notice to quit, 304.
receiver vested with title to leasehold, 443.
doctrine as to assignment by way of mortgage, 458.
forfeiture for non-payment of rent, 625.
statute against implication of covenants, 351.
rule of liability of assignees of part of leasehold, 669.
statute as to apportionment of rent, 6671.
abatement of rent under statute, 681.

NORTH CAROLINA,
statute as to cropping contracts, 56.
statute as to notice to quit, 305.
forfeiture for non-payment of rent, 526.
statute as to division of crops, 656.

NORTH DAKOTA,
statute as to notice to quit, 306.
statutory liability of landlord to repair, 407.
forfeiture for non-payment of rent, 527.

NOTICE TO QUIT,
nature of doctrine, 251.
necessity for notice, 251.
common-law rule, 251.
length of notice in United States, 252.
distinction based on origin of tenancy, 252.
length of notice from monthly tenant, 253.
length of notice from weekly tenant, 253.
as affected by terms of letting, 253.
written notice unnecessary at common law, 254.
rights of tenant at sufferance to notice, 254.
no notice to terminate lease for time certain, 255.
same rule at end of extension, 255.
no notice at end of term provided for by void agreement, 256.
when no relation of landlord and tenant exists, 257.
after disclaimer by tenant, 257.
mere licensee not entitled, 257.
no substitute for statutory notice, 258.
waiver of notice by landlord, 258.
rights and duties as to notice mutual, 259.
contrary rule by statute in Kansas, 259.

[*References are to Sections.*]

NOTICE TO QUIT—*Continued.*
Sufficiency of notice, 260–271.
must point to time when the term ends, 260.
demand for immediate possession insufficient, 260.
time for quitting must be on rent day, 261.
sufficient to name day corresponding to day of letting, 261.
precise time of expiration, 261.
no particular form required, 262.
description must identify premises, 262.
slight inaccuracies not fatal, 262.
notice addressed to tenant in possession, 263.
formal insufficiency waived by repudiation, 264.
authority of agent to give notice, 265.
who may give notice after assignment, 266.
notice binding on undertenants, 266.
notice should be absolute, 267.
proposals for change in rent, etc., 267.
Sunday contract, 267.
notice by parol sufficient at common law, 268.
notices to and from joint owners, 269.
requirements for notice may be waived, 270.
mere agreement to pay rent in advance not a waiver, 270.
enforcement of notice, 271.
rights acquired under notice may be waived, 271.
Service of notice, 272–276.
personal service unnecessary, 272.
delivering copy to person on premises, 272.
rule in England, 273.
delivering copy to agent off premises, 273.
mailing notice to tenant, 274.
posting notice in public places, 275.
proof of service, 276.
Statutory provisions, 277–317.
Alaska, 277.
Arizona, 278.
Arkansas, 279.
California, 280.
Colorado, 281.
Connecticut, 282.
Delaware, 283.
District of Columbia, 284.
Georgia, 285.
Idaho, 286.
Illinois, 287.
Indiana, 288.
Iowa, 289.
Kansas, 290.
Kentucky, 291.
Louisiana, 292.

[*References are to Sections.*]

NOTICE TO QUIT—*Continued.*
Maine, 293.
Maryland, 294.
Massachusetts, 295.
Michigan, 296.
Minnesota, 297.
Mississippi, 298.
Missouri, 299.
Montana, 300.
Nevada, 301.
New Hampshire, 302.
New Jersey, 303.
New York, 304.
North Carolina, 305.
North Dakota, 306.
Ohio, 307.
Oregon, 308.
Oklahoma Territory, 309.
Pennsylvania, 310.
Rhode Island, 311.
South Carolina, 312.
South Dakota, 313.
Virginia, 314.
Washington, 315.
West Virginia, 316.
Wisconsin, 317.

NUISANCE ON ADJOINING PREMISES,
as eviction, 360.

NUISANCE ON LEASED PREMISES,
primary liability for rests on occupier, 599.
"occupier" defined, 599.
landlord liable when, 599.
statement of general rule, 599.
effect of technical outstanding title, 599.
injuries on abutting sidewalks, 600.
defective scuttle or coal hole, 600.
general supervision a basis of liability, 600.
injuries from falling articles, 601.
capstone, window-blind, awning, 601.
falling snow and ice, 602.
general supervision retained by lessor, 602.
landlord and tenant both responsible when, 603.
necessity for request to abate nuisance, 604.
lessor is not liable when, 605.
improper use does not make lessor liable, 606.
lessor is liable when, 607.
injuries on public wharves, 608.

[*References are to Sections.*]

NUISANCE ON LEASED PREMISES—*Continued.*
collapse of building, 609.
statutory nuisances, 610.
no criminal liability on lessor, 610.
what constitutes a reletting of premises, 611.

O

OCCUPIER,
defined, 599.

OHIO,
acknowledgment of lease necessary, 72.
testamentary law as to permanent leaseholds, 171.
rule as to notice affected by origin of yearly tenancy, 252.
statutory provision as to notice to quit, 307.
right of assignee to sue for rent, 658.
abatement of rent under statute, 681.

OKLAHOMA,
statute as to yearly tenancies, 246.
statute as to notice to quit, 309.
forfeiture for non-payment of rent, 529.

ORDINANCE,
forbidding wooden buildings, 399.

OREGON,
statute as to notice to quit, 308.
forfeiture for non-payment of rent, 529.

P

PAROL AGREEMENTS,
See AGREEMENTS COLLATERAL TO LEASE.

PAROL EVIDENCE,
not admissible to vary written lease, 130.
to show lease was an assignment, 132.

PAROL LEASE,
not absolutely void, 148.
exception of, for short term from statute of frauds, 148.
requirements as to value of rent reserved, 149.
extent of validity of, for short term, 153.
doctrine of South Carolina and Maryland, 153.
duration of term of, 154.
renewal agreement as part of, 154.
whether void only as to excess, 155.
ratification, 156.
parol agreement to lease distinguished from, 162.
tenancy at will created by entry and occupation under, 180.

[*References are to Sections.*]

PAROL LEASE—*Continued.*
governs terms of holding, 199.
occupant liable for rent reserved in, 199.
action to recover rent on, use and occupation, 200.
effective to give term definite end, 217.
can be assigned by parol, 441.

PARTIES TO LEASES,
general question of authority and capacity, 84.
ownership in fee unnecessary, 84.
joint lease by owners in severalty, 84.
estoppels distinguished, 84.
persons disseised and dispossessed, 85.
what constitutes adverse holding, 85.
California code provision, 85.
tenant in common, 86.
partners, 86.
married women, 87.
separte property, 87.
Mississippi code provision, 87.
Maine act, 87.
Indiana statute, 87.
holder of dower or curtesy, 87.
husband, 88.
community lands, 88.
guardians, 89, 90.
trustees, 91.
infants, 92, 95, 96.
executors and administrators, 93.
mortgagor and mortgagee, 94.

PARTNERS,
authority to lease partnership land, 86.
execution of covenants by, 320.

PART PERFORMANCE,
renders parol lease valid, 159.
distinction between law and equity, 159.
what constitutes, 159.
acts must refer to agreement, 160.
delivery of possession, 160.
making valuable improvements, 160.
part payment, 160.
Alabama statute, 161.
of assignment, 151, 441.

PASSAGEWAYS,
duty of landlord as to common, in tenement, 614, 615.
defective carpeting in, 621.

[*References are to Sections.*]

PENNSYLVANIA,
statute as to notice to quit, 310.
forfeiture for non-payment of rent, 530.

PERPETUITIES,
rule against, puts no limits on lease, 111.

PERSONAL INJURIES,
from defects in leased premises, 576.
assumption of risk, 576.
rule of *caveat emptor* applies when, 579.
fraud as a basis of liability, 580.
concealed defects not discoverable on examination, 581.
Minnesota statute, 581.
landlord's duty to learn of defects, 582.
duty to warn against infection, 584.
rights of guests of the tenant, 585.
Georgia statute, 587.

PERSONAL PROPERTY,
letting of, for a term, 10.
joint lease of real and personal property, 10.
apportionment of rent in case of destruction, 10, 669.

POSSESSION OF LEASED PREMISES,
transfer of, does not change agreement into lease, 146.
valid as evidence showing actual demise, 146.
shows waiver of formal lease, 146.
covenant of assignor to deliver, 427.
covenant to deliver, not apportioned, 460.
duty of tenant to restore at end of term, 554.
covenants to deliver up possession, 554.
duty to remove sub-tenants, 554.
retained by agreement for short time after end of term, 555.
does not become adverse, 555.
what constitutes continued occupation, 555.
duty to return keys, 555.
effect of leaving improvements on premises, 555.
failure to pay for improvements does not justify continued possession, 555.
continuing to hold possession as mortgagee, 555.
landlord's right to regain by force, 556.
forcible entry defined, 557.
civil liability of landlord for use of force, 558.
trespass for assault and battery against landlord, 559.
forcible invasion of tenants legal possession, 560.
statutory remedy exclusive one in some states, 361.
Actions relative to possession, 640–647.
actual or constructive possession necessary to support trespass, 640.
trespass on the case without possession, 641.
right of action as between landlord and tenant, 642.

[*References are to Sections.*]

POSSESSION OF LEASED PREMISES—*Continued.*
taking on eminent domain, 643.
extent of reversioner's interest to appear in pleading, 644.
injury to growing crop, 645.
tenants at will and by sufferance, 646.
trespass by landlord against tenant, 647.
by tenant against landlord, 647.

POSTING,
notice to quit in public places, 275.

POWER OF ATTORNEY,
to confess judgment for rent, 664.

PROSTITUTION,
leasing premises for purpose of, 122.
a statutory offense in Illinois, 122.
liability of guardian, 122.
use of adjoining tenement for purpose of, 360.

PUBLIC ENEMIES,
liability for rent after destruction by 675, 678.

PURCHASER IN POSSESSION,
is not a tenant, 29.
remedies of vendor, 29.
entry under parol contract to purchase, 29.
under contract absolutely void, 29.
right to possession similar to that of tenant at will, 30.
relation of parties after default in contract, 30.
tenant buying premises ceases to be tenant, 31.
assignment by vendor creates no new tenancy, 31.
vendee in possession entitled to emblements, 32.
vendor continuing in possession is not tenant, 33.
character of occupation determined by condition subsequent, 34.
proof of change in relationship, 35.
becomes tenant at sufferance after default, 224.

Q

QUIET ENJOYMENT,
covenants for, see COVENANTS.

R

"RAILROAD PURPOSES,"
means public purposes, 114.

RATIFICATION,
of agreement reducing rent, 135.
of lease by agent, 157.

[*References are to Sections.*]

RECEIVER,
in possession of leased premises not an assignee, 443.
estoppel to deny title of, 683.

RECORDING LEASES,
statutory provisions, 163.
New Jersey rule, 163.
Louisiana doctrine, 163.
unrecorded lease not valid except as to excess, 163.
requirement of possession under unrecorded lease, 163.
lease of growing trees, 163.
validity of unrecorded instruments, 164.
good between parties and purchasers with notice, 164.
Maryland rule, 164.
transfer of possession as a substitute, 164.
place of record, 165.
record of sub-lease, 166.
computing length of term, 167.
recording assignment, 438, 456.

RECOUPMENT,
See SET-OFF AND RECOUPMENT.

REFORMATION,
of lease, allowed when, 70.
loss of right by *laches*, 70.
third persons affected with knowledge, 70.

"RELET,"
meaning of term defined, 69a.
what constitutes reletting in periodical tenancy, 611.

RENEWAL OF LEASE,
a valid and usual privilege, 336.
lease for one year continued from year to year, 336.
distinction between renewal and extension, 337.
necessity for new lease, 338.
renewal notice required before end of original term, 339.
no notice necessary in case of extension, 340.
compliance with provisions as to notice, 340, 342.
effect of holding over, 340.
payment of rent as evidence of extension, 340.
right of lessor to call for election, 341.
effect of statement of intention by tenant, 341.
sufficiency of terms of covenant, 343.
perpetual renewal not ordinarily implied, 343.
not applicable to subdivisions of leasehold, 344.
parties bound and parties entitled, 345.
fixing rent in renewal lease by arbitration, 346.
conditional covenant to renew, 347.
happening of contingency, 348.

[*References are to Sections.*]

RENEWAL OF LEASE—*Continued.*
assignment of right to renew, 431.
effect of, on right to remove fixtures, 718.
right of removal under agreement not lost by, 720, 721.

RENT,
reservation of not essential to tenancy, 6.
payment of, as proof of tenancy, 12.
recoverable from tenant at will after sale, 189.
when due under year to year tenancy, 195.
occupant under invalid lease liable for, 199.
form of action is use and occupation, 200.
acceptance of, implies assent to holding over, 204.
change in amount on holding over, 213.
penalty of double rent, 214.
Non-payment of rent as ground for forfeiture, 502–505.
special provision necessary at common law, 502.
sufficiency of distress on premises, 502.
necessity for a demand, 503.
time and place of demand, 503.
amount to be demanded, 503.
no technical form for demand, 503.
demand need not precede action for use and occupation, 503.
sufficiency of demand by assignee, 503.
express stipulation dispensing with demand, 504.
what constitutes such a stipulation, 504.
damages from trespass by landlord not a set-off, 505.
payment of rent in labor or materials, 505.
Statutory provisions for forfeiture on non-payment.
Arizona, 506.
Arkansas, 507.
California, 508.
Colorado, 509.
Connecticut, 510.
Florida, 511.
Georgia, 512.
Illinois, 513.
Indiana, 514.
Iowa, 515.
Kansas, 516
Massachusetts, 517.
Michigan, 518.
Minnesota, 519.
Mississippi, 520.
Missouri, 521.
Nebraska, 522.
New Hampshire, 523.
New Jersey, 524.
New York, 525.

[*References are to Sections.*]

RENT—*Continued.*
North Carolina, 526.
North Dakota, 527.
Oklahoma, 529.
Oregon, 528.
Pennsylvania, 530.
Rhode Island, 531.
South Carolina, 532.
Vermont, 533.
Virginia, 534.
West Virginia, 535.
Wisconsin, 536.
Wyoming, 537.
Nature of rent, 648–649.
rent defined, 648.
kinds of rent, 648.
fee farm rent, 649.
condition for forfeiture for non-payment of rent not repugnant to grant, 649.
Actions to recover rent, 650–666.
remedy of distress, 650.
debt for rent maintainable when, 650.
debt for *reasonable* value, 650.
origin of indebitatus assumpsit for use and occupation, 650.
nature of action, 651.
trespass for mesne profits, 651, 653.
use and occupation will not lie for a tortious entry, 651.
action for money had and received lies against trespasser in certain cases, 651.
void lease proper to show value of rent, 651.
use and occupation limited to agreements not under seal, 652.
contrary rule in Michigan, 652.
relation of landlord and tenant necessary to support use and occupation, 654.
implication of tenancy from circumstances may be rebutted, 655.
what is sufficient to rebut implication, 655.
cestui que trust cannot maintain use and occupation, 655.
recovery of crop rent by action at law, 656.
crops belong to year when they are harvested, 656.
North Carolina statute as to division, 656.
liability of tenant in common to use and occupation, 657.
indebitatus assumpsit in place of account, 657.
right of tenant in common to sue for rent, 657.
who are entitled to sue for rent, 658.
Ohio doctrine, 658.
liability of sub-tenant for rent, 659.
rights and liabilities of undisclosed principal, 660.
Illinois statute as to form of action, 660.
no debt arises till time for paying rent, 661.

[*References are to Sections.*]

RENT—*Continued.*
special assumpsit on express agreement, 661.
entry necessary to sustain use and occupation, 661.
rent not due till end of term, 661.
agreements as to time for payment construed, 661.
rent payable on a holiday, 661.
tenant has entire day to pay rent, 661.
contracts of suretyship for rent, 662.
no tenancy between surety and lessor, 662.
discharge of surety by *laches*, 662.
extent of surety's obligation, 662.
acceptance of services in lieu of money, 663.
of crop rent in lieu of cash rent, 663.
erroneous and conflicting reversations of rent, 663.
agreements for reducing rent, 663.
power of attorney to confess judgment for rent, 664.
when premises are put to illegal use, 664.
defenses against actions for rent, 665.
Illinois statute as to want of consideration, 665.
Recovery of interest on rent, 666.
not included in distress, 666.
Virginia doctrine, 666.
statutes in Illinois and Kentucky, 666.
rents and profits due mortgagor bear interest when, 666.
Apportionment of rent, 667–671.
general rule, 667.
no redress for lessor ending tenancy before rent day, 667.
tenancy ended by entry of mortgagee, 667.
tenancy at will ended by transfer, 667.
apportionment is for benefit of owners of rent, 667.
on sale of part of reversion, 668.
on death of lessor, 668.
wrong doer cannot claim benefit of apportionment, 668.
transfer of undivided interest, 668.
transferee may sue in covenant, 668.
jury the proper tribunal to make, 668.
transfer by lessee as occasion for, 669.
surrender of part by lessee, 669.
eviction by title paramount, 669.
value not quantity the basis for apportionment, 669.
possessory right not actual possession the basis, 669.
lease covering land and chattels, 669.
past due rent never apportioned, 670.
not discharged by quitclaim deed, 670.
obligation to pay rent not apportioned, 670.
leases granted by life tenant, 670.
California statute against double liability, 670.
notice to tenant of transfer, 670.
South Dakota statute as to mortgage foreclosure, 670.
statutory provisions as to apportionment, 671.

[*References are to Sections.*]

RENT—*Continued.*
Set-off and recoupment, 672–674.
cost of repairs to be paid for by landlord, 672.
measure of damage for failure to repair, 672.
California statute as to repairs, 672.
for failure to build according to specifications, 672.
right to abandon not co-extensive with recoupment, 673.
election to treat covenants as independent, 673.
waiver of right to insist on repairs, 673.
recoupment distinguished from set-off, 673.
misrepresentation as a basis for recoupment, 674.
landlord not an insurer, 674.
Abatement of rent, 675–681.
destruction by fire no ground for, 675.
origin and basis of rule, 675.
effect of seal, 675.
injury by tempest and flood, 675.
failure of water supply, 675.
acts of landlord after destruction, 675.
destruction prior to commencement of term, 675.
application of insurance money after fire, 676.
Kansas doctrine as to, 676.
lessor's building covenant not revived by destruction, 676.
destruction of entire subject matter abates rent, 677.
when interest in land passes to lessee, 677.
voluntary advance payment of rent, 677.
exception to general rule not recognized in Kentucky, 677.
Nebraska doctrine as to continued liability for rent after destruction, 678.
destruction by public enemies, 678.
agreements for abatement in case of destruction, 679.
lease not terminated by, 679.
trifling injuries disregarded, 679.
election to disregard injuries, 679.
what constitutes a "casualty," 679.
lessor's covenant to repair does not abate rent, 679.
taking on eminent domain, 680.
tearing down dangerous building, 680.
statutory modifications of common-law rule, 681.

REPAIRS,
Covenant by lessee to make, 391–403.
regarded as usual covenant in lease, 391.
sufficiency of oral undertaking, 391.
extent of liability under, 391.
sub-tenant's covenant to repair, 391.
binds lessee to repair inevitable accident, 392.
basis of such liability, 392, 393.
express qualifications of liability, 392.

[References are to Sections.]

REPAIRS—*Continued.*
liability affected by form of covenant, 392, 393.
agreement to deliver in good order and condition, 393.
Mississippi code provison, 393.
liability affected by nature of property, 393.
"unavoidable casualty" defined, 394.
negligence of tenant a question for jury, 394.
"damage by the elements" defined, 395.
"external parts" of premises defined, 396.
covenant refers to condition of premises at time of letting, 397, 402.
lessee to rebuild after condemnation by authorities, 397.
extent of repairs required by covenant, 397.
"habitable" defined, 397.
"necessary repairs" defined, 397.
lessee has no claim on insurance, 398.
effect of ordinance forbidding wooden buildings, 399.
duty to maintain machinery, 400.
painting, papering and decorating, 401.
right of action for failure to return in good condition accrues when, 403.
what constitutes a continuing covenant to repair, 403.
Obligation on landlord to make repairs, 404–410, 588–589.
express contract necessary to create obligation, 404, 588.
what amounts to an agreement to repair, 404, 589.
effect of voluntary repairs by landlord, 404, 590.
insurance money need not be used in rebuilding, 405.
right of landlord to enter after destruction, 405.
California statute as to repairs, 406.
statutory provisions in the Dakotas, 407.
extent of obligation under covenant to repair, 408.
under covenant to make outside repairs, 408.
notice to landlord of lack of repair, 409.
when lack of repair is visible, 409.
remedies of tenant for breach of covenant to repair, 410.
measure of damages for breach, 410.
Liability imposed by lessor's agreement to repair, 588–595.
no duty to repair in absence of agreement, 588.
clear language necessary to create obligation, 589.
extent of statutory duty to repair fire escapes, 589.
payment by landlord for repairs made by tenant, 590.
voluntary promise to pay for repairs, 590.
no duty to repair inevitable accidents, 590.
exempting lessee does not bind lessor, 591.
landlord's liability rests on breach of contract, 592.
measure of damages recoverable, 592.
damages for personal injuries are too remote, 592.
no recovery in tort allowed, 592.
notice to landlord of need of repairs, 593.
tenant's contributory negligence protects landlord, 594.
rights conferred on third persons by such agreement, 595.

[*References are to Sections.*]

REPAIRS—*Continued.*
Liability for unsafe repairs, 596–598.
when made by landlord in person, 596.
by agent or independent contractor, 597.
non-performance of voluntary promise to repair, 598.
See also, DEFECTS IN DEMISED PREMISES, and FITNESS.

REVERSION,
transferred by deed, 424.
rent excepted from grant of, 425.
injury to, entitles lessor to sue for damages, 641, 644.
year to year tenancy not affected by transfer of, 195.
month to month tenancy not affected by transfer of, 219.

RESERVATIONS AND EXCEPTIONS,
in leases, 63.
thing specifically granted cannot be excepted, 63.
public roads and lots designated by number, 63.
validity of reservation, 110.
takes effect as condition subsequent, 110.

RHODE ISLAND,
tenancy by sufferance how created, 225.
doctrine as to tenancy by sufferance, 230.
doctrine as to yearly tenancies, 247.
statute as to notice to quit, 311.
forfeiture for non-payment of rent, 531.

RIGHT OF WAY,
constitutes an easement, 39.
covenant for, 319.

RIPARIAN BOUNDARIES,
of leasehold property, 109.
right to accretions, 109.

ROYALTY,
covenant for, 319.

RUNNING OF COVENANTS,
See COVENANTS.

S

SALE OF LEASED PREMISES,
under provision in lease, 114, 387.
time for exercise of privilege, 387.
right to end term by sale, 388.
right of lessee to quit on sale, 388.
bona fides required, 388.
ordinary effect of sale, 427.

[*References are to Sections.*]

SALE OF LEASED PREMISES—*Continued.*
on execution operates as assignment, 422, 444, 703.
return of officer, sufficient memorandum, 444.
passes subject to equities, 444.
on foreclosure of mortgage, 444.
decree of sale on lien judgment, 444.
chancery decree for sale, 444.
on credit, not an assignable right, 454.
to lessee ends condition against subletting, 464.
effect of sale of leasehold on execution, 422, 703.
on execution not a breach of condition not to assign, 466.
of leasehold on partition, 428.
decree of, on lien judgment, 444.
covenant as to, of premises valid and enforceable, 387.
nature of such obligation, 387.
time of cunsummation of sale, 387.
right to end term by sale, 388.
of lessee to quit on sale, 388.
bona fide sale required, 388.
covenant to sell to lessee passes to assignee, 454.
See also ASSIGNMENT.

SALT WELLS,
no implied covenant as to capacity, 574.

SCENIC RAILWAY,
removable as fixture, 725.

SEAL,
necessary on lease when, 74.
Delaware statute, 74.
by joint covenantors, 320.
necessary on assignment when, 439.

SERVANT,
occupying master's house is not tenant, 20.
relation of parties after termination of employment, 20.
may be tenant of his master, 21.
as tenant at will on contingency, 170.

SERVICES,
of laborer paid for by part of crop, 49.
accepted in place of money rent, 663.

SET-OFF AND RECOUPMENT,
cost of repairs, 672.
measure of damage for failure to repair, 672.
California statute as to repairs, 672.
for failure to build according to specifications, 672.
right to abandon not co-extensive with recoupment, 673.
waiver of right to insist on repairs, 673.

[*References are to Sections.*]

SET-OFF AND RECOUPMENT—*Continued.*
recoupment distinguished from set-off, 673.
misrepresentation as a basis for recoupment, 674.
landlord not an insurer, 674.

SHARES, LETTING ON,
See CROP RENTS AND CROPPING CONTRACTS.

SIDEWALKS,
liability for injuries occurring on, 600–602.

SIGNATURE,
of lessor to lease necessary, 75.
leases drawn in duplicate, 75.
errors in signature, 76.
of lessee not necessary, 77.
indenture taking effect as deed poll for lack of, by lessee, 78.
form of action on unsigned lease, 80.

SIGNS,
on a wall not a leasing, 40.
lessee's right to place, on outside wall, 108.
placing, on walls not a subletting, 468.

SNOW AND ICE,
falling on traveller along highway, 602.
on roof of tenement, 603.
on steps of tenement, 619.

SOUTH CAROLINA,
statute as to yearly tenancies, 248.
statute as to notice to quit, 312.
forfeiture for non-payment of rent, 532.

SOUTH DAKOTA,
statute as to notice to quit, 313.
statutory liability of landlord to repair, 407.
statute as to rent after mortgage sale, 670.

SPECIFIC PERFORMANCE,
See EQUITY.

SUBJECT MATTER,
capable of demise, 9.
right to fish and to cut ice, 9.
timber grass and berries, 9.
franchise and public rights, 9.
right to flow land, 9.
where chattels are let for a term, 10.
no lease of dower or curtesy, 87.
destruction of, abates rent, 677.

[*References are to Sections.*]

SUB-LEASE,
record of, 166.
effective to give notice when, 166.
how affected by assignment of reversion, 425.
effect of merger on, 429.

SUB-LETTING,
not ground for entry by landlord, 431.
for full term an assignment, 446.
taking effect as both under lease and assignment, 446.
sub-tenant bound to know terms of original lease, 456.
Conditions against sub-letting, 464–473.
not usual covenant in lease, 464.
construction of such provisions, 464.
enforced by injunction, 464.
sale to lessee terminates, 464.
entry upon sub-tenant, 464.
value of term depends upon assignability, 464.
not broken by transfer by operation of law, 466.
sale on execution, 466.
bankruptcy and insolvency, 466.
general assignments, 466.
not a breach of covenant not to assign, 467.
what language forbids sub-letting, 467.
what constitutes a sub-letting, 468.
grant of license not a breach, 468.
advertising sign, 468.
provision not "to sub-let the whole or assign," 468.
joint lessee as assignee, 468.
servant in charge, 468.
marriage of lessee as breach of covenant, 468.
change in business relations, 469.
rule in Dumpor's case, 470, 471.
special license to assign or sub-let, 472.
estoppel in favor of sub-tenant, 473.
mere tolerance of a sub-letting, 473.
not a continuing act of forfeiture, 501.

SUB-TENANTS,
covenant by, to repair, 391.
effect of merger upon, 429.
liability of, on covenants in lease, 429.
English statute covering such cases, 429.
distinguished from assignee, 445.
insolvency of original lessee, 445.
entry upon, for breach of condition against sub-letting, 464.
acts of, as ground for forfeiture, 489.
statutory forfeiture for illegal acts by, 489.
duty of lessee to remove, at end of term, 554.
liability of, for rent, 659.

[*References are to Sections.*]

SUFFERANCE,
See TENANCY BY SUFFERANCE.

SUMMARY PROCESS,
distinguished from forcible entry and detainer, 562.
title to property cannot be litigated in, 563.
form of judgment in, 566.

SUNDAY,
leases executed on, 61.
validity of renewal contract made on, 267.
rent falling due on Sunday, 661.

SURETY,
lessee becomes, for assignee, 449.
for lessee not discharged by assignment, 453.
contract of, does not run with land, 333.
contract of, must be based on consideration, 662.
no tenancy between surety and lessor, 662.
discharge of surety by laches, 662.
extent of surety's obligation, 662.

SURRENDER,
is yielding up of particular estate to estate in reversion, 538.
writing required by statute of frauds, 538.
seal not required for valid surrender, 538.
oral agreement executed is valid, 538.
term created by parol may be surrendered by parol, 538.
by express words or implied from conduct, 539.
mere abandonment not a surrender, 539.
duty of landlord to relet after abandonment, 539.
effected by executed agreement, 540.
landlord's resumption of abandoned premises, 540.
what constitutes transfer of possession, 540.
cancellation and destruction of lease, 541.
substitution of a new lease, 542.
parol lease substituted for written one, 542.
acceptance of rent directly from under-tenant, 543.
second lease to another person, 543.
agreement may be implied, 543.
reversionary interest as subject-matter of surrender, 544.
effect of change in terms of existing lease, 545.
leases *in futuro* not capable of surrender, 546.
contrary doctrine in Illinois, 546.
abandonment and reëntry by tenant, 547.
landlord's right to gather abandoned crops, 547.
effect of death of tenant, 547.
acceptance of key by landlord, 548.
repairs on abandoned premises by landlord, 548, 549.
reletting by landlord after abandonment, 549.
notice of continued liability to tenant, 550.

[*References are to Sections.*]

SURRENDER—*Continued.*
evidence of intention to hold tenant, 550.
consent of tenant to reletting implied, 551.
right of sub-tenant not divested by surrender, 552.
jury to decide about agreements for surrender, 553.

T

TAXES AND ASSESSMENTS,
covenant to pay, runs with land, 411.
lessee paying may recover from assignee, 411.
enforcement of covenant by grantee of reversion, 411.
form of the covenant, 411.
not paid as part of rent, 411.
liability for, in absence of agreement, 412.
new buildings erected by tenant, 412.
exempt property, 412.
statutory duty of tenant to pay, 413.
recovery back of money so paid, 413.
how affected by special agreement, 413.
responsibility of life tenant, 413.
water rate not a tax or assessment, 414.
landlord not bound to pay water rates, 414.
implication of agreement to pay water rate, 414.
tenant's covenant to pay water rate, 414.
construction of covenant to pay taxes, 415.
special assessments included when, 415.
license fee for lessor not payable by lessee, 415.
apportionment of taxes, 416.
levy distinguished from assessment, 417.
liability for taxes not payable till end of term, 417.
taxable year defined, 317.
invalid taxes not included in covenant, 318.
convenantor not released by destruction of premises, 419.
what constitutes a breach of such covenant, 420.
prior payment by lessor before suit not necessary, 420.
necessity for demand, 420.
damages for breach of covenant, 420.
assignee's liability for, 455.
life tenant's failure to pay, constitutes waste, 637.
purchase of premises sold for, 690, 703.
attornment to holder of tax title, 709.
Arkansas doctrine, 690.
Kansas and Missouri doctrine, 690.

TEMPEST,
injury by does not abate rent, 675.

[*References are to Sections.*]

TENANCY,
created by contract, 1.
definitions, 1.
occupation must be adverse, 2.
adverse holding changed to tenancy, 2.
injunction bond creating quasi tenancy, 2.
lawful occupancy raises what inference of, 3.
rebuttal of such inference, 3.
trustee holding land not a tenant, 3.
absence of intention to create, rebuts presumption, 3.
award of arbitrators cannot create, 4.
formal letting, hiring or leasing not necessary, 5.
present letting or agreement for future lease, 5.
reservation of rent not essential, 6.
validity of landlord's title not material, 7.
taking on eminent domain does not create, 7.
fiduciary relation of tenant, 8.
Proof of tenancy, 11–14.
a question of fact to be proved by parol, 11.
production of lease as proof, 11.
payment of rent proves what, 12.
occupation under executed lease presumed, 12.
entry and occupation of lessee, 13.
province of court and jury, 14.
drawing inferences from agreed facts, 14.
Similar contractual relations, 18–28.
contract for use of land does not necessarily create tenancy, 18.
intention of parties is the test, 18.
statutory remedies dependent on technical relation of landlord and tenant, 19.
remedy allowed against tenant at sufferance, 19.
servant occupying master's house does not become his tenant, 20.
relation of parties after termination of employment, 20.
servant may be tenant to his master, 21.
right of servant to emblements, 21.
independent contractor becomes tenant when, 22.
mill operating contracts create tenancy when, 22.
lodger does not become a tenant, 23.
distinction between lodger and tenant, 23.
contract for lodging not within statute of frauds, 24.
separate rooms in house may be demised, 24.
mortgagor in possession is not a tenant, 25.
entry by mortgagee on tenant of mortgagor, 25.
contracts for mortgage or for letting, 26.
suit to redeem rebuts presumption of tenancy, 26.
mortgagee in possession not a tenant of mortgagor, 27.
tenancy between joint owners, 28.
Purchaser in possession, 29–35.
occupant under contract of purchase not a tenant, 29.

[*References are to Sections.*]

TENANCY—*Continued.*
remedies of vendor, 29.
entry under parol contract to purchase, 29.
rule *contra* under absolutely void contract, 29.
purchaser's right to possession similar to that of tenant at will, 30.
relation of parties after default in contract, 30.
agreement regulating purchaser's right of possession, 30.
tenant buying premises ceases to be tenant, 31.
assignment by vendor creates no new tenancy, 31.
relations between parties changed by agreement, 31.
vendee in possession entitled to emblements, 32.
vendor continuing in possession is not a tenant, 33.
character of occupation determined by condition subsequent, 34.
proof of change in relationship, 35.
Tenancy or grant of license, 37–45. (See LICENSE.)
Tenancy or cropping contract, 46–56. (See CROPPING CONTRACTS.)

TENANCY FROM MONTH TO MONTH,
rests on payment of monthly rent, 215.
real unit is rent period, 215.
periodic tenancy for quarterly period, 215.
created by express agreement, 216.
holding over after occupation at monthly rent, 216.
Oregon doctrine, 216.
occupation for indefinite time at monthly rent, 216.
termination rendered definite by void lease, 217.
yearly rent payable in monthly installments, 218.
change from monthly to quarterly periods, 218.
not a continuing right of possession, 219.
effect of transfering reversion, 219.

TENANCY BY SUFFERANCE,
general nature of holding, 220.
arises on holding over, 19, 221.
lessee of life tenant after end of life estate, 221.
widow having dower interest, 221.
easement taken by power of eminent domain, 221.
no prior contract of letting necessary, 222.
mortgagor holding after under mortgage, 223.
purchaser in possession making default, 224.
none after occupation vested by operation of law, 225.
exceptional doctrine in Rhode Island, 225.
holding over by divorced wife, 225.
rights of tenant at sufferance, 226.
liability for loss by fire, 226.
recovery for taking on eminent domain, 226.
use and occupation not allowed, 227.
Massachusetts statute, 227.
notice to tenant necessary, 227.
right of entry by landlord, 228.

[*References are to Sections.*]

TENANCY BY SUFFERANCE—*Continued.*
tenant cannot maintain trespass, 228.
plea of *liberum tenementum*, 228.
technical meaning discarded by some courts, 229.
Wisconsin doctrine, 229.
New York statute, 229.
use of term in statutes, 230.
Michigan statute, 230.
Massachusetts statute, 230.
Rhode Island statute, 230.

TENANCY AT WILL,
determined by a conditional limitation, 114.
created by grant and contract, 174.
how distinguished from other holdings, 174.
occupation for indefinite time without rent, 175.
parol gift of land, 176.
landowner must consent to holding, 177.
purchaser in possession not tenant at will, 178.
implication from permissive occupation, 178.
grantor continuing in possession, 178.
confers a complete and unqualified possession, 179.
entry and occupation under void parol lease, 180.
unauthorized lease not binding on true owner, 181.
effect of exceeding authority, 181.
determination of holding, 182.
no notice required at common law, 182.
some act necessary to end holding, 183.
death of parties, 184.
destruction of subject matter, 184.
question of reasonable notice, 185.
alienation by either party defeats estate, 186.
mode and purpose of transfer immaterial, 187.
notice of transfer necessary, 188.
recovery of rent after alienation, 189.
Massachusetts statute, 189.
estate at will not capable of bargain and sale, 190.
sale voidable only at election of landlord, 190.
effect of involuntary transfer of the same, 190.
notice to landlord of sale, 191.
expression "tenant at will from year to year," 194.
statutory modifications, 196.
changed to yearly holding by payment of rent, 197.

TENANCY FOR YEARS,
a chattel interest, 168.
must be definite in duration, 168.
may be for less than a year, 168.
whether term is for years or from year to year, 168, 169.
a mere estate at will if of uncertain duration, 170.

[*References are to Sections.*]

TENANCY FOR YEARS—*Continued.*
occupation of servant, 170.
chattel real passes to administrator, 171.
no lien for purchase money, 171.
nature of estate unaffected by length of term, 171.
Ohio doctrine, 171.
sale of leasehold on execution, 172.
no curtesy or dower in leasehold, 173.
no right to emblements, 569.
local custom changing rule, 569.

TENANCY FROM YEAR TO YEAR,
rests on judicial authority, 192.
origin and development of such holdings, 192.
doctrine applicable to conditions in this country, 193.
expression "tenant at will from year to year," 194.
compared to estate for years, 195.
effect of conveyance of reversion, 195.
rent falls due at end of year, 195.
statutory modifications, 196.
payment of rent converts estate at will into yearly holding, 197.
rent referable to aliquot part of year, 197.
effect of payment in gross, 197.
receipt of rent may be explained, 198.
invalid parol lease governs terms of holding, 199.
time when yearly holding begins, 199.
rent recovered in action of use and occupation, 200.
created by holding over, 201.
landlord's right to charge tenant, 201.
new tenancy not under original lease, 201.
holding over is on same terms, 202.
conditional limitation applicable, 202.
tenant cannot create different tenancy, 202.
landlord's option to charge tenant for another year, 203.
acceptance of rent implies assent, 204.
overt acts not necessary to indicate assent, 205.
effect of dissent on part of tenant, 206.
rule in England, 207.
followed in Massachusetts and Missouri, 207.
surrender rendered impossible by act of God, 208.
length of holding over necessary to charge tenant, 209.
where landlord is responsible for holding over, 209.
Kentucky statute, 209.
rebutting presumption of year to year tenancy, 210.
invalid new agreement, 210.
covenant in lease as to holding over, 211.
express renewal of lease, 212.
treaty for new lease, 212.
effect of changes in amount of rent, 213.

[*References are to Sections.*]

TENANCY FROM YEAR TO YEAR—*Continued.*
provision for penalty of double rent, 214.
holding on yearly tenancy may be assigned, 431.
Statutory provisions, 231–250.
California, 231.
Connecticut, 232.
District of Columbia, 233.
Delaware, 234.
Georgia, 235.
Indiana, 236.
Iowa, 237.
Kentucky, 238.
Maine, 239.
Massachusetts, 240.
Michigan, 241.
Missouri, 242.
Nevada, 243.
New Hampshire, 244.
New York, 245.
Oklahoma Territory, 246.
Rhode Island, 247.
South Carolina, 248.
Washington, 249.
Wyoming, 250.
yearly tenant not entitled to emblements, 569.

TENANTS IN COMMON,
when tenancy exists between, 28.
one cannot lease community land, 86.
right to change amount of rent, 86.
partnership between tenants in common, 86.
notice to quit by joint owners, 269.
liability to co-tenant for rent, 657.
indebitatus assumpsit allowed when, 657.
right of one, to sue for rent, 657.

TENEMENT HOUSES,
no obligation to keep roof in repair, 612.
application of maxim *sic utere tuo*, 612.
landlord's duty as to side walls, 613.
common passageways, 614, 615.
water flowing from a closet, 616.
to whom duty extends, 617, 618.
reasonable care only required, 619.
place where accident occurs, 620.
defective carpeting of passageways, 621.
liability for negligent repairs, 622.
negligence of janitor, 623.
tenant's duty to use due care, 624.

[*References are to Sections.*]

TERM,
may be for years, for life, or for perpetual duration, 111.
rule against perpetuities, 111.
limitations in Alabama, 111.
agricultural land in New York, 111.
not ended by death, 111.
of lease for years must be certain, 112.
determined by matter *ex post facto*, 112.
commencing at an indefinite future time, 113.
contingent limitation of, 114.
or of tenancy at will, 114.
happening of contingency, 115.
condition and contingent limitation distinguished, 115.
"life of building" defined, 115.
for tenant's life, 116.
for several lives, 116.
errors in calculating length of term, 117.
separate parcels covered by a single lease, 118.
word "from" either exclusive or inclusive, 119.
statute of frauds sets what limits on, 154.
recording statutes apply to what length of, 167.

TERMINATION OF LEASES,
introductory, 474.
destruction of subject matter, 474.
"express stipulation" terminating lease, 474.
Repudiation of relation by tenant, 474a–481.
hostile claim of title, 474a.
acts of disclaimer open, continued, and notorious, 474a.
sufficiency of disclaimer, 475.
attornment or delivery of possession to stranger, 476.
conveyance by tenant a disclaimer when, 477.
forfeiture by matter of record, 478.
forfeiture by deed recorded, 479.
payment of rent as act of disclaimer, 480.
mere words never work forfeiture, 481.
By forfeiture for breach of condition. See FORFEITURE.
For non-payment of rent. See RENT.
By surrender. See SURRENDER.
By merger. See MERGER.
Duty to restore possession. See RESTORATION OF POSSESSION.
Right to emblements. See EMBLEMENTS.
See also NOTICE TO QUIT.

TEXAS,
statute against assignment, 434.

THEATER,
ticket a mere license, 44.

[*References are to Sections.*]

THIRD PARTIES, RIGHT OF ACTION AGAINST,
lessor out of possession cannot bring trespass, 640.
tenant may maintain trespass, 640.
action of case for injury to freehold maintainable, 641.
what constitutes injury to the freehold, 641.
owner of local right entitled to action for invasion of it, 642.
action to abate nuisance, 642.
"party aggrieved" in statute defined, 642.
eminent domain, 643.
necessary proof of injury to reversion, 644.
landlord cannot sue for injury to crop, 645.
tenants at will and at sufferance, 646.

TIMBER,
See TREES AND TIMBER.

TIME,
date not essential to lease, 60.
date is *prima facie*, for commencement, 60.
verbal leases date from possession, 60.
Sunday lease, 61.
for which leases may be granted, 111.
rule against perpetuities, 111.
limitation in Alabama, 111.
agricultural lands in New York, 111.
term for years must have definite, to end, 112.
determined by matter *ex post facto*, 112.
leases from an indefinite future, 113.
what constitutes lease for life, 116.
lease for term of several lives, 116.
errors in calculation of, 117.
word "from" either exclusive or inclusive, 119.
computation of, in respect to validity of parol lease, 154.
computation of, in respect to recording statutes, 167.
for payment of rent, 661.
not due till end of term, 661.
computation of time, 661.
rent falling due on Sunday, 661.

TITLE,
warranty of, by lessee on assignment, 435.
cannot be litigated in summary process, 563.
eviction by, paramount, 669.
purchase of adverse, by tenant, 689.
tax title, 690.
lessor need give no evidence of, 701.
showing transfer or expiration of landlord's title, 703.
tax or execution sale, 703.
foreclosure of mortgage, 703.
tenant may buy, at execution sale, 704.
attornment to holder of tax title, 709.
See DENIAL OF TITLE.

[*References are to Sections.*]

TOLLS,
from use of dam, what included, 663.

TREES AND TIMBER,
parol license to cut and carry away, 88.
lease of growing, must be recorded, 163.
cutting of, constitutes waste when, 635.
clearing wild land for cultivation, 636.

TRESPASS, ACTION OF,
by tenant at sufferance, 228.
when maintainable by assignee, 458.
lies against tenant at will guilty of waste, 488.
plea of *molliter manus imposuit*, 556, 558.
against landlord regaining possession by force, 558.
for assault and battery against landlord, 559.
Massachusetts doctrine, 559.
statutory modifications, 561.
for injury to way-going crop, 569.
right of, depends on possession, 640.
tenant may maintain, 640.
landlord out of possession cannot maintain, 640.
landlord cannot bring, for injury to crops, 645.
lessor at will may maintain, 646.
lessor cannot maintain, against lessee, 647.
for mesne profits by lessor against lessee, 651, 653.

TRESPASS ON THE CASE,
by landlord lies for injury to freehold, 641, 642.

TRUSTEE,
holding land not a tenant, 3.
authority of, to grant lease, 91.
for charitable use, 91.
cestui que trust of lessee must claim through trustee, 566.
must bring action for rent, 655.
estoppel to deny title, 693.

TURPENTINE,
from trees is personal property, 567.

U

UNDISCLOSED PRINCIPAL,
See AGENT.

UNSANITARY CONDITION,
of premises renders landlord liable when, 583.
duty to warn against infection, 584.

USE AND OCCUPATION,
for occupation under void agreement, 200.
tenant at sufferance not liable in action of, 227.

[*References are to Sections.*]

USE AND OCCUPATION—*Continued.*
Massachusetts statute, 227.
notice to tenant necessary, 227.
no prior demand for rent necessary, 503.
old action of debt for rent, 650.
early statutes, 650.
distinctions between actions of debt and covenant, 650.
not an action *ex delicto*, 651.
distinguished from trespass for mesne profits, 651.
will not lie for a trespass, 651.
waiver of the tort allowed when, 651.
amount of recovery is fair value of property, 651.
will not lie on lease under seal, 652.
contrary rule in Michigan, 652.
trespass for mesne profits described, 653.
relation of landlord and tenant necessary to support use and occupation, 654.
action not maintainable against adverse holder, 654.
implied agreement only necessary, 654.
implication of tenancy rebutted how, 655.
allegation of title in plaintiff not necessary, 655.
suits to recover crop rents, 656.
liability of tenants in common to one another, 657.
indebitatus assumpsit allowed when, 657.
right of assignee to maintain action, 658.
attornment unnecessary, 658.
lessor cannot sue after assignment, 658.
cropping contract enforced by administrator, 658.
sub-tenant not subject to action, 659.
agent with undisclosed principal, 660.
lease under seal, 660.
Illinois statute, 660.
no legal debt till rent is payable, 661.
rent not due till end of term except by agreement, 661.
computation of time for payment, 661.
rent falling due on Sunday, 661.
defenses to actions for rent, 665. (See ABATEMENT.)
recovery of interest, 666.

USE OF DEMISED PREMISES,
validity of restriction on, 382.
right as to, in absence of restriction, 382.
what constitutes a covenant for restrictive use, 283.
effect of recitals in lease, 383.
what constitutes a breach of covenant, 383.
prohibited use enjoined when, 384.
covenant must be express in that case, 384.
injunction to stay waste, 384.
covenant for personal occupation not a usual one, 385.

[*References are to Sections.*]

USE OF DEMISED PREMISES—*Continued.*
domestic relations of tenant a collateral matter, 385.
agreement not "to make or suffer" an unlawful use, 386.
conditions against assignment, 431.

V

VERMONT,
forfeiture for non-payment of rent, 533.

VIRGINIA,
statute as to notice to quit, 314.
forfeiture for non-payment of rent, 534.
rent abated under statute, 681.

VOID AND VOIDABLE,
distinguished, 495.

W

WAIVER,
of ground for forfeiture, what constitutes, 496.
none of conditional limitation, 496.
acceptance of rent constitutes when, 497.
suit for entire amount of rent, 497.
distraining for rent, 497.
effect of mere demand for rent, 497.
lessor must have knowledge of ground for forfeiture, 497.
past due rent receivable without waiver, 498.
allowing default to continue not a waiver, 499.
permission to hold over constitutes, 499.
none of continuing covenant, 500.
what constitutes a continuing covenant, 500.
of estoppel to deny title, 694.

WARRANTY,
of title on assignment of leasehold, 435, 436.
of fitness not implied, 574.
oral evidence of, inadmissible, 575.
of dwelling house, 576.
of rooms in tenement, 576.
of furnished apartments, 577, 578.

WASHINGTON,
statute as to yearly tenancies, 249.
statute as to notice to quit, 315.

WASTE,
definition, 625.
distinction between voluntary and permissive, 625.
history of remedy for, 625.
mode of procedure to charge tenant for, 626.
writ of waste superceded by action of case, 626.

[*References are to Sections.*]

WASTE—*Continued.*
extent of liability for, by tenant at will, 627.
destruction by fire is permissive waste, 627.
liability for negligence is independent of agreement, 628.
extent of implied obligation on tenant, 628.
acceptance of rent not a waiver, 628.
tenantable repairs only are required, 629.
what constitutes such repairs, 629.
express covenant becomes measure of liability, 630.
action of tort allowed when, 630.
covenants raised on demise of farming land, 631.
change in tillage as constituting waste, 631.
action of account allowed on lease on shares, 631.
construction of covenant "to improve" farm, 631.
alterations in buildings constitute waste, 632.
authorized alterations, 632.
rule in the United States, 633.
motive immaterial in determining what constitutes waste, 634.
cutting timber constitutes waste when, 635.
clearing wild land for cultivation, 636.
right of life tenant to open mines, 637.
failure of life tenant to pay taxes constitutes, 637.
injunction against threatened waste, 638.
forfeiture of place wasted, 639.

WATER,
lease of surplus, in canal, 352a.
rate not a tax or assessment, 414.
landlord not bound to pay, 414.
covenant by tenant to pay, construed, 414.
implication of agreement by landlord to pay, 414.
injuries caused by flowing, 616.

WEAR AND TEAR,
tenant not liable for ordinary, 629.

WEST VIRGINIA,
statute as to notice to quit, 316.
forfeiture for non-payment of rent, 535.

WHARVES,
agreements for payment for, 374.
liability for injuries received on, 608, 609.

WISCONSIN,
summary process only lies against tenant, 19.
doctrine as to tenancy at sufferance, 229.
statute as to notice to quit, 317.
statute against implication of covenants, 351.
forfeiture for non-payment of rent, 536.
forfeiture for waste, 639.

[*References are to Sections.*]

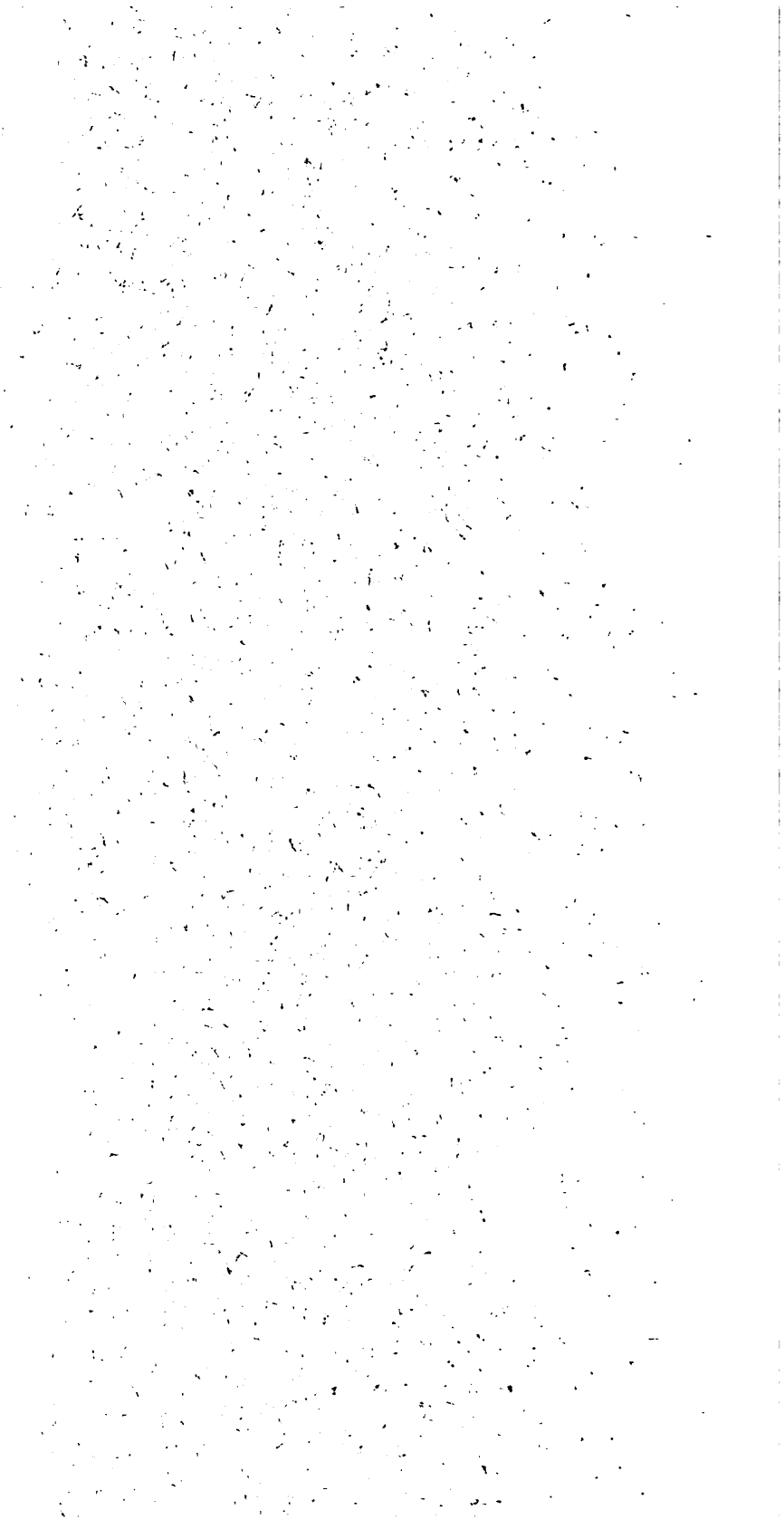
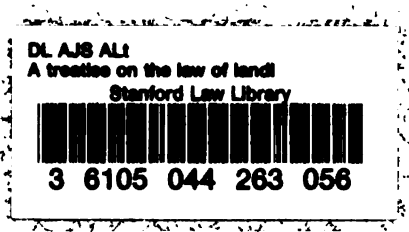
WOOD,
drift, belongs to lessee, 567.
cutting of, constitutes waste when, 635.
clearing wild land for cultivation, 636.

WYOMING,
statute as to yearly tenancies, 250.
forfeiture for non-payment of rent, 537.

Y

YEAR TO YEAR TENANCY,
See TENANCY FROM YEAR TO YEAR.

Whole number of pages, 1011.



STANFORD UNIVERSITY LAW LIBRARY